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9 a.m.–12:30 p.m.

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Federal Register

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 870

RIN 3206–AM67

Federal Employees' Group Life Insurance Program: Court Orders Prior to July 22, 1998

AGENCY: U.S. Office of Personnel Management.

ACTION: Interim final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing an interim regulation to amend regulations regarding the effect of any court decree of divorce, annulment, or legal separation, or any court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation (hereinafter ''court order'') where the court order expressly provides that an individual receive Federal Employee's Group Life Insurance (FEGLI) benefits. The interim regulations will allow court orders submitted to the appropriate Federal agency before July 22, 1998 to be effective for providing FEGLI benefits if the court order was received in the appropriate office before the insured Federal employee's or annuitant's death. This revision does not affect the current statutory limitation that court orders apply only when FEGLI benefits are based on insured individuals who died after July 22, 1998.

DATES: This rule is effective December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Marguerite Martel, Senior Policy Analyst, at (202) 606–0004 or email: *marguerite.martel@opm.gov.*

SUPPLEMENTARY INFORMATION: Public Law 105–205, 112 Stat. 683, enacted July 22, 1998, amending section 8705 of title 5, United States Code, required benefits to be paid in accordance with the terms of a court order instead of the otherwise existing statutory order of precedence for payment of benefits under FEGLI. On October 8, 1999, OPM published a final regulation interpreting the law to mean that only those court orders received in the appropriate office after the date the law was enacted would be valid to name a FEGLI beneficiary. The regulation amended § 870.01(d)(2), of title 5, Code of Federal Regulations.

Based on *Pascavage* v. *Office of Personnel Management,* 773 F. Supp.2d 452 (D. Del. 2011), OPM is changing this regulation to provide FEGLI benefits based on court orders submitted to the appropriate Federal agency before July 22, 1998, so long as the court order was received in the appropriate office before the insured Federal employee's or annuitant's death. This change is consistent with the settlement agreement in this case, *Pascavage* v. *Office of Personnel Management,* C.A. No.: 09–276–LPS–MPT (D. Del. filed Aug. 6, 2012).[1] This revision does not affect the current statutory limitation that court orders apply only when FEGLI benefits are based on insured individuals who died after July 22, 1998.

Under Section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551, et seq.) a general notice of proposed rulemaking is required unless an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. In addition, the APA exempts interpretative rules from proposed rulemaking procedures. This rule expands benefit eligibility based on a court-approved settlement agreement which requires the agency to amend current regulations in an expeditious manner. Therefore, OPM has concluded that delaying implementation of this rule due to a full notice and public comment period would be impracticable and contrary to the public interest. Further, OPM has determined that this rule is an interpretive rule implementing a court decision and adds little substantive interpretation of the law. For the foregoing reasons, OPM asserts that good cause exists to implement this rule as an interim rule under the APA, 5 U.S.C. 553(b) and accordingly, adopts this rule on that basis.

[1] The settlement agreement has been preliminarily approved by the Court.

Regulatory Impact Analysis

OPM has examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and Executive Order 13563, which directs 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, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of $100 million or more in any one year. This rule is not considered a major rule because OPM estimates there are relatively few court orders received by the appropriate office before July 22, 1998.

Paperwork Reduction Act

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal employees, annuitants and their former spouses.

List of Subjects in 5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is amending 5 CFR part 870 as follows:

PART 870—FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM

■ 1. The authority citation for 5 CFR part 870 continues to read as follows:

Authority: 5 U.S.C. 8716; Subpart J also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 870.302(a)(3)(ii) also issued under section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec.

870.302(a)(3) also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251, and section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 870.302(a)(3) also issued under section 145 of Pub. L. 106–522, 114 Stat. 2472; Secs. 870.302(b)(8), 870.601(a), and 870.602(b) also issued under Pub. L. 110–279, 122 Stat. 2604; Subpart E also issued under 5 U.S.C. 8702(c); Sec. 870.601(d)(3) also issued under 5 U.S.C. 8706(d); Sec. 870.703(e)(1) also issued under section 502 of Pub. L. 110–177, 121 Stat. 2542; Sec. 870.705 also issued under 5 U.S.C. 8714b(c) and 8714c(c); Public Law 104–106, 110 Stat. 521.

■ 2. In § 870.801, paragraph (d)(2) is revised to read as follows:

§ 870.801 Order of precedence and payment of benefits.

* * * * *

(d) * * *

(2) To qualify a person for such payment, a certified copy of the court order must be received in the appropriate office before the death of the insured.

* * * * *

[FR Doc. 2012–29164 Filed 12–3–12; 8:45 am]

BILLING CODE 6325–63–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 915

[Doc. No. AMS–FV–11–0094; FV12–915–1 FIR]

Avocados Grown in South Florida; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule that decreased the assessment rate established for the Avocado Administrative Committee (Committee) for the 2012–13 and subsequent fiscal periods from $0.37 to $0.25 per 55-pound bushel container of Florida avocados handled. The Committee locally administers the marketing order for avocados grown in South Florida. The interim rule decreased the assessment rate to reflect a reduction in expenditures for research and to help reduce industry costs.

DATES: Effective December 5, 2012.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson or Christian D. Nissen, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or Email: *Doris.Jamieson@ams.usda.gov* or *Christian.Nissen@ams.usda.gov.*

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide;* or by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Laurel.May@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 915, as amended (7 CFR part 915), regulating the handling of avocados grown in South Florida, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

USDA is issuing this rule in conformance with Executive Order 12866.

Under the order, Florida avocado handlers are subject to assessments, which provide funds to administer the order. Assessment rates issued under the order are intended to be applicable to all assessable Florida avocados for the entire fiscal period, and continue indefinitely until amended, suspended, or terminated. The Committee's fiscal period begins on April 1, and ends on March 31.

In an interim rule published in the **Federal Register** on July 2, 2012, and effective on July 3, 2012, (77 FR 39150, Doc. No. AMS–FV–11–0094, FV12–915–1 IR), § 915.235 was amended by decreasing the assessment rate established for Florida avocados for the 2012–13 and subsequent fiscal periods from $0.37 to $0.25 per 55-pound bushel container. The decrease in the assessment rate reflects a reduction in Committee expenditures for research and will help reduce industry costs while still providing adequate funding to meet program expenses.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 30 handlers of Florida avocados subject to regulation under the order and around 300 producers in the production area. Small agricultural service firms are defined by the Small Business Administration (SBA) as those whose annual receipts are less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000 (13 CFR 121.201).

According to Committee data and information from the National Agricultural Statistical Service (NASS), the average price for Florida avocados during the 2011–12 season was around $16.50 per 55-pound bushel container and total shipments were near 1,200,000 55-bushels. Using the average price and shipment information provided by the Committee, the majority of avocado handlers could be considered small businesses under SBA's definition. In addition, based on avocado production, producer prices, and the total number of Florida avocado producers, the average annual producer revenue is less than $750,000. Consequently, the majority of avocado handlers and producers may be classified as small entities.

This rule continues in effect the action that decreased the assessment rate established for the Committee and collected from handlers for the 2012–13 and subsequent fiscal periods from $0.37 to $0.25 per 55-pound bushel container of avocados. The Committee unanimously recommended 2012–13 expenditures of $324,575 and an assessment rate of $0.25 per 55-pound bushel container of avocados. The assessment rate of $0.25 is $0.12 lower than the rate previously in effect. Applying the $0.25 per 55-pound bushel container assessment rate to the Committee's 1,000,000 55-pound bushel container crop estimate should provide $250,000 in assessment income. Thus, income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve will be adequate to cover the budgeted expenses. The decrease in the assessment rate reflects a reduction in Committee expenditures for research and will help reduce industry costs.

This rule continues in effect the action that decreased the assessment obligation imposed on handlers.

Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the Committee's meeting was widely publicized throughout the Florida avocado industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the December 14, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189, Generic OMB Fruit Crops. No changes in those requirements as a result of this action are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large Florida avocado handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Comments on the interim rule were required to be received on or before August 31, 2012. No comments were received. Therefore, for reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *http://www.regulations.gov/#!documentDetail;D=AMS-FV-11-0094-0001.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866 and 12988, and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (77 FR 39150, July 2, 2012) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 915

Avocados, Reporting and recordkeeping requirements.

PART 915—AVCOADOS GROWN IN SOUTH FLORIDA

Accordingly, the interim rule amending 7 CFR part 915, which was published at 77 FR 39150 on July 2, 2012, is adopted as a final rule, without change.

Dated: November 28, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–29253 Filed 12–3–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 710

RIN 1992–AA36

Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material: Technical Amendments

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: DOE is amending its regulations at 10 CFR part 710, which sets forth the policies and procedures for resolving questions concerning eligibility for DOE access authorization, to revise a provision concerning designation of an acting official and to update the official's title. Specifically, the duties assigned to the Principal Deputy for Mission Support Operations (formerly, the Deputy Chief for Operations), Office of Health, Safety and Security, may now be exercised by a person or persons designated in writing as acting for, or in the temporary capacity of, that official. Currently, the part 710 regulations state that this official's duties may be exercised by another individual only in the official's absence. Today's final rule also revises one title: ''Principal Deputy for Mission Support Operations'' replaces ''Deputy Chief for Operations''.

DATES: *Effective Date:* This rule is effective on December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Christina Pak, Office of the General Counsel, GC–52, 1000 Independence Avenue SW., Washington, DC 20585; *Christina.Pak@hq.doe.gov;* 202–586–4114; Mark R. Pekrul, Office of Departmental Personnel Security, 1000 Independence Avenue SW., Washington, DC 20585; *Mark.Pekrul@hq.doe.gov;* 202–586–3249.

SUPPLEMENTARY INFORMATION:

I. Introduction

10 CFR part 710 sets forth the policies and procedures for resolving questions concerning eligibility for DOE access authorization. Various DOE officials are assigned specific duties in this process. Currently, section 710.36 provides that each of the named officials, with the exception of the Secretary of Energy and the Deputy Chief for Operations, Office of Health, Safety and Security, may designate his or her duties to other DOE officials without restriction.

Since the part 710 rule was last amended in 2001, experience has demonstrated that conditioning the Deputy Chief for Operations' ability to delegate his part 710 functions solely on occasions when he is absent from the office is unduly restrictive, unnecessary, and administratively inefficient. In order to enhance the Department's ability to effectively manage the Administrative Review process prescribed by part 710, the Deputy Chief of Operations should be accorded greater flexibility in delegating his assigned responsibilities under the rule. In those cases where duties of the Deputy Chief of Operations are delegated pursuant to this amendment, they will continue to be exercised by a DOE employee in a security-related Senior Executive Service position within the Office of Health, Safety and Security, as approved by the Chief Health, Safety and Security Officer. In addition, DOE would update part 710 to reflect organizational changes within the Office of Health, Safety and Security by replacing ''Deputy Chief for Operations'' wherever it appears in the rule with ''Principal Deputy Chief for Mission Support Operations''.

The regulatory amendments in this final rule do not alter substantive rights or obligations under current law.

II. Procedural Requirements

A. Review Under Executive Orders 12866 and 13563

Today's regulatory action has been determined not to be ''a significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in

Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

B. Administrative Procedure Act

The regulatory amendments in this notice of final rulemaking reflect a transfer of function that relates solely to internal agency organization, management or personnel. As such, pursuant to 5 U.S.C. 553(a)(2), this rule is not subject to the rulemaking requirements of the Administrative Procedure Act, including the requirements to provide prior notice and an opportunity for public comment and a 30-day delay in effective date.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.* As this rule of agency organization, management and personnel is not subject to the requirement to provide prior notice and an opportunity for public comment under 5 U.S.C. 553 or any other law, this rule is not subject to the analytical requirements of the Regulatory Flexibility Act.

D. Review Under the Paperwork Reduction Act

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule amends existing regulations without changing the environmental effect of the regulations being amended, and, therefore, is covered under the Categorical Exclusion in paragraph A5 of Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does 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. No further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

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

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. DOE has determined that today's regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

I. Review Under the Treasury and General Government Appropriations Act, 1999

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

J. Review Under the Treasury and General Government Appropriations Act, 2001

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

K. Review Under Executive Order 13211

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

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

M. Approval by the Office of the Secretary of Energy

The Office of the Secretary of Energy has approved issuance of this rule.

List of Subjects in 10 CFR Part 710

Administrative practice and procedure, Classified information, Government contracts, Government employees, Nuclear materials.

Issued in Washington, DC, on November 26, 2012.

Gregory H. Woods,

General Counsel.

For the reasons stated in the preamble, DOE amends part 710 of chapter III, title 10, Code of Federal Regulations, as set forth below:

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILTY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

■ 1. The authority citation for part 710 is revised to read as follows:

Authority: 42 U.S.C. 2165, 2201, 5815, 7101, *et seq.,* 7383h–l; 50 U.S.C. 2401 *et seq.;* E.O. 10450, 3 CFR 1949–1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 13526, 3 CFR 2010 Comp., pp. 298–327 (or successor orders); E.O. 12968, 3 CFR 1995 Comp., p. 391.

§§ 710.9, 710.10, 710.28, 710.29, 710.30, 710.31, and 710.32 [Amended]

■ 2. Sections 710.9(e); 710.10(f); 710.28(c)(2); 710.29(a), (b), (c), (d), (f), (g), (h), (i) ; 710.30(b)(2); 710.31(a), (b), (d); and 710.32(c) are amended by removing the words ''Deputy Chief for Operations'' and adding, in their place, the words ''Principal Deputy Chief for Mission Support Operations'' wherever they appear.

■ 3. Section 710.36 is revised to read as follows:

§ 710.36 Acting officials.

Except for the Secretary, the responsibilities and authorities conferred in this subpart may be exercised by persons who have been designated in writing as acting for, or in the temporary capacity of, the following DOE positions: The Local Director of Security; the Manager; the Director, Office of Personnel Security, DOE Headquarters; or the General Counsel. The responsibilities and authorities of the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, may be exercised by persons in security-related Senior Executive Service positions within the Office of Health, Safety and Security who have been designated in writing as acting for, or in the temporary capacity of, the Principal Deputy Chief for Mission Support Operations, with the approval of the Chief Health, Safety and Security Officer.

[FR Doc. 2012–29234 Filed 12–3–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2001–8994; Amdt. No. 21–96]

RIN 2120–AK19

Type Certification Procedures for Changed Products

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is revising a final rule published on June 7, 2000 (65 FR 36244). In that final rule, the FAA amended its regulations for the certification of changes to type-certificated products. That amendment was to enhance safety by applying the latest airworthiness standards, to the extent practical, for the certification of significant design changes of aircraft, aircraft engines, and propellers. The existing rule requires the applicant show that the ''changed product'' complies with applicable standards. This action revises that requirement so that an applicant is required to show compliance only for the change and areas affected by the change. The intended effect of this action is to make the regulation consistent with the FAA's

intent and with the certification practice both before and after the adoption of the existing rule.

DATES: *Effective date:* This rule becomes effective February 4, 2013.

Comment date: Send comments on or before January 3, 2013.

ADDRESSES: Send comments identified by docket number FAA–2001–8994 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket. This includes the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Victor Powell, Certification Procedures Office (AIR–110), Aircraft Certification Service, Federal Aviation Administration, 950 L'Enfant Plaza SW., Washington, DC 20024; telephone (202) 385–6326; email *victor.powell@faa.gov;* or Randall Petersen, Certification Procedures Office (AIR–110), Aircraft Certification Service, Federal Aviation Administration, 950 L'Enfant Plaza SW., Washington, DC 20024; telephone (202) 385–6325, email *randall.petersen@faa.gov.*

For legal questions concerning this action, contact Douglas Anderson, Northwest Mountain Region—Deputy Regional Counsel (ANM–7), Office of the Chief Counsel, Federal Aviation Administration Northwest Mountain Regional Office, 1601 Lind Ave. SW., Renton, WA 98057; telephone (425) 227–2166; facsimile (425) 227–1007; email *douglas.anderson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The Federal Aviation Administration's (FAA) authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes the scope of the FAA Administrator's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart III, chapter 447, section 44701. Under that section, Congress charges the FAA with promoting the safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the FAA Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it will clarify existing requirements for an applicant's showing of compliance of an altered type-certificated product.

I. Overview of Final Rule

The FAA has recognized over time the wording of current § 21.101 may establish a requirement for a compliance showing that is too broad for an applicant for a major design change. The current § 21.101(a) requires an applicant to show the ''changed product'' meets applicable airworthiness requirements.[1] The purpose of § 21.101 is to require an applicant to evaluate the proposed design change and its effect on the product rather than the re-evaluation (certification) of the entire changed product. Therefore, § 21.101 is amended to replace ''changed product'' with ''change and areas affected by the change'' to accurately limit the scope of compliance responsibility for the applicant. That change is also made in § 21.97 for the same reason.

II. Background

On June 7, 2000, the FAA published a final rule entitled, ''Type Certification Procedures for Changed Products'' (65 FR 36244). In that final rule, the FAA revised the procedural requirements for the certification of changes to type-certificated products. The revision required the applicant to apply the latest airworthiness standards in effect, to the extent practical, for the certification of significant design changes of aircraft, aircraft engines, and propellers. Before this final rule, many changes to aeronautical products were not required to show compliance with the latest airworthiness standards. This rule was needed because incremental design approval changes accumulated into significant differences from the original product. The final rule was intended to expand under what conditions the latest airworthiness amendments needed to be applied to changes to aeronautical products.

A. Statement of the Problem

Section 21.101 requires that applicants show the ''changed product'' meets the applicable requirements to obtain an amended type certificate, supplemental type certificate, or amended supplemental type certificate. While the purpose of the rule was to enhance safety by requiring compliance with the latest amendments, we intended to limit an applicant's responsibility to those areas affected by the change. Areas not affected by the change, as described in § 21.101(b)(2) need not be resubstantiated.

The preambles to the notice of proposed rulemaking (NPRM) (62 FR 24294, May 2, 1997) and the subsequent final rule entitled ''Type Certification Procedures for Changed Products'' (65 FR 36244, June 7, 2000) established parameters of an applicant's responsibility for showing compliance with the latest amendments to the change and those areas affected by the change of a type-certificated product. However, the term ''product'' is defined in § 21.1(b) to mean ''aircraft, aircraft engine, or propeller.'' By requiring applicants to show the ''changed product'' meets applicable requirements, we inadvertently required the entire product be shown to meet at least the requirements that applied to the original type certificate. This was not our intent and was neither the FAA's practice before the adoption of that rule, nor has it been our practice since its adoption.

B. Revision to the Regulation

The term ''changed product'' is replaced with ''change and areas affected by the change'' in § 21.101 to be consistent with the rule language as established in § 21.101(b)(2) and (b)(3)

[1] The term ''product'' is defined in § 21.1(b) as ''aircraft, aircraft engine, or propeller.''

and to clarify the responsibility of the applicant. The ''change'' refers to the design change proposed by the applicant. ''Areas affected by the change'' refers to aspects of the type design the applicant may not be proposing to change directly, but that are affected by the applicant's proposal. For example, changing an airframe's structure, such as adding a cargo door in one location, may affect the frame or floor loading in another area. Further, upgrading engines with new performance capabilities could require additional showing of compliance for minimum control speeds and airplane performance requirements. For many years the FAA has required applicants to consider these effects, and this practice is unchanged by this rulemaking.

During efforts to revise § 21.101, the FAA discovered that § 21.97(a)(2), Approval of major changes in type design, contains similar language to § 21.101 in the case of a ''changed product.'' The FAA has therefore determined that § 21.97(a)(2) should also be changed by this amendment.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a federal mandate likely to result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this rule.

In conducting these analyses, the FAA determined that this rule: (1) Has benefits that justify its costs, (2) is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, (3) is not ''significant'' as defined in DOT's Regulatory Policies and Procedures, (4) will not have a significant economic impact on a substantial number of small entities, (5) will not create unnecessary obstacles to the foreign commerce of the United States, and (6) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order allows that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a minimal cost determination has been made on this final rule because this requirement reflects current practices.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a final rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare an initial regulatory flexibility analysis as described in the RFA. However, if an agency determines that a final rule will not have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The net economic impact of this rule is expected to be minimal. As this rule is clarifying in nature, the acting FAA Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. We assessed the potential effect of this rule and determined that it will not constitute an obstacle to the foreign commerce of the United States, and, thus, is consistent with the Trade Assessments Act.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This rule does not contain such a mandate; therefore, the requirements of Title II do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

G. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312(f) of the Order and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 12866

See the ''Regulatory Evaluation'' discussion in the ''Regulatory Notices and Analyses'' section elsewhere in this preamble.

B. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, will not have Federalism implications.

C. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the amendments in this document. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking. Before acting on this rulemaking, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The agency may change this proposal in light of the comments it receives.

Proprietary or Confidential Business Information: Commenters should not file proprietary or confidential business information in the docket. Such information must be sent or delivered directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document, and marked as proprietary or confidential. If submitting information on a disk or CD ROM, mark the outside of the disk or CD ROM, and identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), if the FAA is aware of proprietary information filed with a comment, the agency does not place it in the docket. It is held in a separate file to which the public does not have access, and the FAA places a note in the docket that it has received it. If the FAA receives a request to examine or copy this information, it treats it as any other request under the Freedom of Information Act (5 U.S.C. 552). The FAA processes such a request under Department of Transportation procedures found in 49 CFR part 7.

B. Availability of Rulemaking Documents

An electronic copy of a rulemaking document my be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/;* or

3. Access the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

C. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's 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.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 21

Aircraft, Aviation safety, Exports, Imports, Reporting and recordkeeping requirements.

The Amendments

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of Title 14, Code of Federal Regulations as follows:

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

■ 1. The authority citation for part 21 continues to read as follows:

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(g), 40105, 40113, 44701–44702, 44704, 44707, 44709, 44711, 44713, 44715, 45303.

■ 2. In § 21.97, revise paragraph (a)(2) to read as follows:

§ 21.97 Approval of major changes in type design.

(a) * * *

(2) Show that the change and areas affected by the change comply with the applicable requirements of this subchapter, and provide the FAA the means by which such compliance has been shown; and

* * * * *

■ 3. In § 21.101, revise paragraphs (a), (b) introductory text, (b)(3), and (c) to read as follows:

§ 21.101 Designation of applicable regulations.

(a) An applicant for a change to a type certificate must show that the change and areas affected by the change comply with the airworthiness requirements applicable to the category of the product in effect on the date of the application for the change and with parts 34 and 36 of this chapter. Exceptions are detailed in paragraphs (b) and (c) of this section.

(b) Except as provided in paragraph (g) of this section, if paragraphs (b)(1), (2), or (3) of this section apply, an applicant may show that the change and areas affected by the change comply with an earlier amendment of a regulation required by paragraph (a) of this section, and of any other regulation the FAA finds is directly related. However, the earlier amended regulation may not precede either the corresponding regulation incorporated by reference in the type certificate, or any regulation in §§ 23.2, 25.2, 27.2, or 29.2 of this subchapter that is related to the change. The applicant may show compliance with an earlier amendment of a regulation for any of the following:

* * * * *

(3) Each area, system, component, equipment, or appliance that is affected by the change, for which the FAA finds that compliance with a regulation described in paragraph (a) of this section would not contribute materially to the level of safety of the product or would be impractical.

(c) An applicant for a change to an aircraft (other than a rotorcraft) of 6,000 pounds or less maximum weight, or to a non-turbine rotorcraft of 3,000 pounds or less maximum weight may show that the change and areas affected by the change comply with the regulations incorporated by reference in the type certificate. However, if the FAA finds that the change is significant in an area, the FAA may designate compliance with an amendment to the regulation incorporated by reference in the type certificate that applies to the change and any regulation that the FAA finds is directly related, unless the FAA also finds that compliance with that amendment or regulation would not contribute materially to the level of safety of the product or would be impractical.

* * * * *

Issued in Washington, DC on November 21, 2012.

Michael P. Huerta,

Acting Administrator.

[FR Doc. 2012–29276 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 173

[Docket No. FDA–2011–F–0853]

Secondary Direct Food Additives Permitted in Food for Human Consumption; Sodium Dodecylbenzenesulfonate

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of sodium dodecylbenzenesulfonate (CAS No. 25155–30–0) as an antimicrobial agent for use in wash water for fruits and vegetables without the requirement of a potable water rinse. This action is in response to a petition filed by Ecolab, Inc.

DATES: This rule is effective December 4, 2012. Submit either electronic or written objections and requests for a hearing by January 3, 2013. See section VII of this document for information on the filing of objections.

ADDRESSES: You may submit either electronic or written objections and requests for a hearing, identified by Docket No. FDA–2011–F–0853, by any of the following methods:

Electronic Submissions

Submit electronic objections in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written objections in the following ways:

• *FAX:* 301–827–6870.

• *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2011–F–0853 for this rulemaking. All objections received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting objections, see the ''Objections'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or objections received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Molly Harry, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–1075.

SUPPLEMENTARY INFORMATION:

I. Background

In a notice published in the **Federal Register** of February 2, 2012 (77 FR 5201), FDA announced that a food additive petition (FAP 2A4785) had been filed by Ecolab, Inc., 370 North Wabasha St., St. Paul, MN 55102–1390. The petition proposed to amend the food additive regulations in part 173, ''Secondary Direct Food Additives Permitted in Food for Human Consumption'' (21 CFR part 173), to provide for the safe use of sodium dodecylbenzenesulfonate (SDBS) as an antimicrobial agent used as a component of an antimicrobial formulation added to wash water for fruits and vegetables (e.g., whole fruits and vegetables as well as fruits, vegetables, and herbs that have been chopped, sliced, cut, or peeled) to reduce microorganisms in wash water

and on the surfaces of treated fruits and vegetables. Fruits and vegetables treated by the additive do not require a potable water rinse. The petition requested that the additive be considered for use only in certain food service facilities. The additive may be used at a level not to exceed 111 milligrams per kilogram of the wash water.

The use of SDBS is currently approved in washing or to assist in the peeling of fruits and vegetables under § 173.315 provided its use is followed by a potable water rinse. In addition, FDA food additive regulations permit the use of SDBS as an indirect food additive for use as a component of single and repeated use food contact substances (21 CFR 177.1010, 177.1200, 177.1630, 177.2600, and 177.2800), in sanitizing solutions (21 CFR 178.1010), and in the production of animal glue (21 CFR 178.3120).

The definition of ''pesticide chemical'' under section 201(q)(1)(B)(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 321(q)(1)(B)(i)), excludes an antimicrobial added to water that comes into contact with food, in the preparing, packing, or holding of the food for commercial purposes. This exclusion applies whether the water is to contact raw agricultural commodities or processed food. Consequently, such an antimicrobial is a ''food additive'' under section 201(s) of the FD&C Act and subject to the requirements in section 409 of the FD&C Act (21 U.S.C. 348). The petitioned use of SDBS as an antimicrobial agent in processing water is for a food additive use in certain food service facilities. Although the petitioned use of SDBS is regulated under section 409 of the FD&C Act as a food additive, this intended use of SDBS may nevertheless be subject to regulation as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Therefore, manufacturers intending to use this food additive for this intended use should contact the Environmental Protection Agency to determine whether this use requires a pesticide registration under FIFRA.

II. Evaluation of Safety

Under the general safety standard in section 409 of the FD&C Act, a food additive cannot be approved for a particular use unless a fair evaluation of the data available to FDA establishes that the additive is safe for that use. FDA's food additive regulations (21 CFR 170.3(i)) define ''safe'' as ''a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use.''

To establish with reasonable certainty that a food additive is not harmful under its intended conditions of use, FDA considers the projected human dietary intake of the additive, the additive's toxicological data, and other relevant information (such as published literature) available to FDA. As part of FDA's safety evaluation, FDA reviewed data from published studies in animals on the safety of SDBS, including a 2-year carcinogenicity study in rats and a multigeneration reproductive study with rats. Based on the results from these studies and FDA's estimated dietary intake to SDBS from current and the proposed food uses, FDA concludes that there is a reasonable certainty of no harm and the petitioned use of SDBS is safe within the meaning of section 409 of the FD&C Act.

III. Conclusion

FDA reviewed data in the petition and other available relevant material to evaluate the safety of SDBS as an antimicrobial agent for use in wash water for fruits and vegetables without the requirement of a potable water rinse. Based on this information, FDA concludes that the proposed use of the additive is safe and the additive will achieve its intended technical effect as an antimicrobial agent under the proposed conditions of use. Therefore, the regulations in part 173 should be amended as set forth in this document.

IV. Public Disclosure

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition will be made available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 171.1(h), FDA will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

V. Environmental Impact

FDA has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday.

VI. Paperwork Reduction Act of 1995

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VII. Objections

Any person who will be adversely affected by this regulation may file with the Division of Dockets Management (see **ADDRESSES**) either electronic or written objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. It is only necessary to send only one set of documents. Identify documents with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

VIII. Section 301(ll) of the FD&C Act

FDA's review of this petition was limited to section 409 of the FD&C Act. This final rule is not a statement regarding compliance with other sections of the FD&C Act. For example, the Food and Drug Administration Amendments Act of 2007, which was signed into law on September 27, 2007, amended the FD&C Act to, among other things, add section 301(ll) (21 U.S.C. 331(ll)). Section 301(ll) of the FD&C Act prohibits the introduction or delivery for introduction into interstate commerce of any food that contains a drug approved under section 505 of the FD&C Act (21 U.S.C. 355), a biological product licensed under section 351 of the Public Health Service Act (42 U.S.C. 262), or a drug or biological product for which substantial clinical investigations have been instituted and their existence has been made public, unless one of the

exemptions in section 301(ll)(1) to (ll)(4) applies. In our review of this petition, FDA did not consider whether section 301(ll) or any of its exemptions apply to food containing this additive. Accordingly, this final rule should not be construed to be a statement that a food containing this additive, if introduced or delivered for introduction into interstate commerce, would not violate section 301(ll) of the FD&C Act. Furthermore, this language is included in all food additive final rules and therefore should not be construed to be a statement of the likelihood that section 301(ll) of the FD&C Act applies.

List of Subjects in 21 CFR Part 173

Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 173 is amended as follows:

PART 173—SECONDARY DIRECT FOOD ADDITIVES PERMITTED IN FOOD FOR HUMAN CONSUMPTION

■ 1. The authority citation for 21 CFR part 173 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

■ 2. Section 173.405 is added to subpart D to read as follows:

§ 173.405 Sodium dodecylbenzenesulfonate.

Sodium dodecylbenzenesulfonate (CAS No. 25155–30–0) may be safely used in accordance with the following prescribed conditions:

(a) The additive is an antimicrobial agent used in wash water for fruits and vegetables. The additive may be used at a level not to exceed 111 milligrams per kilogram in the wash water. Fruits and vegetables treated by the additive do not require a potable water rinse.

(b) The additive is limited to use in commissaries, cafeterias, restaurants, retail food establishments, nonprofit food establishments, and other food service operations in which food is prepared for or served directly to the consumer.

(c) To assure safe use of the additive, the label or labeling of the additive container shall bear, in addition to the other information required by the Federal Food, Drug, and Cosmetic Act, adequate directions to assure use in compliance with the provisions of this section.

Dated: November 28, 2012.

Susan M. Bernard,

Director, Office of Regulations, Policy and Social Sciences, Center for Food Safety and Applied Nutrition.

[FR Doc. 2012–29279 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0971]

RIN 1625–AA08

Safety Zone; Overhead Cable Replacement, Maumee River, Toledo, OH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary Safety Zone on the waters of Maumee River, Toledo, Ohio, from 8:30 a.m. on November 27, 2012 until 6:30 p.m. on December 7, 2012. This safety zone will encompass all waters of Maumee River starting from the CSX Railroad Bridge at River Mile Marker 1.07 and ending 700 feet downriver from the CSX Railroad Bridge. This temporary Safety Zone is necessary to protect persons operating in the area.

DATES: This temporary final rule is effective December 4, 2012. This rule has been enforced with actual notice since November 27, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2012–0971. To view documents mentioned in this preamble as being available in the docket, go *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 temporary rule, call or email MST1 Kevin Biami, Marine Safety Unit Toledo, Coast Guard; telephone (419) 418–6008, email *Kevin.E.Biami@uscg.mil.* If you have questions on viewing 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 October 18, 2012, the Coast Guard established a temporary final rule (TFR) entitled Safety Zone; Overhead Cable Replacement, Maumee River, Toledo, OH (docket number USCG–2012–0948) in support of the replacement of electrical cables suspended over the Maumee River. To coincide with the expected schedule of the cable replacement project, that TFR was effective from 9:30 a.m. on October 23, 2012 until 3 p.m. on October 26, 2012. However, due to an equipment failure, an unforeseen breakage of one of the electrical cables and inclement weather conditions, the contractor had requested an extension of the safety zone, and a subsequent TFR was established on October 26, 2012, extending the safety zone from 9:30 a.m. on October 27, 2012 until 3 p.m. on November 2, 2012. Due to the effects of Hurricane Sandy, the contractor was unable to complete the operation and has requested that a new safety zone be established from 8:30 a.m. on November 27, 2012 until 6:30 p.m. on December 7, 2012.

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 doing so would be impracticable and contrary to the public interest. The final details for this stage of the operation were not known to the Coast Guard until there was insufficient time remaining before the operation to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect the public from the hazards associated with this Coast Guard operation.

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.** Waiting for a 30 day effective period to run is impracticable and

contrary to the public interest for the same reasons discussed in the preceding paragraph.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 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; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

First Energy/Toledo Edison is replacing three overhead power cables that span across the Maumee River near the CSX Railroad Bridge on the Maumee River. All work will be near the CSX Railroad Bridge on the downriver side. The Captain of the Port Detroit has determined that this stage of the operation continues to pose certain public hazards, including possible entanglement of the power lines in a vessel's propellers if the power lines are dropped onto the Maumee River during the operation.

C. Discussion of Rule

With the aforementioned hazards in mind, the Captain of the Port Detroit has determined that a safety zone is necessary to ensure the safety of participants and vessels during the operation. The temporary safety zone is established herein will be enforced from 8:30 a.m. on November 27, 2012 until 6:30 p.m. on December 7, 2012, and will be enforced from 8:30 a.m. until 6:30 p.m. on each day of this period.

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

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 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. The Office of Management and Budget has not reviewed it under these 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. The safety zone created by this rule will be relatively small and enforced for relatively short time. Although the requesting organization, First Energy/Toledo Edison, is requesting a ten hour block each day for up to eleven days, First Energy/Toledo Edison estimates that the safety zone will only need to be active for forty minutes to three hours on each day. Also, the safety zone is designed to minimize its impact on navigable waters. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

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 term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit through the Maumee River, OH between 8:30 a.m. and 6:30 p.m. on November 27th, 28th, 29th, 30th, and December 1st, 2nd, 3rd, 4th, 5th, 6th and 7th 2012.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule is expected to be in effect for only approximately forty minutes to three hours each day. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port, Sector Detroit to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast Notice to Mariners that the regulation is in effect.

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 so that they can better evaluate its effects on them. If this 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 made a 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 rule involves a temporary safety zone and, therefore it 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. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T09–0971 as follows:

§ 165.T09–0971 Safety Zone; Overhead Cable Replacement, Maumee River, Toledo, OH.

(a) *Location.* The following area is a temporary safety zone: all U.S. navigable waters of the Maumee River, Toledo, OH, starting from the CSX Railroad Bridge at River Mile Marker 1.07 and ending 700 feet down river from the CSX Railroad Bridge.

(b) *Effective and enforcement period.* This regulation will be enforced from 8:30 a.m. on November 27, 2012 until 6:30 p.m. on December 7, 2012. This regulation will be enforced from 8:30 a.m. until 6:30 p.m. on each day of this period.

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

(1) ''On-scene Representative'' means any Coast Guard Commissioned, warrant, or petty officer designated by the Captain of the Port Detroit to monitor a safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zones, and take other actions authorized by the Captain of the Port.

(2) ''Public vessel'' means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

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

(2) This safety zone is closed to all vessel traffic, excepted as may be permitted by the Captain of the Port Detroit or his designated representative. All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port or his designated representative. Upon being hailed by the U.S. Coast Guard by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(3) All vessels must obtain permission from the Captain of the Port or his designated representative to enter, move within, or exit the safety zone established in this section when this safety zone is enforced. Vessels and persons granted permission to enter the safety zone must obey all lawful orders or directions of the Captain of the Port or a designated representative. While within a safety zone, all vessels must operate at the minimum speed necessary to maintain a safe course.

(e) Exemption. Public vessels, as defined in paragraph (b) of this section, are exempt from the requirements in this section.

(f) Waiver. For any vessel, the Captain of the Port Detroit or his designated representative may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of public or environmental safety.

(g) Notification. The Captain of the Port Detroit will notify the public that the safety zones in this section are or will be enforced by all appropriate means to the affected segments of the public including publication in the **Federal Register** as practicable, in accordance with 33 CFR 165.7(a). Such means of notification may also include, but are not limited to Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone is cancelled.

Dated: November 21, 2012.

J.E. Ogden,

Captain, U.S. Coast Guard, Captain of the Port, Sector Detroit.

[FR Doc. 2012–29187 Filed 12–3–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0619; FRL–9754–9]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Control of Stationary Generator Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the Delaware Department of Natural Resources and Environmental Control (DNREC) State Implementation Plan (SIP). The revision amends Regulation 1102—PERMITS, Appendix A to provide permit exemptions for certain internal combustion engines. EPA is approving this revision in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on February 4, 2013 without further notice, unless EPA receives adverse written comment by January 3, 2013. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0619 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0619, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0619. 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.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Cathleen Van Osten, (215) 814–2746, or by email at *vanosten.cathleen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On April 29, 2008 (73 FR 23101), EPA approved a SIP revision containing provisions to control emissions from stationary generators. The revision added a new regulation, Regulation No. 1144—CONTROL OF STATIONARY GENERATOR EMISSIONS. The regulation established operating requirements, fuel sulfur content limits, and record keeping requirements for stationary generators.

II. Summary of SIP Revision

On November 1, 2007, the Delaware Department of Natural Resources and Environmental Control submitted a formal revision to its State Implementation Plan. The SIP revision contains amendments to Regulation No. 1102—PERMITS. This amendment clarifies the permitting requirements for owners of stationary generators, specifically adding certain internal combustion engines to the list of exempted sources in Appendix A, of Regulation No. 1102, List of Exempted Sources. The amendment exempts: (a) Any internal combustion engine associated with a stationary electrical generator that (1) has a standby power rating of 450 kilowatts or less that is used only during the times of emergency, (2) is located at any residence, or (3) is located at any commercial poultry producing premise, as these terms are defined in Regulation No. 1144; and (b) any internal combustion fuel burning equipment, which is not associated with a stationary electrical generator, and has an engine power rating of 450 horsepower (hp) or less.

III. Final Action

EPA is approving the Delaware SIP revision for Regulation No. 1102–PERMITS submitted on November 1, 2007. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on February 4, 2013 without further notice unless EPA receives adverse comment by January 3, 2013. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions,

EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 4, 2013. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action, to amend Delaware's Regulation 1102—PERMITS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 6, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (c) is amended by revising the entry for Regulation 1102, Appendix A to read as follows:

§ 52.420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

State regulation (7 DNREC 1100)	Title/subject	State effective date	EPA approval date	Additional explanation
* *	*	*	*	* *
1102	Permits.			
* *	*	*	*	* *
Appendix A	[List of Permits Exemptions]	1/11/06 9/11/08	12/4/12 [*Insert page number where the document begins*].	Addition of paragraphs 32.0 and 33.0 (formerly gg. and hh. respectively).
* *	*	*	*	* *

* * * * *

[FR Doc. 2012–29103 Filed 12–3–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 73

RIN 0920–AA34

Possession, Use, and Transfer of Select Agents and Toxins; Biennial Review

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Final rule; correction.

SUMMARY: The Department of Health and Human Services is correcting a final rule that appeared in the **Federal Register** on October 5, 2012 (77 FR 61084). The document updated the list of HHS and overlap biological agents and toxins and designated certain select agents and toxins as Tier 1 agents.

DATES: *Effective Date:* Effective December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Robbin Weyant, Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Rd., MS A–46, Atlanta, GA 30333. Telephone: (404) 718–2000.

SUPPLEMENTARY INFORMATION: In FR Doc. 2012–24389, published on October 5, 2012 (77 FR 61084) appearing on pages 61086 and 61110, the following corrections are made: Preamble [Corrected]

1. On page 61086, in the second column, second paragraph, beginning on the fourth line, ''According to available reports, Lujo virus (1) caused a fatal outbreak of hemorrhagic fever, (2) has a case fatality rate of 80 percent, (3) has been phylogenetically identified as an arenavirus, and (4) is related to those members of the Old World arenaviridae family (Junin, Machupo, Sabia, Guanarito, and Lassa) listed as HHS select agents that cause hemorrhagic fever and pose a significant risk to public health and safety (Ref 2)'' is corrected to read: ''According to available reports, Lujo virus (1) caused a fatal outbreak of hemorrhagic fever, (2) has a case fatality rate of 80 percent, (3) has been phylogenetically identified as an arenavirus, and (4) is related to those members of the *Arenaviridae* family (Junin, Machupo, Sabia, Guanarito, and Lassa) listed as HHS select agents that cause hemorrhagic fever and pose a significant risk to public health and safety (Ref 2).''

§ 73.0 [Corrected]

2. On page, 61110, in the second column, in § 73.0 (Applicability and related requirements), in paragraph one, ''All individuals and entities that possess SARS-CoV, Lujo virus, or Chapare virus must provide notice to CDC regarding their possession of SARS-CoV, Lujo virus, or Chapare virus on or before November 5, 2012. Currently registered individuals and entities possessing SARS-CoV, Lujo virus, or Chapare virus must meet all the requirements of this part by December 4, 2012. All previously unregistered individuals and entities possessing SARS-CoV, Lujo virus, or Chapare virus must meet all of the requirements of this part by April 3, 2013 is corrected to read: ''All individuals and entities that possess SARS-CoV, Lujo virus, or Chapare virus must provide notice to CDC regarding their possession of SARS-CoV, Lujo virus, or Chapare virus on or before December 4, 2012. Currently registered individuals and entities possessing SARS-CoV, Lujo virus, or Chapare virus must meet all the requirements of this part by December 4, 2012. All previously unregistered individuals and entities possessing SARS-CoV, Lujo virus, or Chapare virus must meet all of the requirements of this part by April 3, 2013.''

Dated: November 21, 2012.

Kathleen Sebelius,

Secretary.

[FR Doc. 2012–28784 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2012–0003]

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

State	City/town/county	Source of flooding	Location	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified
Unincorporated Areas of Carbon County, Montana Docket No.: FEMA–B–1221				
Montana	Unincorporated Areas of Carbon County.	Clarks Fork Yellowstone River.	Approximately 1.89 miles downstream of Twany Trail.	+3304
			Approximately 770 feet downstream of the Rock Creek (Lower) confluence.	+3405

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES
Unincorporated Areas of Carbon County
Maps are available for inspection at 17 West 11th Street, Red Lodge, MT 59068.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Indian River County, FL, and Incorporated Areas Docket No.: FEMA–B–1148			
Collier Creek	Approximately 550 feet upstream of the confluence with South Prong Creek.	+5	City of Sebastian, Unincorporated Areas of Indian River County.
	Approximately 1,320 feet upstream of Fleming Street	+19	
FT–1	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 27th Avenue Southwest to the west, 21st Street Southwest to the south, and 20th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
Lateral J Tributary 1	At the confluence with Lateral J	+18	Unincorporated Areas of Indian River County.
	Approximately 1,450 feet upstream of the confluence with Lateral J.	+20	
Lateral J Tributary 1–1	Just upstream of 18th Place Southwest	+18	Unincorporated Areas of Indian River County.
	Approximately 1,750 feet upstream of 18th Place Southwest.	+20	
Lateral J Tributary 1–2	At the confluence with Lateral J Tributary 1	+18	Unincorporated Areas of Indian River County.
	Approximately 1.1 mile upstream of the confluence with Lateral J Tributary 1.	+22	
ML–1	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
ML–2	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+22	Unincorporated Areas of Indian River County.
ML–3	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–4	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–5	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–6	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–7	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–8	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–9	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–10	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–11	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–12	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–13	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–14	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–15	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+22	Unincorporated Areas of Indian River County.
ML–16	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–17	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
ML–18	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–19	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–20	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–21	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–22	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–23	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+21	Unincorporated Areas of Indian River County.
ML–24	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
ML–25	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+22	Unincorporated Areas of Indian River County.
ML–26	Within area of multiple ponding areas bounded by 17th Street Southwest to the north, 43rd Avenue Southwest to the west, 25th Street Southwest to the south, and 27th Avenue Southwest to the east.	+20	Unincorporated Areas of Indian River County.
P–1	Within area of multiple ponding areas bounded by Barber Street to the north and west, 85th Street to the south, and U.S. Route 1 to the east.	+19	City of Sebastian.
P–2	Within area of multiple ponding areas bounded by Barber Street to the north and west, 85th Street to the south, and U.S. Route 1 to the east.	+18	City of Sebastian.
P–3	Within area of multiple ponding areas bounded by Barber Street to the north and west, 85th Street to the south, and U.S. Route 1 to the east.	+18	City of Sebastian.
SH–1	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–2	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–3	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–4	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–5	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–6	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–7	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
SH–8	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+21	City of Sebastian.
SH–9	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+21	City of Sebastian.
SH–10	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+20	City of Sebastian.
SH–11	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+21	City of Sebastian.
SH–12	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+22	City of Sebastian.
SH–13	Within area of multiple ponding areas bounded by Main Street to the north and west, and Sebastian Boulevard to the south and east.	+23	City of Sebastian.
SL–1	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+21	City of Sebastian.
SL–5	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–6	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–7	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–8	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+21	City of Sebastian.
SL–9	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–10	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–11	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–12	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+21	City of Sebastian.
SL–13	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–14	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–15	Within area of multiple ponding areas bounded by Sebastian Boulevard to the north and west, Genesee Avenue to the south, and Laconia Street to the east.	+20	City of Sebastian.
SL–16	Within area of multiple ponding areas bounded by Genesee Avenue to the north, Stony Point Drive to the west, and Stonecrop Street to the south and east.	+14	City of Sebastian.
SL–17	Within area of multiple ponding areas bounded by Crystal Mist Avenue to the north, Laconia Street to the west, Concha Drive to the south, and Clearbrook Street to the east.	+15	City of Sebastian.
SL–18	Within area of multiple ponding areas bounded by Benedictine Terrace to the north, Cheltenham Street to the west, Rolling Hill Drive to the south, and Cownie Lane to the east.	+19	City of Sebastian.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
SL–19	Within area of multiple ponding areas bounded by Belfast Terrace to the north, Haverford Lane to the west, Browning Terrace to the south, and Coverbrook Lane to the east.	+20	City of Sebastian.
Schumann Waterway	Approximately 250 feet downstream of Schumann Drive	+15	City of Sebastian, Unincorporated Areas of Indian River County.
	Approximately 0.7 mile upstream of Schumann Drive	+23	
Stream 1	Approximately 207 feet upstream of 14th Street Southwest.	+22	Unincorporated Areas of Indian River County.
	Just upstream of 17th Street Southwest	+22	
Vero Lakes Channel A (Landward of Right Levee).	Just upstream of 85th Street	+20	Unincorporated Areas of Indian River County.
	Approximately 2.7 miles upstream of 85th Street	+23	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Sebastian

Maps are available for inspection at City Hall, 1225 Main Street, Sebastian, FL 32958.

Unincorporated Areas of Indian River County

Maps are available for inspection at the Indian River County Administration Building, 1840 25th Street, Vero Beach, FL 32960.

Webster County, Iowa, and Incorporated Areas
Docket No.: FEMA–B–1221

Des Moines River	Approximately 1.6 miles downstream of U.S. Route 20	+987	City of Fort Dodge, Unincorporated Areas of Webster County.
	Approximately 2.1 miles upstream of East Hawkeye Avenue.	+1008	
Lizard Creek	At the Des Moines River confluence	+995	City of Fort Dodge, Unincorporated Areas of Webster County.
	Approximately 0.9 mile upstream of Phinney Park Drive	+999	
Solider Creek	At the Des Moines River confluence	+993	City of Fort Dodge, Unincorporated Areas of Webster County.
	Approximately 1.2 miles upstream of Solider Creek Drive	+1098	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Fort Dodge

Maps are available for inspection at 819 1st Avenue South, Fort Dodge, IA 50501.

Unincorporated Areas of Webster County

Maps are available for inspection at the Webster County Courthouse, 701 Central Avenue, 4th Floor, Fort Dodge, IA 50501.

Pottawatomie County, Kansas, and Incorporated Areas
Docket No.: FEMA–B–1104 and FEMA–B–1140

Big Blue River Tributary	Approximately 100 feet upstream of the confluence with the Big Blue River.	+1010	Unincorporated Areas of Pottawatomie County.
	Approximately 1,200 feet upstream of Junietta Road	+1058	
Elbo Creek	Approximately 1,600 feet upstream of the confluence with the Big Blue River.	+1010	Unincorporated Areas of Pottawatomie County.
	Approximately 1,400 feet upstream of the confluence with School Creek.	+1064	
Elbo Creek Tributary	At the confluence with Elbo Creek	+1042	Unincorporated Areas of Pottawatomie County.
	Approximately 950 feet upstream of Junietta Road	+1068	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
North Unnamed Tributary	Approximately 500 feet northeast of the intersection of U.S. Route 24 and Walsh Road.	#2	City of Wamego, Unincorporated Areas of Pottawatomie County.
	Approximately 1.0 mile northeast of the intersection of U.S. Route 24 and Walsh Road.	#2	
School Creek	At the confluence with Elbo Creek	+1061	Unincorporated Areas of Pottawatomie County.
	Approximately 0.5 mile upstream of the confluence with Elbo Creek.	+1075	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Wamego

Maps are available for inspection at City Hall, 430 Lincoln Avenue, Wamego, KS 66547.

Unincorporated Areas of Pottawatomie County

Maps are available for inspection at the Pottawatomie County Courthouse, Zoning Office, 207 North 1st Street, Westmoreland, KS 66549.

Dickinson County, Michigan (All Jurisdictions)
Docket No.: FEMA–B–1223

Menominee River	Approximately 1.1 miles downstream of Little Quinnesec Dam.	+888	City of Kingsford, Township of Breitung.
	At the Iron County boundary	+1118	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Kingsford

Maps are available for inspection at City Hall, 305 South Carpenter Avenue, Kingsford, MI 49802.

Township of Breitung

Maps are available for inspection at the Breitung Township Hall, 3851 Menominee Street, Quinnesec, MI 49876.

Macomb County, Michigan (All Jurisdictions)
Docket No.: FEMA–B–1223

Anchor Bay	Entire shoreline within community	+579	City of New Baltimore, Township of Chesterfield, Township of Harrison.
Auvase Creek/Sutherland-Oemig Drain.	Approximately 960 feet downstream of Jefferson Avenue	+579	Township of Chesterfield.
	Approximately 850 feet downstream of Sugarbush Road	+579	
Crapaud Creek	Approximately 860 feet downstream of Main Street	+579	City of New Baltimore.
	Approximately 340 feet downstream of Perrin Street	+579	
Fish Creek	Approximately 1,170 feet downstream of Callens Road	+579	Township of Chesterfield.
	Approximately 1,585 feet upstream of Callens Road	+579	
Salt River	Approximately 0.5 mile downstream of Jefferson Avenue	+579	Township of Chesterfield.
	Approximately 70 feet downstream of 23 Mile Road	+579	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of New Baltimore

Maps are available for inspection at 36535 Green Street, New Baltimore, MI 48047.

Township of Chesterfield

Maps are available for inspection at 47275 Sugarbush Road, Chesterfield, MI 48047.

Township of Harrison

Maps are available for inspection at 38151 L'Anse Creuse Street, Harrison Township, MI 48045.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Santa Fe County, New Mexico, and Incorporated Areas Docket No: FEMA–B–1196			
Arroyo Barranca	Approximately 100 feet upstream of the Arroyo Mascaras confluence.	+7022	City of Santa Fe.
	Approximately 100 feet upstream of Camino Del Norte	+7338	
Arroyo De La Paz	At the Arroyo De Los Antores confluence	+6722	City of Santa Fe.
	Approximately 1,000 feet upstream of Rodeo Road	+6802	
Arroyo De La Piedra	Approximately 300 feet downstream of Vallecita Drive	+7103	City of Santa Fe.
	Approximately 1,400 feet upstream of Barranca Drive	+7435	
Arroyo De Los Amigos	Approximately 100 feet upstream of the Arroyo De Los Chamisos confluence.	+6852	City of Santa Fe.
	Approximately 1,400 feet upstream of Saint Michaels Drive.	+7016	
Arroyo De Los Antores	Approximately 200 feet upstream of the Arroyo De Los Chamisos confluence.	+6701	City of Santa Fe.
	Approximately 600 feet upstream of Zia Road	+6738	
Arroyo De Los Antores Ponding Area.	Entire shoreline	+6750	City of Santa Fe.
Arroyo De Los Antores Sheet Flow.	Sheet flow areas along the Arroyo De Los Antores (Lowest Flood Depth).	#1	City of Santa Fe.
	Sheet flow areas along the Arroyo De Los Antores (Highest Flood Depth).	#2	
Arroyo En Medio	Approximately 500 feet upstream of the Arroyo De Los Chamisos confluence.	+6754	City of Santa Fe, Unincorporated Areas of Santa Fe County.
	Approximately 1,200 feet upstream of Cloudstone Drive	+7510	
Arroyo Hondo	At the Arroyo De Los Chamisos confluence	+6098	City of Santa Fe, Unincorporated Areas of Santa Fe County.
	Approximately 70 feet upstream of County Road 67F	+7428	
Arroyo Hondo Split Flow	Approximately 0.7 mile upstream of Rancho Viejo Boulevard.	+6400	Unincorporated Areas of Santa Fe County.
	Approximately 1.8 miles upstream of Arroyo Viejo Road	+6483	
Arroyo Ranchito	Approximately 150 feet upstream of the Arroyo De La Piedra confluence.	+7043	City of Santa Fe.
	Approximately 600 feet upstream of Camino Encantado	+7320	
Arroyo Saiz	At the upstream side of Avenida Primera	+7191	City of Santa Fe.
	Approximately 0.6 mile upstream of Avenida Primera	+7339	
Big Tesuque Creek	At the Rio Tesuque confluence	+6930	Unincorporated Areas of Santa Fe County.
	Approximately 1.0 mile upstream of County Road 72A	+7234	
Canada Ancha	Approximately 0.4 mile upstream of the Santa Fe River confluence..	+7194	City of Santa Fe, Unincorporated Areas of Santa Fe County.
	Approximately 0.3 mile upstream of La Entrada	+7780	
East Arroyo De La Piedra	At the Arroyo De La Piedra confluence	+7199	City of Santa Fe.
	Approximately 0.7 mile upstream of Calle Conejo	+7585	
Little Tesuque Creek	At the Rio Tesuque confluence	+6930	Unincorporated Areas of Santa Fe County.
	Approximately 100 feet upstream of Bishops Lodge Road	+7140	
Northeast Arroyo De Los Pinos	Approximately 80 feet upstream of 6th Street	+6828	City of Santa Fe.
	Approximately 1,100 feet upstream of Luisa Street	+6955	
Rio Tesuque	Approximately 0.5 mile downstream of Tesuque Village Road.	+6693	Pueblo of Tesuque, Unincorporated Areas of Santa Fe County.
	At the Big Tesuque Creek and Little Tesuque Creek confluence.	+6930	
Santa Cruz River	Approximately 1,000 feet downstream of State Route 106	+5670	City of Espanola, Santa Clara Indian Reservation, Unincorporated Areas of Santa Fe County.
	Approximately 0.5 mile upstream of State Route 106	+5702	
Unnamed Stream 31	At the Rio Tesuque confluence	+6741	City of Santa Fe, Unincorporated Areas of Santa Fe County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 500 feet upstream of Sangre De Cristo Drive.	+7105	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Espanola

Maps are available for inspection at City Hall, 405 North Paseo de Onate, Espanola, NM 87532.

City of Santa Fe

Maps are available for inspection at City Hall, 200 Lincoln Avenue, Santa Fe, NM 87504.

Pueblo of Tesuque

Maps are available for inspection at the Pueblo of Tesuque Governor's Office, TP 804 Building 4, Santa Fe, NM 87506.

Santa Clara Indian Reservation

Maps are available for inspection at the Santa Clara Indian Reservation Governor's Office, 1 Kee Street, Espanola, NM 87532.

Unincorporated Areas of Santa Fe County

Maps are available for inspection at the Santa Fe County Building, 102 Grant Avenue, Santa Fe, NM 87504.

Johnson County, Texas, and Incorporated Areas
Docket No.: FEMA–B–1130

Hurst Creek	Just upstream of County Road 601A	+679	City of Burleson, Unincorporated Areas of Johnson County.
	Approximately 540 feet upstream of Hidden Court	+721	
Little Booger Creek	Approximately 375 feet downstream of Summercrest Boulevard.	+739	City of Burleson.
	Approximately 725 feet upstream of Marcia Lane	+769	
Low Branch	Approximately 1,600 feet downstream of U.S. Route 287 Business.	+616	City of Mansfield.
	Just upstream of U.S. Route 287 Business	+622	
McAnear Creek	At the confluence with East Buffalo Creek	+732	City of Cleburne.
	Approximately 1,850 feet upstream of Kilpatrick Avenue	+817	
Quil Miller Creek	Approximately 450 feet downstream of Hidden Creek	+683	City of Burleson, Unincorporated Areas of Johnson County.
	Approximately 75 feet east of Litchfield Lane	+695	
Shannon Creek	Approximately 1,500 feet upstream of the confluence with Unnamed Tributary to Shannon Creek.	+758	City of Burleson.
	Just downstream of County Road 1020	+793	
Tributary of Valley Branch	Approximately 500 feet upstream of County Road 608	+674	Unincorporated Areas of Johnson County.
	Approximately 1,000 feet upstream of County Road 608	+674	
Unnamed Tributary to Shannon Creek.	Approximately 0.30 mile upstream of the confluence with Shannon Creek.	+756	City of Burleson.
	Approximately 0.98 mile upstream of the confluence with Shannon Creek.	+773	
VC–8A Stream	Just upstream of Greenway Drive	+788	City of Burleson, Unincorporated Areas of Johnson County.
	Approximately 100 feet upstream of County Road 802	+818	
Valley Branch	Approximately 0.38 mile downstream of County Road 529	+673	Unincorporated Areas of Johnson County.
	Approximately 1,500 feet downstream of County Road 529.	+673	
Village Creek	At the northern Tarrant County boundary	+658	City of Burleson.
	Approximately 0.44 mile upstream of the confluence with North Creek.	+677	
West Buffalo Creek	Approximately 650 feet downstream of Westhill Drive	+799	City of Cleburne.
	Approximately 300 feet downstream of U.S. Route 67	+800	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected

ADDRESSES

City of Burleson

Maps are available for inspection at City Hall, 141 West Renfro Street, Burleson, TX 76028.

City of Cleburne

Maps are available for inspection at City Hall, 10 North Robinson Street, Cleburne, TX 76033.

City of Mansfield

Maps are available for inspection at 1200 East Broad Street, Mansfield, TX 76063.

Unincorporated Areas of Johnson County

Maps are available for inspection at the Johnson County Courthouse, 2 North Main Street, Cleburne, TX 76033.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: November 8, 2012.

James A. Walke,

Acting Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–29255 Filed 12–3–12; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 54

[CC Docket 96–45; FCC 12–131]

Commission's Rules Regarding the Office of Managing Director and the Office of Inspector General

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) amends its rules to reassign to the Office of Managing Director (OMD) certain audit activities formerly assigned to the Office of Inspector General (OIG). The activities concern oversight of the annual audit of the Universal Service Administrative Corporation (USAC) required by the Commission's rules. In addition, the Commission delegates of authority to OMD, in consultation with the Office of General Counsel, to issue subpoenas concerning matters within its jurisdiction.

DATES: Effective December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Office of Managing Director, Financial Operations: call Thomas Buckley at (202) 418–0725.

SUPPLEMENTARY INFORMATION: This is a summary of the Part 54 Audit Authority Transition Order released on October 19, 2012. The Part 54 Audit Authority Transition Order and related Commission documents may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example FCC 12–131. The Part 54 Audit Authority Transition Order is also available on the Internet at the Commission's Electronic Filing System Web Page at: *http://fjallfoss.fcc.gov/edocs_public/.*

1. Section 54.717 of the Commission's rules requires the USAC ''to obtain and pay for an annual audit conducted by an independent auditor to examine its operations and books of account to determine, among other things, whether * * * [USAC] is properly administering the universal service support mechanisms to prevent fraud, waste, and abuse.'' Since 2006, OIG has been the staff unit responsible for overseeing the conduct of the part 54 audit. The purpose of this annual audit has been to oversee the operations of the Universal Service Administrator and to safeguard the Universal Service Fund from potential waste, fraud, and abuse.

2. The Commission amends section 54.717 of its rules to substitute OMD as the staff unit responsible for overseeing the part 54 USAC audit. In 2010, OMD instructed USAC that OIG would no longer directly conduct or oversee the universal service fund beneficiary and contributor audit plan (BCAP), an audit separate from the part 54 USAC audit. This change was in furtherance of OIG's understanding of its responsibilities consistent with the Inspector General Act of 1978, as amended (IG Act). As a result, OMD assumed from OIG the responsibility for directing and overseeing USAC's implementation of the BCAP program. Consistent with OIG's request that the part 54 audit function be transferred back to an appropriate Bureau or Office, and because the Commission finds that OMD now oversees the universal service fund BCAP audits and has in place the resources and expertise needed to oversee the part 54 audit as well, the Commission transfers part 54 oversight authority to OMD.

3. Given this augmentation of OMD's role in audit oversight, the Commission also finds it appropriate to delegate limited authority to OMD, upon receiving approval from the Office of General Counsel, to issue subpoenas that directly relate to OMD'S oversight of audits of the USF programs and OMD's review and evaluation of the interstate telecommunications relay services fund, the North American numbering plan, regulatory fee collection, FCC operating expenses, and debt collection. By granting OMD with this specific, limited and discreet subpoena authority, the Commission will ensure that OMD has the necessary tools to obtain all relevant documentation in a timely manner to complete audit findings and implement corrective actions for all of these programs. Absent this delegation, there is the potential that an audited entity in a particular FCC program may resist providing essential data to OMD to confirm that entity is operating consistent with program rules. Providing OMD with this specific, limited and discreet subpoena authority, therefore strengthens OMD's ability to effectively review and evaluate the aforementioned FCC programs in a

timely manner and further protect these programs against waste, fraud, and abuse.

4. The rule amendments adopted in this Order involve rules of agency organization, procedure, or practice. The notice and comment and effective date provisions of the Administrative Procedure Act are therefore inapplicable.

5. Accordingly, it is ordered, that pursuant to sections 4(i), 4(j), 5(c), 303(r), 47 U.S.C. 154(i), 154(j), 155(c), 303(r) of the Communications Act of 1934, as amended, 47 CFR part 54 is amended, as set forth below, effective upon publication in the **Federal Register**.

List of Subjects

47 CFR Part 0

Classified information, Freedom of information, Government publications, Reporting and recordkeeping requirements.

47 CFR Part 54

Communications common carriers, Health facilities, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 54 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; *47 U.S.C. 155,* 225, unless otherwise noted.

■ 2. Amend § 0.231 by adding paragraph (l) to read as follows:

§ 0.231 Authority delegated

* * * * *

(l) *Subpoena authority.* The Managing Director is delegated authority to issue subpoenas for the Office of Managing Director's oversight of audits of the USF programs and the Office of Managing Director's review and evaluation of the interstate telecommunications relay services fund, the North American numbering plan, regulatory fee collection, FCC operating expenses, and debt collection. Before issuing a subpoena, the Office of Managing Director shall obtain the approval of the Office of General Counsel.

PART 54—UNIVERSAL SERVICE

■ 3. The authority citation for part 54 is revised to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

§ 54.717 [Amended]

■ 4. In § 54.717 remove the words ''Office of Inspector General'' and add in their place, the words ''Office of Managing Director'' and remove the words ''Inspector General'' and add in their place, the words ''Managing Director'' each place it appears.

[FR Doc. 2012–29150 Filed 12–3–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 11–42; 03–109; 12–23 and CC Docket No. 96–45; FCC 12–11]

Lifeline and Link Up Reform and Modernization, Advancing Broadband Availability Through Digital Literacy Training

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection requirements associated with certain of the provisions of the rules adopted as part of the Commission's *Lifeline and Link Up Reform and Modernization Report and Order* (*Order*). The Commission submitted revisions to those information collection requirements under control number 3060–0819 to OMB for review and approval, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), 77 FR 52718, August 30, 2012. The revisions as updated were approved by OMB on November 7, 2012.

DATES: The Office of Management and Budget granted approval on November 7, 2012 for the information collection requirements under OMB Control No. 3060–0819.

FOR FURTHER INFORMATION CONTACT: Jonathan Lechter, Wireline Competition Bureau, (202) 418–7400 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This document announces that, on November 7, 2012, OMB approved, for a period of three years, the information collection requirements contained in the Commission's *Order,* FCC 12–11, published at 77 FR 12952, March 2, 2012. The OMB Control Number is 3060–0819. The Commission publishes this notice as an announcement of the effective date rules requiring OMB approval. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on November 7, 2012, for the information collection requirements contained in the Commission's rules at 47 CFR Sections 54.202(a), 54.401(d), 54.403, 54.404, 54.405(c), 54.405(e) except the portion of paragraph (4) relating to temporary address de-enrollment, 54.407, 54.410(a) through (f), 54.416, 54.417, 54.420, and 54.422.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0819.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Pub. L. 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–0819.

OMB Approval Date: November 7, 2012.

OMB Expiration Date: November 30, 2015.

Title: Section 54.400 through 54.707 and Lifeline Assistance (Lifeline) Connection Assistance (Link-Up) .

Form Numbers: FCC Forms 497, 550, 555, and 560.

Respondents: Individuals or households and businesses or other for-profit.

Number of Respondents and Responses: 13,500,940 respondents; 41,828,019 responses.

Estimated Time per Response: .25 hours to 50 hours.

Frequency of Response: On Occasion, Quarterly, Biennially, Monthly, 1-Time,

and Annual reporting requirements, Third Party Disclosure requirements and Recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 1, 4(i), 201–205, 214, 254, 403 of the Communications Act of 1934, as amended.

Total Annual Burden: 24,185,658 hours.

Total Annual Cost: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. We note that the Universal Service Administrative Corporation must preserve the confidentiality of all data obtained from respondents and contributors to the universal service support program mechanism, must not use the data except for purposes of administering the universal service support program, and must not disclose data in company-specific form unless directed to do so by the Commission. Also, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: In the *2012 Lifeline Reform Order,* 77 FR 12952, March 2, 2012, we take actions necessary to address waste in the Universal Service Fund. All the requirements contained herein are necessary to implement the congressional mandate for universal service. These reporting and recordkeeping requirements are necessary to ensure that only eligible subscribers receive support and that Eligible Telecommunications Carriers follow certain rules designed to protect low income consumers and the Universal Service Fund. The *Lifeline Reform Order* is another step in the Commission's ongoing efforts to overhaul all of USF programs. The Order acts to eliminate waste and inefficiency in the program and to increase accountability.

Federal Communications Commission.

Bulah P. Wheeler,

Associate Secretary.

[FR Doc. 2012–29069 Filed 11–30–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09–52; FCC 11–190]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection requirements (form revisions) associated with the Commission's rules contained in the Third Report and Order, FCC 11–190, pertaining to the policies to promote rural radio service and to streamline allotment and assignment procedures. This notice is consistent with the Third Report and Order, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of these information collection requirements (form changes).

DATES: *Effective date:* The amendment to § 73.3573, published at 77 FR 32034, May 31, 2012, was approved by OMB July 2, 2012, and is effective December 4, 2012.

Applicability date: The form revisions to FCC Forms 314 and 315 associated with this rule are applicable December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Cathy Williams on (202) 418–2918 or via email to: *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that, on October 10, 2012, OMB approved, for a period of three years, the information collection requirements contained in the Commission's Third Report and Order, FCC 11–190, published at 77 FR 2916, January 20, 2012. The OMB Control Number is 3060–0031. The Commission publishes this document as an announcement of the effective date of the information collection requirements (form revisions for FCC Forms 314 and 315).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on October 10, 2012, for the form revisions to FCC Forms 314 and 315.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0031.

The foregoing is required by the Paperwork Reduction Act of 1995, Pub. L. 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

Control Number: 3060–0031.

Title: Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC Form 314; Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, FCC Form 315; Section 73.3580, Local Public Notice of Filing of Broadcast Applications.

Form Numbers: FCC Forms 314 and 315.

OMB Approval Date: October 10, 2012.

OMB Expiration Date: October 31, 2015.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 4,840 respondents and 12,880 responses.

Estimated Time per Response: 0.084 to 6 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in Sections 154(i), 303(b) and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 18,670 hours.

Total Annual Cost: $52,519,656.

Privacy Impact Assessment(s): No impacts.

Nature and Extent of Confidentiality: There is no need for confidentiality and respondents are not being asked to submit confidential information to the Commission.

Needs and Uses: On January 28, 2010, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking (''Rural First R&O'') in MB Docket No. 09–52, FCC 10–24, 25 FCC Rcd 1583 (2010). In the Rural First R&O, the Commission

adopted a Tribal Priority under Section 307(b) of the Communications Act of 1934, as amended, to assist federally recognized Native American Tribes and Alaska Native Villages (''Tribes'') and entities primarily owned or controlled by Tribes in obtaining broadcast radio construction permits designed primarily to serve Tribal Lands (the ''Tribal Priority''). Tribal affiliated applicants that meet certain conditions regarding Tribal membership and signal coverage qualify for the Tribal Priority, which in most cases will enable the qualifying applicants to obtain radio construction permits without proceeding to competitive bidding, in the case of commercial stations, or to a point system evaluation, in the case of noncommercial educational (''NCE'') stations. On March 3, 2011, the Commission adopted a Second Report and Order (''Rural Second R&O''), First Order on Reconsideration, and Second Further Notice of Proposed Rule Making in MB Docket No. 09–52, FCC 11–28, 26 FCC Rcd 2556 (2011). On December 28, 2011, the Commission adopted a Third Report and Order in MB Docket No. 09–52, FCC 11–190, 26 FCC Rcd 17642 (2011) (''Rural Third R&O''). In the Rural Third R&O the Commission further refined the use of the Tribal Priority in the commercial FM radio context, specifically adopting a ''Threshold Qualifications'' approach to commercial FM application processing.

Furthermore, under the Commission's Tribal Priority procedures, entities obtaining:

(a) An AM authorization for which the applicant claimed and received a dispositive Section 307(b) priority because it qualified for the Tribal Priority; or

(b) An FM commercial non-reserved band station awarded:

(1) To the applicant as a singleton Threshold Qualifications Window applicant,

(2) To the applicant after a settlement among Threshold Qualifications Window applicants, or

(3) To the applicant after an auction among a closed group of bidders composed only of threshold qualified Tribal applicants; or

(c) A reserved-band NCE FM station for which the applicant claimed and received the Tribal Priority in a fair distribution analysis as set forth in 47 CFR 73.7002(b)(1), may not assign or transfer the authorization during the period beginning with issuance of the construction permit, until the station has completed four years of on-air operations, unless the assignee or transferee also qualifies for the Tribal Priority. Pursuant to procedures set forth in the Rural Third R&O, 26 FCC Rcd at 17645–50, the Tribal Priority Holding Period is now applied in the context of authorizations obtained using Tribal Priority Threshold Qualifications.

Consistent with actions taken by the Commission in the Rural Third R&O, the following changes are made to Forms 314 and 315: Section I of each form includes a question asking applicants to indicate whether any of the authorizations involved in the subject transaction were obtained: after award of a dispositive Section 307(b) preference using the Tribal Priority; through Threshold Qualification procedures; or through the Tribal Priority as applied before the NCE fair distribution analysis. A subsequent question then asks whether both the assignor/transferor and assignee/transferee qualify for the Tribal Priority in all respects. Applicants not meeting the Tribal Priority qualifications and proposing an assignment or transfer during the Holding Period must provide an exhibit demonstrating that the transaction is consistent with the Tribal Priority policies or that a waiver is warranted. The instructions for Section I of Forms 314 and 315 have been revised to assist applicants with completing the questions.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–26009 Filed 12–3–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 567

[Docket No. NHTSA–2012–0093 Notice 2]

RIN 2127–AL18

Final Rule

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: This document amends regulations that prescribe the format and contents labels that manufacturers are required to affix to motor vehicles manufactured for sale in the United States to certify the compliance of those vehicles with U.S. safety standards. The amendment will require specified certification language to be included on the labels affixed to certain types of vehicles.

DATES: This rule is effective January 3, 2013. Petitions for reconsideration must be received by NHTSA not later than January 18, 2013.

ADDRESSES: Petitions for reconsideration of this final rule should refer to the docket and notice numbers identified above and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., West Building, Washington, DC 20590. It is requested, but not required, that 10 copies of the petition be submitted. The petition must be received not later than 45 days after publication of this final rule in the **Federal Register**. Petitions filed after that time will be considered petitions filed by interested persons to initiate rulemaking pursuant to 49 U.S.C. Chapter 301.

The petition must contain a brief statement of the complaint and an explanation as to why compliance with the final rule is not practicable, is unreasonable, or is not in the public interest. Unless otherwise specified in the final rule, the statement and explanation together may not exceed 15 pages in length, but necessary attachments may be appended to the submission without regard to the 15-page limit. If it is requested that additional facts be considered, the petitioner must state the reason why they were not presented to the Administrator within the prescribed time. The Administrator does not consider repetitious petitions and unless the Administrator otherwise provides, the filing of a petition does not stay the effectiveness of the final rule.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, 1200 New Jersey Avenue SE., Washington, DC 20590; (202) 366–3151.

SUPPLEMENTARY INFORMATION: NHTSA published a final rule on February 14, 2005 (70 FR 7414) that amended certain provisions of title 49, Code of Federal Regulations, that pertain to the certification of motor vehicles to standards administered by NHTSA. In amending the provisions that establish the format and content requirements for certification labels, the agency inadvertently omitted from 49 CFR 576.4(g)(5) the requirement for manufacturers to include a specific certification statement in the labels they affix to certain types of motor vehicles. This rule corrects that inadvertent omission.

Background and Amendments

This rule was preceded by a notice of proposed rulemaking that NHTSA published on August 6, 2012 (77 FR 46677). There were no comments in response to the notice of proposed rulemaking.

Under the National Traffic and Motor Vehicle Safety Act of 1966, as amended, (49 U.S.C. 30112(a), 30115), a motor vehicle manufactured for sale in the United States must be manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) and bear a label certifying such compliance that is permanently affixed by the vehicle's original manufacturer. The label constitutes the manufacturer's certification that the vehicle complies with the applicable standards. Under 49 CFR 567.4, the label, among other things, must identify the vehicle's manufacturer, its date of manufacture, its gross vehicle weight rating or GVWR, the gross axle weight rating or GAWR of each axle, the vehicle type classification (e.g., passenger car, multipurpose passenger vehicle, truck, bus, motorcycle, trailer, low-speed vehicle), and the vehicle's Vehicle Identification Number or ''VIN.'' The certification label must also contain a variant of the statement: ''This vehicle conforms to all applicable Federal motor vehicle safety standards in effect on the date of manufacture shown above.'' For example, passenger cars are subject to safety, bumper, and theft prevention standards; therefore, a passenger car certification label must contain the statement: ''This vehicle conforms to all applicable Federal motor vehicle safety, bumper, and theft prevention standards in effect on the date of manufacture shown above.'' The expression ''U.S.'' or ''U.S.A.'' may be inserted before the word ''Federal'' as it appears in this statement.

In the final rule published on February 14, 2005 (70 FR 7414), 49 CFR 567.4(g)(5) was amended by replacing the statement ''This vehicle conforms to all applicable Federal motor vehicle safety standards in effect on the date of manufacture shown above'' with the language, ''One of the following statements, as appropriate'' followed by subparagraphs i, ii, and iii, which pertain, respectively, to passenger cars, multipurpose passenger vehicles (MPVs) and trucks with a GVWR of 6,000 pounds or less, and multipurpose passenger vehicles and trucks with a GVWR of over 6,000 pounds. Manufacturers of other types of motor vehicles remained subject to the statutory duty to certify those vehicles to the applicable FMVSS. And the logical certification language for these manufacturers to use was: ''This vehicle conforms to all applicable Federal motor vehicle safety standards in effect on the date of manufacture shown above.'' But due to an inadvertent omission in the course of amendments to the regulations, the regulations did not specifically state that manufacturers of trailers, buses, motorcycles, and low-speed vehicles (those vehicle types not identified by subparagraphs i, ii, and iii) were required to use this specific language. To address this lack of specificity, the agency is amending section 567.4(g) to add a new subparagraph (iv) that covers these vehicle types. Subparagraphs i, ii, and iii remain unchanged.

Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

NHTSA has considered the impact of this rulemaking under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking is not significant. Accordingly, the Office of Management and Budget has not reviewed this rulemaking under Executive Order 12886. Further, NHTSA has determined that the rulemaking is not significant under Department of Transportation's regulatory policies and procedures. Manufacturers are required by statute (49 U.S.C. 30115(a)) to permanently affix a tag or label to a vehicle certifying the vehicle's compliance with applicable safety standards. The agency is not aware of any manufacturer that has discontinued inserting the certification language on the certification labels affixed to trailers, buses, motorcycles, and low-speed vehicles manufactured since the regulations were revised in 2005. Based on this, NHTSA currently anticipates that the costs of the final rule would be so minimal as not to warrant preparation of a regulatory evaluation. The action does not involve any substantial public interest or controversy. The rule would have no substantial effect upon State and local governments. There would be no substantial impact upon a major transportation safety program.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) provides that 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. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this rulemaking under the Regulatory Flexibility Act, and certifies that the rule being adopted will not have a significant economic impact on a substantial number of small entities. Accordingly, the agency has not prepared a final regulatory flexibility analysis for this rulemaking. NHTSA makes these statements on the basis that covered entities have been and are subject to a statutory obligation to certify vehicles they manufacture, this rulemaking merely restores text that was part of the regulation before it was last amended in 2005, and manufacturers have continued to affix labels that include the appropriate certification language on trailers, buses, motorcycles, and low-speed vehicles manufactured since then. As a consequence, this rulemaking will not impose any significant costs on anyone. Therefore, it has not been necessary for NHTSA to conduct a regulatory evaluation or Regulatory Flexibility Analysis for this rulemaking.

The costs of the 2005 amendments were analyzed at the time they were issued as a final rule. At that time, we explained that the rule did not impose

any significant economic impact on a substantial number of small businesses. The agency explained that the rule would, in fact, reduce burdens on final-stage manufacturers, many of which are small businesses.

The agency is not aware that any vehicle manufacturers have stopped including the certification language that is the subject of this rule on the labels they affix to trailers, buses, motorcycles, or low-speed vehicles. For this reason, we view this rulemaking as merely restoring to the regulation text that was inadvertently omitted in the 2005 amendment and find that there is no change in the meaning or application of the rule as explained in the preamble at 70 FR 7414.

C. Executive Order 13132 (Federalism)

Executive Order 13132 on ''Federalism'' requires NHTSA 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.'' Executive Order 13132 defines the term ''policies that have federalism implications'' 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, NHTSA 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 NHTSA consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to this rulemaking action.

D. Executive Order 12988 (Civil Justice Reform)

Executive Order 12988 requires that agencies review proposed regulations and legislation and adhere to the following general requirements: (1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity; (2) The agency's proposed legislation and regulations shall be written to minimize litigation; and (3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

When promulgating a regulation, Executive Order 12988 specifically requires the agency to make every reasonable effort to ensure that the regulation, as appropriate: (1) Specifies in clear language the preemptive effect; (2) specifies in clear language the effect on existing Federal law or regulation, including all provisions repealed, circumscribed, displaced, impaired, or modified; (3) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction; (4) specifies in clear language the retroactive effect; (5) specifies whether administrative proceedings are to be required before parties may file suit in court; (6) explicitly or implicitly defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship of regulations.

NHTSA has reviewed this rulemaking according to the general requirements and the specific requirements for regulations set forth in Executive Order 12988. This rulemaking simply restores text that existed before the regulation was amended in 2005 and makes clear the requirement that manufacturers include language in the certification labels that they must affix to vehicles under 49 U.S.C. 30115 and the regulations at 49 CFR part 567. This change does not result in any preemptive effect and does not have a retroactive effect. A petition for reconsideration or other administrative proceeding is not required before parties may file suit in court.

F. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with the base year of 1995). Before promulgating a rule for which a written assessment is needed, Section 205 of the UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of Section 205 do not apply when they are inconsistent with applicable law. Moreover, Section 205 allows NHTSA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Because this final rule will not require the expenditure of resources beyond $100 million annually, this action is not subject to the requirements of Sections 202 and 205 of the UMRA.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. This final rule includes a ''collection of information,'' as that term is defined in 5 CFR part 1320 *Controlling Paperwork Burdens on the Public,* because it requires manufactures to insert text in the certification labels they affix to trailers, buses, motorcycles, and low-speed vehicles that is not specified in the regulations as they currently exist. There is no burden on the general public.

OMB has approved NHTSA's collection of information associated with motor vehicle labeling requirements under OMB clearance no. 2127–0512, *Consolidated Labeling Requirements for Motor Vehicles (Except the Vehicle Identification Number).* NHTSA's request for the extension of this approval was granted on June 6, 2011, and remains in effect until June 30, 2014. For the following reasons, NHTSA believes that the requirements imposed by this rule will not increase the information collection burden on the public. Manufacturers of all motor vehicles manufactured for sale in the United States are required by statute to certify their vehicles' compliance with all applicable Federal motor vehicle safety standards. See 49 U.S.C. 30115(a). The statute provides that ''[c]ertification of a vehicle must be shown by a label or tag permanently fixed to the vehicle.'' *Ibid.* To satisfy this requirement, manufacturers of all motor vehicles, including trailers, buses, motorcycles, and low-speed vehicles, have been affixing certification labels to those vehicles containing the required certification language even though there has been no certification language specified in the regulations since they

were amended in 2005. Reinstating the specific language in the regulations will therefore not increase the paperwork burden on those manufacturers.

H. Executive Order 13045

Executive Order 13045 applies to any rule that (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental, health, or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned rule is preferable to other potentially effective and reasonably feasible alternatives considered by us. This rulemaking is not economically significant and does not concern an environmental, health, or safety risk.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs NHTSA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs the agency to provide Congress, through the OMB, with explanations when we decide not to use available and applicable voluntary consensus standards.

In this final rule, we are adding to 49 CFR 576.4(g)(5) the requirement that manufacturers include in the certification labels that they affix to certain types of motor vehicles a statement certifying that the vehicle conforms to all applicable FMVSS. This language was inadvertently omitted from the regulation in 2005 and we are adopting no substantive changes to the regulation nor do we propose any technical standards. For these reasons, Section 12(d) of the NTTAA would not apply.

J. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

List of Subjects in 49 CFR Part 567

Labeling, Motor vehicle safety, Motor vehicles.

In consideration of the foregoing, Part 567, Certification, in Title 49 of the Code of Federal Regulations is amended as follows:

PART 567—CERTIFICATION

■ 1. The authority citation for part 567 is revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, 30166, 32502, 32504, 33101–33104, 33108, and 33109; delegation of authority at 49 CFR 1.95.

■ 2. Amend § 567.4 by adding paragraph (g)(5)(iv) to read as follows:

§ 567.4 Requirements for manufacturers of motor vehicles.

* * * * *

(g) * * *

(5) * * *

(iv) For all other vehicles, the statement: ''This vehicle conforms to all applicable Federal motor vehicle safety standards in effect on the date of manufacture shown above.'' The expression ''U.S.'' or ''U.S.A.'' may be inserted before the word ''Federal''.

* * * * *

Issued on: November 28, 2012.

Daniel C. Smith,

Senior Associate Administrator for Vehicle Safety.

[FR Doc. 2012–29132 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2012–0171]

RIN 2127–AK99

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: NHTSA is amending the Federal motor vehicle safety standard (FMVSS) on lamps, reflective devices, and associated equipment to restore the blue and green color boundaries that were removed when the agency published a final rule reorganizing that standard on December 4, 2007.

DATES: *Effective date:* December 4, 2012.

Petitions for reconsideration: Petitions for reconsideration of this final rule must be received not later than January 18, 2013.

ADDRESSES: Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, West Building, Ground Floor, Docket Room W12–140, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For technical issues: Ms. Marisol Medri, Office of Crash Avoidance Standards, NHTSA, 1200 New Jersey Avenue SE, West Building, Washington, DC 20590 (Telephone: (202) 366–6987) (Fax: (202) 366–7002).

For legal issues: Mr. Thomas Healy, Office of the Chief Counsel, NHTSA, 1200 New Jersey Avenue SE, West Building, Washington, DC 20590 (Telephone: (202) 366–2992) (Fax: (202) 366–3820).

SUPPLEMENTARY INFORMATION:

I. Background

FMVSS No. 108, *Lamps, Reflective Devices and Associated Equipment,* has been in existence since 1968. The standard had been amended on an *ad hoc* basis over time resulting in a patchwork organization of the standard. NHTSA published a final rule on December 4, 2007,[1] amending FMVSS No. 108 by reorganizing the regulatory text so that it provides a more straightforward and logical presentation of the applicable regulatory requirements; incorporating important agency interpretations of the existing requirements; and reducing reliance on third-party documents incorporated by reference. The preamble of the final rule stated that the rewrite of FMVSS No. 108 was administrative in nature and would have no impact on the substantive requirements of the standard. The December 4, 2007 final rule made several changes to the proposal contained in the Notice of Proposed Rulemaking for that rule including removing the blue and green color boundary requirements from paragraph S14.4.1.3.2 and eliminating references to three additional SAE documents.

[1] 72 FR 68234, (Dec. 4, 2007). The agency published the Notice of Proposed Rulemaking proposing to reorganize the standard on December 30, 2005. 70 FR 77454, (Dec. 30, 2005).

SABIC Innovative Plastics US LLC (SABIC–IP) sent a letter to NHTSA on August 11, 2008, after the final rule comment period was over. In this letter, SABIC–IP stated that the agency did not allow for public comment when it made the decision to remove the blue and green color boundaries from the standard. SABIC–IP further stated that in removing the blue and green color boundaries from paragraph S14.4.1.3.2, the agency substantively changed the requirements of FMVSS No. 108 during the rewrite process. On July 13, 2011, NHTSA published a NPRM [2] initiating this rulemaking to replace the color boundaries that were removed during the administrative rewrite of the standard.

In the NPRM, the agency explained that while neither blue nor green are directly permitted by the standard, it is possible to use these color boundaries to certify a material to the outdoor exposure test. Once individually certified to the three year outdoor exposure test, the blue and clear material could be mixed to produce a clear material with a blue tint, which could then be used in a lamp lens provided the lamp itself emits light within the white color boundary. Under the standard, the mixed material can be certified to the outdoor exposure test without an additional three years of testing. The pre-rewrite version of the standard contained two tests for determining compliance with the color requirements in the standard, the Visual Method or the Tristimulus Method. The blue and green color boundary definitions that were removed are part of the color requirements of the Tristimulus method procedure. The NPRM proposed to amend FMVSS No. 108 to restore the color boundary definitions for green, restricted blue and signal blue so that the requirements of the rewrite coincide with those of the old standard.

II. Public Comments on NPRM

NHTSA received four public comments in response to the Notice of Proposed Rulemaking for this rulemaking.[3] All of the comments supported reinstating the color boundary definitions for green, restricted blue and signal blue to FMVSS No. 108.

The Alliance of Automobile Manufacturers (the ''Alliance'') supported the rulemaking but stated that the agency omitted the color requirements for green and blue when tested according to the visual method. The Alliance claimed that these requirements from SAE J578c *Color Specification for Electric Signal Lighting Devices,* (FEB 1977) (the third party standard from which the color boundaries were derived) were incorporated into the NPRM proposing the reorganization of the standard but were not incorporated into the December 4, 2007 Final Rule. The Alliance recommended that these requirements be reinstated into the standard as sections 14.4.1.3.2.4 and 14.4.1.3.2.5.

SABIC–IP submitted a comment urging the agency to restore the green and blue color boundaries to FMVSS No. 108. SABIC–IP also requested that the agency clarify that polymers and additives would not have to be retested to the three year outdoor exposure test after the effective date of the administrative rewrite before being combined to create new materials. SABIC–IP stated that the rewrite of the standard creates ambiguity as to whether combinations of individually certified materials can continue to be mixed to create new material and then certified to the outdoor exposure test without an additional three years of testing as was permitted under the pre-write version of the standard. SABIC–IP requested that NHTSA amend paragraph S14.4.2.2.2 to state that materials and additives used in plastics could be changed without outdoor exposure testing if the materials had previously been tested to FMVSS No. 108 and found to meet the requirements. Paragraph S14.4.2.2.2 currently states that materials and additives used in plastics can be changed without outdoor exposure testing if the materials have previously been tested to ''this section'' and found to meet the requirements. SABIC–IP believes that it is possible to interpret the use of the words ''this section'' in paragraph S14.4.2.2.2 to require that materials be retested to the outdoor exposure test in the new paragraph S14.4.2.2.2, published in December 2007, before they can be used to create new materials. SABIC–IP stated that this interpretation would go against the stated goal of the rewrite of the standard to refrain from making any substantive change to the requirements.

SABIC–IP also asked the agency to clarify that the lower concentration of additive of previously tested materials used to create a new material according to S14.4.2.2.2 paragraph can be represented by a composition of zero.

III. Agency Decision

Since it was not the agency's intention to create any substantive modifications to the standard, we have decided to amend FMVSS No. 108 to add the color boundary definitions for green, restricted blue and signal blue to the Tristimulus method procedure as proposed in the NPRM and to include the two missing color requirements from the visual method procedure so that the requirements of the rewrite coincide with those of the old standard.

We have decided not to amend paragraph S14.4.2.2.2 of FMVSS No. 108 as requested by SABIC–IP over the course of the rewrite rulemaking. We attempted, where ever possible, to avoid changes to the language of the standard. We note that the phrase ''this section'' refers to the requirements of paragraph S14.4.2.2 in general, not to a specific version of the standard. Thus, so long as the additives and polymers have previously been tested to and found to comply with the same substantive requirements as they appear in FMVSS No. 108, they can be added to create new materials without additional outdoor exposure testing. However, if the requirements of S14.4.2.2 were changed, previously tested additives and polymers would no longer have been tested to ''this section'' and would have to be retested to the outdoor exposure test before being used to create new materials under paragraph S14.4.2.2.2.

The agency will respond to SABIC–IP's comment about the lower concentration of additive used to create new materials being represented by a composition of zero in a letter of interpretation from the NHTSA Office of Chief Counsel.

IV. Effective Date

The National Highway and Motor Vehicle Safety Act states that an FMVSS issued by NHTSA cannot become effective before 180 days after the standard is issued unless the agency makes a good cause finding that a different effective date is in the public interest. Additionally, the Administrative Procedure Act (5 U.S.C. 553(d)) requires that a rule be published 30 days prior to its effective date unless one of three exceptions applies. One of these exceptions is when the agency finds good cause for a shorter period. We have determined that it is in the public interest for this final rule to have an immediate effective date so that the effective date of this final rule coincides as closely as possible with the effective date of the 2007 rewrite of the standard. An effective date for this final rule that

[2] 76 FR 41181, (July 13, 2011).

[3] The Alliance of Automobile Manufacturers, SABIC–IP and two private individuals submitted comments in response to the NPRM.

closely coincides with the 2007 rewrite of the standard will ensure that the requirements of FMVSS No. 108 remain consistent so as to avoid unnecessary changes in the requirements of the standard that would force regulated parties to change their compliance strategies, potentially imposing costs on manufacturers while not improving safety.

V. Regulatory Notices and Analyses

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the DOT's regulatory policies and procedures. This final rule was not reviewed by the Office of Management and Budget (OMB) under E.O. 12866, ''Regulatory Planning and Review.'' It is not considered to be significant under E.O. 12866 or the Department's regulatory policies and procedures.

This Final Rule restores existing requirements to the standard thereby maintaining flexibility in compliance for manufacturers who choose to use these colors to certify materials to the outdoor exposure test. Because this Final Rule merely restores existing requirements it is not expected to have any costs. The agency expects some minor unquantifiable benefits to manufacturers due to the continued availability of the green and blue color boundaries to certify to the outdoor exposure test. Because there are not any costs associated with this rulemaking and only minor unquantifiable benefits, we have not prepared a separate economic analysis for this rulemaking.

B. Executive Order 13609: Promoting International Regulatory Cooperation

The policy statement in section 1 of Executive Order 13609 provides, in part:

> The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

NHTSA is not aware of any conflicting regulatory approach taken by a foreign government concerning the subject matter of this rulemaking.

C. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act, 5 U.S.C. 60l *et seq.,* NHTSA has evaluated the effects of this action on small entities. I hereby certify that this rule would not have a significant impact on a substantial number of small entities. The final rule would affect manufacturers of motor vehicle light equipment, but the entities that qualify as small businesses would not be significantly affected by this rulemaking because the agency is restoring requirements that previously existed in an older version of the regulation. This rulemaking is not expected to affect the cost of manufacturing motor vehicle lighting equipment.

D. Executive Order 13132

NHTSA has examined today's rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rulemaking would not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The final rule would 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.''

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: ''When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.'' 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance.

The express preemption provision set forth above is subject to a savings clause under which ''[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' 49 U.S.C. 30103(e) Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of such State common law tort causes of action by virtue of NHTSA's rules, even if not expressly preempted. This second way that NHTSA rules can preempt is dependent upon there being an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer, notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Order 13132 and 12988, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (e.g., the language and structure of the regulatory text) and objectives of today's rule and finds that this rule, like many NHTSA rules, prescribes only a minimum safety standard. As such, NHTSA does not intend that this rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard announced here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

E. National Environmental Policy Act

NHTSA has analyzed this final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would not have any

significant impact on the quality of the human environment.

F. Paperwork Reduction Act

Under the procedures established by the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. This final rule would not establish any new information collection requirements.

G. National Technology Transfer and Advancement Act

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Public Law 104–113), ''all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.'' This Final Rule would not adopt or reference any new industry or consensus standards that were not already present in FMVSS No. 108.

H. Civil Justice Reform

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The preemptive effect of this final rule is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

I. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). This final rule would not result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector in excess of $100 million annually.

J. Executive Order 13211

Executive Order 13211 (66 FR 28355, May 18, 2001) applies to any rulemaking that: (1) Is determined to be economically significant as defined under E.O. 12866, and is likely to have a significantly adverse effect on the supply of, distribution of, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This rulemaking is not subject to E.O. 13211.

K. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

L. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (70 FR 19477–19478).

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles, and Tires.

In consideration of the foregoing, NHTSA amends 49 CFR part 571 as set forth below.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for Part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

■ 2. Section 571.108 is amended by adding paragraphs S14.4.1.3.2.4, S14.4.1.3.2.5, S14.4.1.4.2.4, S14.1.4.2.5, and S14.4.1.4.2.6 to read as follows:

§ 571.108 Standard No.108; Lamps, reflective devices, and associated equipment.

* * * * *

S14.4.1.3.2.4 Green. Green is not acceptable if it is less saturated (paler), yellower, or bluer than the limit standards.

S14.4.1.3.2.5 Blue. Blue is not acceptable if it is less saturated (paler), greener, or redder than the limit standards.

* * * * *

S14.4.1.4.2.4 Green. The color of light emitted must fall within the following boundaries:

$y = 0.73 - 0.73x$ (yellow boundary)
$x = 0.63y - 0.04$ (white boundary)
$y = 0.50 - 0.50x$ (blue boundary)

S14.4.1.4.2.5 Restricted Blue. The color of light emitted must fall within the following boundaries:

$y = 0.07 + 0.81x$ (green boundary)
$x = 0.40 - y$ (white boundary)
$x = 0.13 + 0.60y$ (violet boundary)

S14.4.1.4.2.6 Signal Blue. The color of light emitted must fall within the following boundaries:

$y = 0.32$ (green boundary)
$x = 0.16$ (white boundary)
$x = 0.40 - y$ (white boundary)
$x = 0.13 + 0.60y$ (violet boundary)

* * * * *

Issued on: November 28, 2012.

David L. Strickland,

Administrator.

[FR Doc. 2012–29284 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120321209–2643–02]

RIN 0648–BC08

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Framework Adjustment 5

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

ACTION: Final rule.

SUMMARY: NMFS is broadening the scope of individuals and entities approved to complete vessel fish hold capacity certifications for vessels issued Tier 1 and 2 limited access Atlantic mackerel permits under the Atlantic

Mackerel, Squid, and Butterfish Fishery Management Plan (MSB FMP). In addition, this rule extends the deadline to submit vessel fish hold capacity certifications from December 31, 2012, to December 31, 2013 or during a vessel replacement transaction, whichever comes first.

DATES: Effective on December 3, 2012.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council, including the Framework Document, are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The Framework Document is also accessible via the Internet at *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Lindsey Feldman, Fishery Management Specialist, 978–675–2179, fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

NMFS published a proposed rule for Framework Adjustment 5 on September 21, 2012 (77 FR 58507). Additional background information and detail on why and how Framework Adjustment 5 was developed are included in the proposed rule, and are not repeated here. Amendment 11 to the MSB FMP (76 FR 68642, November 7, 2011) implemented a three-tiered mackerel limited access program in which all qualifiers were required to have possessed a valid permit on March 21, 2007. The final rule implementing Amendment 11 provided that a fish hold capacity certification must be made by an individual credentialed as a Certified Marine Surveyor with a fishing specialty by the National Association of Marine Surveyors (NAMS), or by an individual credentialed as an Accredited Marine Surveyor with a fishing specialty by the Society of Accredited Marine Surveyors (SAMS). Vessel owners who have received a certification of their vessel's fish hold capacity by the Maine State Sealer of Weights and Measures also meet the fish hold capacity requirement. Vessel owners are required to submit documentation in support of their vessel's certified fish hold capacity to NMFS by December 31, 2012, or their first vessel replacement or upgrade, whichever comes first.

This action revises the fish hold capacity certification requirement to allow additional individuals or entities beyond those with credentials approved in Amendment 11 to complete fish hold capacity certifications. This framework action does not make any changes from the proposed rule and expands the range of individuals and entities that are approved to complete hold capacity certifications and allow them also to be completed by employees or agents of a classification society approved by the Coast Guard pursuant to 46 U.S.C. 3316(c), Maine State Sealer of Weights and Measures, a professionally licensed and/or registered Marine Engineer, or a Naval Architect with a professional engineer license. This action also extends the date that vessels are required to submit fish hold capacity measurements by 1 year. Due to a delay in rulemaking, vessels with mackerel Tier 1 and 2 permits will be required to submit fish hold capacity measurements by December 31, 2013, or their first vessel replacement or upgrade, whichever comes first, instead of December 31, 2012.

Comments and Responses

NMFS received four comments on the proposed rule for Framework Adjustment 5 from: Lund's Fisheries, Inc., a processing facility in Cape May, NJ; Quest Marine Services, a marine surveying company; a vessel owner with a mackerel permit; and a member of the general public.

Comment 1: Quest Marine Services commented that the list of individuals or entities approved to conduct vessel capacity measurements should include independent accredited marine surveyors that are not members of a classification society such as NAMS or SAMS. They noted that independent surveyors have experience necessary to conduct commercial fishing vessel surveys and have long-standing relationships with the commercial fishing industry. They also commented in support of extending the deadline to submit vessel capacity measurements from December 31, 2012, to December 31, 2013.

Response: Although independent marine surveyors may have experience completing commercial fishing vessel surveys and vessel hold capacity calculations, there are no accreditation requirements for such surveyors. Without any type of accreditation, such as being a member of a classification society, having a degree in naval architecture, etc., it is not possible for us to verify the qualifications of an independent marine surveyor. Therefore, NMFS does not support the inclusion of independent marine surveyors in the list of individuals or entities approved to complete vessel capacity measurements for Tier 1 and Tier 2 mackerel vessels.

Comment 2: Lund's Fisheries, Inc., commented in support of broadening the scope of individuals approved to complete vessel capacity measurements, but did not support the inclusion of Maine State Sealer of Weights and Measures as an approved entity as the state's method of certifying hold capacities is based on a volumetric measurement using hogsheads, which was developed for the Atlantic herring, but not the mackerel fishery. Lund's suggested the use of cubic feet as a standardized measurement and that NMFS hold a workshop to develop a universal standard for fish hold standardization in the mackerel fishery.

Response: NMFS does not agree that the Maine State Sealer of Weights and Measures should be removed from the list of approved entities to complete vessel capacity measurements. The vessel capacity measurement requirement was implemented as a baseline measurement that will limit future upgrades to Tier 1 and 2 mackerel permits to 10 percent above the certified baseline vessel hold capacity. The unit of such measurements may vary depending on the methodology used by the approved individual or entity (for example, the Maine State Sealer of Weights and Measures uses the hogshead as a unit of measures). The unit of the vessel capacity measurement does not have any impact on the measurement as a baseline specification. Vessels that submit hold capacity measurements in hogsheads, or any other unit of measure, will still be limited in any vessel replacement or upgrade to 10 percent above the baseline hogshead (or other) measurement. If the volumetric unit differs between vessels during an upgrade or replacement, accepted methods of unit conversion will be used (ex. 1 hogshead = 1225 lb = 21.8 ft^3). While we understand the importance of having a standardized unit of measure for vessel holds in the mackerel and herring fisheries for other purposes, such standardization is not necessary for the capacity measurement to function as a baseline specification.

Comment 3: A vessel owner with a mackerel permit commented that the fish hold certification requirement is too expensive for small vessels that only catch minimal amounts of mackerel.

Response: The vessel hold capacity measurement requirement is only required for vessels with Atlantic mackerel Tier 1 and 2 limited access permits. The trip limits for Tier 1 and Tier 2 permits are unlimited mackerel, and 135,000 lb per trip or per calendar day respectively. Vessels that are issued Tier 1 and Tier 2 mackerel permits are

predominantly large boats with larger catches than the commenter described, and therefore smaller vessels that land minimal mackerel are not subject to the vessel hold capacity measurement requirement. For smaller vessels with minimal mackerel landings, NMFS recommends obtaining either a Tier 3 limited access permit, which has a 100,000 lb-trip limit, or an Atlantic mackerel open access permit, which has a 20,000 lb-trip limit, recognizing that after the limited access program application period has expired, vessels will be prohibited from upgrading from a low to a high possession limit Tiered permit. Neither of these permits would require obtaining and submitting a vessel hold capacity measurement.

Comment 4: A member of the public commented generally against the fishing industry and NOAA.

Response: This comment did not address the subject of this rulemaking and therefore does not warrant a specific response within this rule.

Classification

The Administrator, Northeast Region, NMFS, determined that this framework adjustment to the Atlantic Mackerel, Squid, and Butterfish FMPs is necessary for the conservation and management of the Atlantic mackerel, butterfish, fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received, and no new information has been received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

The Assistant Administrator for Fisheries finds good cause under section 553(d) of the Administrative Procedure Act to waive the 30-day delay in effectiveness for this action. Due to a delay in rulemaking, this action extends the deadline for Tier 1 and 2 Atlantic mackerel vessels to complete vessel hold capacity measurements from December 31, 2012, to December 31, 2013. If the effectiveness of this rule was delayed for 30-days from the date of publication, vessels issued Tier 1 and 2 mackerel permits would still be required to submit hold capacity measurements by December 31, 2012, therefore invalidating the 1 year extension in this action. Because the majority of Tier 1 and 2 mackerel vessels have been waiting to obtain and submit vessel hold capacity measurements to NMFS until this rulemaking was published in the **Federal Register**, they would have minimal time and potentially added expense to do so if the deadline was not extended as a result of the 30-day delay in effectiveness. In addition, vessels would be required to have hold capacity measurements completed by the original entities approved under Amendment 11 to the MSB FMP. As this rulemaking broadens the scope of entities and individuals approved to complete vessel hold capacity measurements, delaying this rule would result in economic harm to the vessels that are subject to the capacity measurement requirement by limiting their options and constraining their time for obtaining vessel capacity measurements.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: November 27, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, Performing the Functions and Duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 648.4, paragraph (a)(5)(iii)(H)(*1*) is revised to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(5) * * *

(iii) * * *

(H) * * *

(*1*) In addition to the baseline specifications specified in paragraph (a)(1)(i)(H) of this section, the volumetric fish hold capacity of a vessel at the time it was initially issued a Tier 1 or Tier 2 limited access mackerel permit will be considered a baseline specification. The fish hold capacity measurement must be certified by one of the following qualified individuals or entities: an individual credentialed as a Certified Marine Surveyor with a fishing specialty by the National Association of Marine Surveyors (NAMS); an individual credentialed as an Accredited Marine Surveyor with a fishing specialty by the Society of Accredited Marine Surveyors (SAMS); employees or agents of a classification society approved by the Coast Guard pursuant to 46 U.S.C. 3316(c); the Maine State Sealer of Weights and Measures; a professionally-licensed and/or registered Marine Engineer; or a Naval Architect with a professional engineer license. Owners whose vessels qualify for a Tier 1 or Tier 2 mackerel permit must submit a certified fish hold capacity measurement to NMFS by December 31, 2013, or with the first vessel replacement application after a vessel qualifies for a Tier 1 or Tier 2 mackerel permit, whichever is sooner. The fish hold capacity measurement submitted to NMFS as required in this paragraph (a)(5)(iii)(H)(*1*) must include a signed certification by the individual or entity that completed the measurement, specifying how they meet the definition of a qualified individual or entity.

* * * * *

[FR Doc. 2012–29140 Filed 12–3–12; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 77, No. 233

Tuesday, December 4, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1156; Directorate Identifier 2011–NM–205–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain The Boeing Company Model 737–200, –200C, –300, and –400 series airplanes. The existing AD currently requires repetitive inspections to detect cracking of the corners of the door frame and the cross beams of the aft cargo door, and corrective actions if necessary. The existing AD also requires a modification to the aft cargo door, which terminates the repetitive inspections. Since we issued that AD, we have received reports of cracking on doors on airplanes that were not included in the existing AD. This proposed AD would add airplanes to the applicability, add inspections and related investigative and corrective actions, and revise certain inspection types. This proposed AD would also reduce the compliance time, for certain doors, to do a modification of the doors. We are proposing this AD to prevent fatigue cracking of the corners of the door frame and the cross beams of the aft cargo door, which could result in rapid depressurization of the airplane.

DATES: We must receive comments on this proposed AD by January 18, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98057–3356. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6450; fax: (425) 917–6590; email: *alan.pohl@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1156; Directorate Identifier 2011–NM–205–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On July 2, 2001, we issued AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), for certain The Boeing Company Model 737–200, –200C, –300, and –400 series airplanes. That AD requires repetitive inspections to detect cracking of the corners of the door frame and the cross beams of the aft cargo door, and corrective actions, if necessary. That AD also requires a modification to the aft cargo door, which terminates the repetitive inspections. That AD resulted from reports of cracking in the forward and aft corner frame of the aft cargo door and in the lower cross beam. We issued that AD to prevent fatigue cracking of the corners of the door frame and the cross beams of the aft cargo door, which could result in rapid depressurization of the airplane.

Actions Since Existing AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001) Was Issued

Since we issued AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), we received reports of cracking on doors on airplanes that were not included in the existing AD. Therefore, we have determined that the applicability of AD 2000–06–13 R1 must be expanded to include all The Boeing Company Model 737–200, -200C, -300, -400, and -500 series airplanes in order to adequately address the identified unsafe condition. The existing AD also bases compliance times and repetitive intervals on airplane flight cycles. Since that AD was issued, we have determined that door interchangeability has a significant impact on addressing the unsafe condition. Doors may be rotated from airplane to airplane, and a door may have accumulated considerably more cycles than the

airplane on which it is installed. Therefore, this proposed AD bases compliance times and repetitive intervals on door flight cycles.

In addition, more work is necessary on airplanes that have not accomplished the repair or preventive modification specified in Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999, or previous issues of that service bulletin. We have also determined that the compliance time to do a modification of those doors should be reduced. We referred to Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999, as the appropriate source of service information for accomplishing the required actions specified in AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). We have also determined that additional work is necessary on airplanes on which certain repairs and modifications specified in Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999, or previous issues of that service bulletin, have been done.

Relevant Service Information

We reviewed the following service information:

- Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011.
- Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.
- Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010.

For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2012–1156.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain all the requirements of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). This proposed AD would add airplanes to the applicability. This proposed AD would also require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

The phrase ''related investigative actions'' might be used in this proposed AD. ''Related investigative actions'' are follow-on actions that (1) are related to the primary action, and (2) are actions that further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

In addition, the phrase ''corrective actions'' might be used in this proposed AD. ''Corrective actions'' are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Change to Existing Requirements

Since AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in existing AD 2000–06–13 R1, Amendment 39-12317 (66 FR 36146, July 11, 2001)	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (h)
paragraph (b)	paragraph (i)
paragraph (c)	paragraph (j)
paragraph (d)	paragraph (k)
paragraph (e)	paragraph (l)

We have revised the retained paragraph (d) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001) (which corresponds to paragraph (k) of this proposed AD), by removing reference to Boeing 737 Nondestructive Test Manual, Part 6, Chapter 51–00–00 (Figure 4 or Figure 23) for the high frequency eddy current inspection. Instead, we have added Note 1 to paragraph (k) of this proposed AD to specify that guidance on the inspection can be found in Boeing 737 Nondestructive Test Manual, Part 6, Chapter 51–00–00 (Figure 4 or Figure 23).

We have also moved the method of compliance specified in Note 3 of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), into paragraph (m) of this proposed AD.

We have also revised the language for the credit for previous service information specified in Note 4 of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), and included it in paragraph (n) of this proposed AD.

Differences Between the Proposed AD and the Service Information

Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; and Boeing Special Attention Service Bulletin 737 52–1154, dated December 17, 2010; specify to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, references an incorrect part number for reinforcement angles. Paragraph (q) of this proposed AD specifies the correct part number.

Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; specify accomplishing supplemental structural inspections. Those inspections are not required by this proposed AD. The damage tolerance inspections specified in those service bulletins may be used in support of compliance with section 121.1109(c)(2) or 129.109(b)(2) of the Federal Aviation Regulations (14 CFR 121.1109(c)(2) or 14 CFR 129.109(b)(2)).

Clarification of Line Numbers

For certain actions, Boeing Alert Service Bulletin 737–52A1079, Revision

7, dated December 17, 2010, specifies line numbers 6 through 873 inclusive, but the corresponding action in Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, specifies line numbers prior to 874. Airplanes having line numbers 1 through 5 are out of service; therefore, those airplanes are not subject to the requirements of this proposed AD.

Costs of Compliance

We estimate that this proposed AD affects 581 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Number of airplanes of U.S. Registry	Cost on U.S. operators
Detailed inspection [retained action from existing AD 2000–06–13 R1, Amendment 39-12317 (66 FR 36146, July 11, 2001)].	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170 per inspection cycle.	494	$83,890 per inspection cycle.
High frequency eddy current inspection [retained action from existing AD 2000–06–13 R1, Amendment 39-12317 (66 FR 36146, July 11, 2001)].	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle.	494	$167,960 per inspection cycle.
Modification [retained action from existing AD 2000–06–13 R1, Amendment 39-12317 (66 FR 36146, July 11, 2001)].	144 work-hours × $85 per hour = $12,240.	$5,430	$17,670	494	$8,728,980
Determination of door configuration [new proposed action].	1 work-hour × $85 per hour = $85.	$0	$85	581	$49,385
Inspections [new proposed action]	6 work-hours × $85 per hour = $510 per inspection cycle.	$0	$510 per inspection cycle.	581	$296,310 per inspection cycle.
Modification [new proposed action]	59 work-hours × $85 per hour = $5,015.	$30,536	$35,551	(1)	Unknown.

[1] The number of airplanes that would be required to have this modification accomplished is dependent on no cracking being found during a certain inspection.

We estimate the following costs to do any necessary related investigative and corrective actions that would be required based on the results of the proposed inspections. We have no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Related investigative and corrective actions	59 work-hours × $85 per hour = $5,015.	$30,536	$35,551

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2000–06–13 R1, Amendment 39–12317

(66 FR 36146, July 11, 2001), and adding the following new AD:

The Boeing Company: Docket No. FAA–2012–1156; Directorate Identifier 2011–NM–205–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by January 18, 2013.

(b) Affected ADs

This AD supersedes AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), which revised AD 2000–06–13, Amendment 39–11654 (65 FR 17583, April 4, 2000). AD 2000–06–13 superseded AD 98–25–06, Amendment 39–10931 (63 FR 67769, December 9, 1998).

(c) Applicability

This AD applies to all The Boeing Company Model 737–200, -200C, -300, -400, and -500 series airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 52, Doors.

(e) Unsafe Condition

This AD was prompted by reports of cracking in the forward and aft corner frame of the aft cargo door and in the lower cross beam. We are issuing this AD to prevent fatigue cracking of the corners of the door frame and the cross beams of the aft cargo door, which could result in rapid depressurization of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Affected Airplanes for Retained Paragraphs

Paragraphs (h), (i), (j), (k), and (l) of this AD are restated from AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). These paragraphs apply to Model 737–200 and –200C series airplanes, line numbers 6 through 873 inclusive; and Model 737–200, –200C, –300, and –400 series airplanes, line numbers 874 through 1642 inclusive; equipped with an aft cargo door having Boeing part number (P/N) 65–47952–1 or P/N 65–47952–524, excluding airplanes identified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Those airplanes on which that door has been modified as specified in Boeing Service Bulletin 737–52–1079. Or,

(2) Those airplanes on which the door assembly having P/N 65–47952–524 includes four straps (P/Ns 65–47952–139, 65–47952–140, 65–47952–141, and 65–47952–142) and a thicker lower cross beam web (P/N 65–47952–157).

(h) Retained Inspections and Corrective Actions

This paragraph restates the actions required by paragraph (a) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. For airplanes identified in paragraph (g) of this AD: Within 90 days or 700 flight cycles after December 24, 1998 (the effective date of AD 98–25–06, Amendment 39–10931 (63 FR 67769, December 9, 1998)), whichever occurs later, perform an internal detailed visual inspection to detect cracking of the corners of the door frame and the cross beams of the aft cargo door, in accordance with Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of the modification required by paragraph (l) of this AD constitutes terminating action for the repetitive inspection requirements of this paragraph. Doing the inspections required by paragraph (p) or (s) of this AD terminates the inspections required by this paragraph.

(1) If no cracking is detected, accomplish the requirements of either paragraph (h)(1)(i) or (h)(1)(ii) of this AD.

(i) Repeat the internal visual inspection thereafter at intervals not to exceed 4,500 flight cycles. Or

(ii) Prior to further flight, modify the corners of the door frame and the cross beams of the aft cargo door, in accordance with Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD.

(2) If any cracking is detected in the upper or lower cross beams, prior to further flight, modify the cracked beam, in accordance with Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD for the modified beam.

(3) If any cracking is detected in the forward or aft upper door frame, prior to further flight, repair the frame and modify the corners of the door frame of the aft cargo door, in accordance with Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; except as provided by paragraph (i) of this AD. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD for the upper door frame.

(4) If any cracking is detected in the forward or aft lower door frame, prior to further flight, replace the damaged frame with a new frame, and modify the corners of the door frame of the aft cargo door, in accordance with Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD for the lower door frame.

(i) Retained Exception for Certain Actions Specified in Paragraphs (h) and (l) of This AD

This paragraph restates the requirement of paragraph (b) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). For actions required by paragraphs (h) and (l) of this AD: Where Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; specifies that certain repairs are to be accomplished in accordance with instructions received from Boeing, this AD requires that, prior to further flight, such repairs be accomplished in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or using a method approved in accordance with the procedures specified in paragraph (x) of this AD.

(j) Retained Corrective Actions for Certain Cracking Found During Inspection Required by Paragraph (h) of This AD

This paragraph restates the corrective action required by paragraph (c) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. If any cracking of the outer chord of the upper or lower cross beams of the aft cargo door is detected during any inspection required by paragraph (h) of this AD, prior to further flight, accomplish the repair specified in paragraph (j)(1), (j)(2), (j)(3), or (j)(4) of this AD. For a repair method to be approved, as required by paragraphs (j)(1), (j)(3), and (j)(4) of this AD, the approval letter must specifically reference this AD.

(1) Repair in accordance with a method approved by the Manager, Seattle ACO.

(2) Repair in accordance with Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(3) Repair in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings.

(4) Repair in accordance with a method approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

(k) Retained Inspections and Corrective Actions for Airplanes Identified in Paragraph (g) of This AD

This paragraph restates the actions required by paragraph (d) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. For airplanes identified in paragraph (g) of this AD: Within 4,500 flight cycles or 1 year after May 9, 2000 (the effective date of AD 2000–06–13, amendment 39–11654 (65 FR 17583, April 4, 2000), whichever occurs later, perform a high frequency eddy current inspection (HFEC) to detect cracking of the four corners of the door frame of the aft cargo door, using a method approved in accordance with the procedures specified in paragraph (x) of this AD, or in accordance with Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of the modification required by paragraph (l) of this AD constitutes terminating action for the repetitive inspection requirements of this paragraph. Doing the inspections required by paragraph (p) or (s) of this AD terminates the inspections required by this paragraph.

Note 1 to paragraph (k) of this AD: Additional guidance for the inspection can be found in Boeing 737 Nondestructive Test Manual, Part 6, Chapter 51–00–00 (Figure 4 or Figure 23).

(1) If no cracking of the corners of the door frame of the aft cargo door is detected, repeat the HFEC inspections thereafter at intervals not to exceed 4,500 flight cycles until accomplishment of the modification specified in paragraph (l) of this AD.

(2) If any cracking of the corners of the door frame of the aft cargo door is detected, prior to further flight, replace the damaged frame with a new frame, and modify the four corners of the door frame, in accordance with Part II and Part III of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part II and Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part III and Part IV of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (k)(1) of this AD for that door frame.

(l) Retained Terminating Action for Inspections Specified in Paragraphs (h) and (k) of This AD

This paragraph restates the action required by paragraph (e) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. For airplanes identified in paragraph (g) of this AD: Within 4 years or 12,000 flight cycles after August 15, 2001 (the effective date of AD 2000–06–13 R1), whichever occurs later, modify the four corners of the door frame and the cross beams of the aft cargo door, in accordance with Part II of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of that modification constitutes terminating action for the repetitive inspection requirements of paragraphs (h) and (k) of this AD.

(m) Retained Method of Compliance

This paragraph restates the method of compliance of Note 3 of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). Accomplishment of the modification required by paragraph (a) of AD 90–06–02, Amendment 39–6489 (55 FR 8372, March 7, 1990), is considered acceptable for compliance with the requirements of paragraph (l) of this AD.

(n) Retained Credit for Previous Actions

This paragraph restates the credit given for service information specified in Note 4 of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). This paragraph provides credit for the modification of the corners of the door frame and the cross beams of the aft cargo door required by paragraph (l) of this AD, if the modification was accomplished prior to August 15, 2001 (the effective date of AD 2000–06–13 R1), using Boeing Service Bulletin 737–52–1079, dated December 16, 1983; Revision 1, dated December 15, 1988; Revision 2, dated July 20, 1989; Revision 3, dated May 17, 1990; or Revision 4, dated February 21, 1991.

(o) New Requirement for Determining Door Configuration

At the applicable time specified in Table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD: Inspect the door to determine the configuration, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011.

(p) New Requirements for Certain Doors Subject to Boeing Alert Service Bulletin 737–52A1079, Revision 7, Dated December 17, 2010

If, during the inspection required by paragraph (o) of this AD, any door is determined to be from any airplane having line numbers 6 through 873 inclusive, and neither the modification nor the repair specified in any service bulletin identified in paragraphs (p)(1) through (p)(7) of this AD has been done as of the effective date of this AD: Do a one-time HFEC and a one-time ultrasonic inspection for cracking of the upper and lower corner frames and the upper and lower cross beams, and do all applicable related investigative and corrective actions, in accordance with Parts II, III, IV, and VI of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; and, as applicable, the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; except as provided by paragraphs (u)(2) and (u)(3) of this AD. Do the inspections at the applicable time specified in Table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; except as provided by paragraph (u)(4) of this AD. Do all applicable related investigative and corrective actions before further flight. If no cracking is found during the initial inspections, before further flight, do the modification in accordance with Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Doing the inspection specified in this paragraph terminates the inspections required by paragraphs (h) and (k) of this AD.

(1) Boeing Service Bulletin 737–52–1079, dated December 16, 1983.

(2) Boeing Service Bulletin 737–52–1079, Revision 1, dated December 15, 1988.

(3) Boeing Service Bulletin 737–52–1079, Revision 2, dated July 20, 1989.

(4) Boeing Service Bulletin 737–52–1079, Revision 3, dated May 17, 1990.

(5) Boeing Service Bulletin 737–52–1079, Revision 4, dated February 21, 1991.

(6) Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996.

(7) Boeing Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999.

(q) Requirements for All Doors Subject to Boeing Alert Service Bulletin 737–52A1079, Revision 7, Dated December 17, 2010

If, during the inspection required by paragraph (o) of this AD, any door is determined to be from any airplane having line numbers 6 through 873 inclusive: At the applicable time specified in Table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, except as provided by paragraph (u)(4) of this AD, inspect the lower corner frames to determine if the door has reinforcement angles, P/N 65C25180–9, –43, –10, –11, or –12, that were installed as specified in any service bulletin identified in paragraphs (q)(1) through (q)(5) of this AD. If any affected reinforcement angle is found, do a one-time general visual inspection for edge margin and do a detailed inspection for cracks; in accordance with Part V of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(1) Boeing Service Bulletin 737–52–1079, dated December 16, 1983.

(2) Boeing Service Bulletin 737–52–1079, Revision 1, dated December 15, 1988.

(3) Boeing Service Bulletin 737–52–1079, Revision 2, dated July 20, 1989.

(4) Boeing Service Bulletin 737–52–1079, Revision 3, dated May 17, 1990.

(5) Boeing Service Bulletin 737–52–1079, Revision 4, dated February 21, 1991.

(r) Corrective Actions for Inspections Specified in Paragraph (q) of This AD

If, during any inspection required by paragraph (q) of this AD, any crack is found, or if any edge margin does not meet the specification identified in Part V of the Accomplishment Instructions of Boeing Alert

Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, before further flight, do the actions specified in paragraphs (r)(1), (r)(2), and (r)(3) of this AD.

(1) Replace the corner reinforcement angle, in accordance with Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(2) Do a one-time detailed inspection or HFEC inspection for cracking at the forward and aft ends of cross beam D, in accordance with Part 1 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010. If any cracking is found, before further flight, do all applicable repairs in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, except as provided by paragraph (u)(2) of this AD.

(3) Do a one-time detailed inspection or ultrasonic inspection for cracking on the frames, in accordance with Part 2 (detailed inspection) or Part 8 (ultrasonic inspection) of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011. If any cracking is found, before further flight, replace the frame in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(s) Requirements for Doors Subject to Boeing Alert Service Bulletin 737–52A1153, Dated July 13, 2011

If, during the action required by paragraph (o) of this AD, a door is determined to be from an airplane having line numbers 874 and subsequent: At the applicable time specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD, do high frequency and detailed inspections for cracks in the forward and aft ends of cross beam E, and do all applicable related investigative and corrective actions, in accordance with Parts 1, 3, 4, 5, and 6 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and, as applicable, the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; except as provided by paragraph (u)(2) of this AD. Do all applicable related investigative and corrective actions at the applicable time specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD. If no cracking is found during the inspections specified in Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, at the applicable time specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD, do the modification in accordance with Parts 5 and 6, as applicable, of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Repeat the inspections thereafter at the times specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, until the preventative modification or repair is done to both ends of cross beam E in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Doing the inspection specified in this paragraph terminates the inspections required by paragraphs (h) and (k) of this AD.

(t) One Time Inspections for Doors Subject to Boeing Alert Service Bulletin 737–52A1153, Dated July 13, 2011

If, during the actions required by paragraph (o) of this AD, a door is determined to be from an airplane having line numbers 874 and subsequent: At the applicable time specified in Tables 3 and 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD, do a one-time ultrasonic inspection of the frame and a detailed inspection of the reinforcing angle for cracks of the forward and aft ends of cross beam E, and do all applicable related investigative and corrective actions, in accordance with Parts 1, 3, 4, 7, and 8 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and, as applicable; the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; except as provided by paragraph (u)(2) of this AD. Do all applicable related investigative and corrective actions before further flight.

(u) Service Information Exceptions

The following exceptions apply to this AD.

(1) Where paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, specifies to contact Boeing for repair, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (x) of this AD.

(3) Where Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, specifies to contact Boeing for repair, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (x) of this AD.

(4) Where paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, specifies a compliance time ''from the date of Revision 7 to this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(v) Supplemental Structural Inspections

The supplemental structural inspections specified in Tables 5 and 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Tables 3 and 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; are not required by this AD.

Note 2 to paragraph (v) of this AD: The damage tolerance inspections specified in Tables 5 and 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Tables 3 and 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; may be used in support of compliance with section 121.1109(c)(2) or 129.109(b)(2) of the Federal Aviation Regulations (14 CFR 121.1109(c)(2) or 14 CFR 129.109(b)(2)). The corresponding actions specified in the Accomplishment Instructions and figures of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; are not required by this AD.

(w) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (p), (q), and (r) of this AD, if the actions were accomplished before the effective date of this AD using any service information specified in paragraph (w)(1), (w)(2), (w)(3), (w)(4), (w)(5), (w)(6), or (w)(7) of this AD.

(1) Boeing Service Bulletin 737–52–1079, dated December 16, 1983.

(2) Boeing Service Bulletin 737–52–1079, Revision 1, dated December 15, 1988.

(3) Boeing Service Bulletin 737–52–1079, Revision 2, dated July 20, 1989.

(4) Boeing Service Bulletin 737–52–1079, Revision 3, dated May 17, 1990.

(5) Boeing Service Bulletin 737–52–1079, Revision 4, dated February 21, 1991.

(6) Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996.

(7) Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999.

(x) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes ODA that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 2000–06–13, Amendment 39–11654 (65 FR 17583, April 4, 2000); and AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001); are approved as AMOCs for the corresponding requirements of this AD.

(y) Related Information

(1) For more information about this AD, contact Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6450; fax: (425) 917–6590; email: *alan.pohl@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 21, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–29170 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1222; Directorate Identifier 2012–NM–134–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain Bombardier, Inc. Model DHC–8–400 series airplanes. The existing AD currently requires a free-play check for excessive free-play of the shaft swaged bearing installed in the tailstock end of each elevator power control unit (PCU), and replacing any PCU on which the bearing exceeds allowable limits with a serviceable PCU. Since we issued that AD, we have determined that additional airplanes are affected by the identified unsafe condition. This proposed AD would add airplanes to the applicability in the existing AD. We are proposing this AD to detect and correct excessive freeplay of the swaged bearings, which could lead to excessive airframe vibrations and difficulties in pitch control, and consequent loss of controllability of the airplane.

DATES: We must receive comments on this proposed AD by January 18, 2013.

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

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

For service information identified in this proposed AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

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

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1222; Directorate Identifier 2012–NM–134–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On June 14, 2011, we issued AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011). That AD required actions intended to address an unsafe condition on Bombardier, Inc. Model DHC–8–400 series airplanes.

Since we issued the existing AD (76 FR 37253, June 27, 2011), we have determined that additional airplanes are affected by the identified unsafe condition. Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2010–28R1, dated June 12, 2012 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Several reports have been received on the elevator power control units (PCUs) where the shaft (tailstock) swaged bearing liners had shown a higher than normal rate of wear. Investigation revealed that the excessive wear was due to the paint contamination between the bearing roller and bearing liner. The bearing paint contamination is known to be abrasive and could seize the bearing.
>
> This condition, if not corrected, could lead to excessive airframe vibrations and difficulties in aircraft pitch control.
>
> This [TCCA] directive mandates a free-play check of the shaft swaged bearing installed in the elevator PCU tailstock end and replacement of the shaft swaged bearings if excessive free-play is found.

This [TCCA] AD is revised to amend the applicability for DHC–8 Series 400 aeroplanes.

The unsafe condition is loss of controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier Inc. has issued Service Bulletin 84–27–52, Revision A, dated March 5, 2012. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 81 products of U.S. registry.

The actions that are required by AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011), and retained in this proposed AD take about 3 work-hours per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $255 per product.

We estimate that it would take about 3 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators for the added airplanes to be $255 per product.

In addition, we estimate that any necessary follow-on actions would take about 5 work-hours and require parts costing $33, for a cost of $458 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011), and adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2012–1222; Directorate Identifier 2012–NM–134–AD.

(a) Comments Due Date

We must receive comments by January 18, 2013.

(b) Affected ADs

This AD supersedes AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011).

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes; certificated in any category; having serial numbers (S/Ns) 4001 through 4334 inclusive, and 4336.

(d) Subject

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

(e) Reason

This AD was prompted by reports of replacement of several elevator power control units (PCUs) due to worn swaged bearings located in the elevator PCU tailstock. We are issuing this AD to detect and correct excessive freeplay of the swaged bearings, which could lead to excessive airframe vibrations and difficulties in pitch control, and consequent loss of controllability of the airplane.

(f) Compliance

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

(g) Retained Free-Play Check With Revised Service Information

This paragraph restates the requirements of paragraph (g) of AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011), with revised service information. For airplanes identified in paragraph (c) of this AD, except airplanes having S/N 4305 through 4334 inclusive, and 4336: At the applicable time specified in paragraphs (g)(1) and (g)(2) of this AD, perform a free-play check for any shaft swaged bearing having part number (P/N) MS14103–7 that is installed in the tailstock end of each elevator PCU (three PCUs per elevator surface) having P/Ns 390600–1007 and 390600–1009, in accordance with paragraph 3.B., Part A, of Bombardier Service Bulletin 84–27–52, dated May 25, 2010; or Revision A, dated March 5, 2012. As of the effective date of this AD, only Bombardier Service Bulletin 84–27–52, Revision A, dated March 5, 2012, may be used to accomplish the actions required by this paragraph.

(1) For airplanes that have accumulated 8,000 or more total flight hours as of August 1, 2011 (the effective date of AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011)): Within 2,000 flight hours after August 1, 2011 (the effective date of AD 2011–13–08).

(2) For airplanes that have accumulated less than 8,000 total flight hours as of August 1, 2011 (the effective date of AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011)): Within 6,000 flight hours after August 1, 2011 (the effective date of AD 2011–13–08), or before the accumulation of 10,000 total flight hours, whichever occurs first.

(h) Retained Follow-on Action

This paragraph restates the requirements of paragraph (h) of AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011), with revised service information. If, during the check required by paragraph (g) of this AD, the bearing free-play is within the limits specified in Bombardier Service Bulletin 84–27–52, dated May 25, 2010, or Revision A, dated March 5, 2012; no further action is required by this AD. As of the effective date of this AD, only Bombardier Service Bulletin 84–27–52, Revision A, dated March 5, 2012, may be used to accomplish the actions required by this paragraph.

(i) Retained Corrective Actions

This paragraph restates the requirements of paragraph (i) of AD 2011–13–08, Amendment 39–16731 (76 FR 37253, June 27, 2011), with revised service information. If, during the check required by paragraph (g) of this AD, the bearing free-play exceeds the limits specified in Bombardier Service Bulletin 84–27–52, dated May 25, 2010; or Revision A, dated March 5, 2012: Before further flight, replace the elevator PCU with a serviceable one, in accordance with paragraph 3.B., Part B, of Bombardier Service Bulletin 84–27–52, dated May 25, 2010; or Revision A, dated March 5, 2012. As of the effective date of this AD, only Bombardier Service Bulletin 84–27–52, Revision A, dated March 5, 2012, may be used to accomplish the actions required by this paragraph.

(j) New Requirements

For airplanes having S/N 4305 through 4334 inclusive, and 4336: At the applicable time specified in paragraphs (j)(1) and (j)(2) of this AD, perform a free-play check for any shaft swaged bearing having P/N MS14103–7 that is installed in the tailstock end of each elevator PCU (three PCUs per elevator surface), having P/Ns 390600–1007 and 390600–1009, in accordance with paragraph 3.B., Part A, of Bombardier Service Bulletin 84–27–52, Revision A, dated March 5, 2012.

(1) For airplanes that have accumulated 8,000 or more total flight hours as of the effective date of this AD: Within 2,000 flight hours after the effective date of this AD.

(2) For airplanes that have accumulated less than 8,000 total flight hours as of the effective date of this AD: Within 6,000 flight hours after the effective date of this AD, or before the accumulation of 10,000 total flight hours, whichever occurs first.

(k) Corrective Actions

During the check required by paragraph (j) of this AD, if the bearing free-play is found to exceed the limits specified in Bombardier Service Bulletin 84–27–52, Revision A, dated March 5, 2012: Before further flight, replace the elevator PCU with a serviceable one, in accordance with paragraph 3.B., Part B, of Bombardier Service Bulletin 84–27–52, Revision A, dated March 5, 2012.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2010–28R1, dated June 12, 2012, and the service information specified in paragraphs (l)(1)(i) and (l)(1)(ii) of this AD, for related information.

(i) Bombardier Service Bulletin 84–27–52, dated May 25, 2010.

(ii) Bombardier Service Bulletin 87–27–52, Revision A, dated March 5, 2012.

(2) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 21, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–29171 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1221; Directorate Identifier 2012–NM–151–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 777–200 and –300 series airplanes. This proposed AD was prompted by reports of hydraulic fluid contamination found in the strut forward dry bay. This proposed AD would require repetitive general visual inspections of the strut forward dry bay for the presence of hydraulic fluid, and related investigative and corrective actions if necessary. We are proposing this AD to detect and correct hydraulic fluid contamination of the strut forward dry bay, which could result in hydrogen embrittlement of the titanium forward engine mount bulkhead fittings, and consequent inability of the fittings to carry engine loads, resulting in the loss or departure of an engine. Hydraulic embrittlement could cause a through-crack formation across the fittings through which an engine fire could breach into the strut, resulting in an uncontained strut fire.

DATES: We must receive comments on this proposed AD by January 18, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1;

fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kevin Nguyen, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6501; fax: 425–917–6590; email: *kevin.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1221; Directorate Identifier 2012–NM–151–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received reports of hydraulic fluid contamination in the strut forward dry bay caused by the clogged and blocked forward strut drain lines not allowing fluids (water, fuel, engine oil and hydraulic) to drain properly, resulting in fluids backing up to the dry bay. The presence of hydraulic fluid and temperatures above 270 degrees Fahrenheit can cause hydrogen embrittlement of the titanium forward engine mount bulkhead fittings. This condition, if not corrected, could result in the inability of the forward engine mount bulkhead fittings to carry engine loads, resulting in the loss or departure of an engine; or cause a through-crack formation across the fittings through which an engine fire could breach into the strut, resulting in an uncontained strut fire.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012. The service information describes procedures for repetitive general visual inspections for hydraulic fluid contamination of the strut forward dry bay, and related investigative and corrective actions if necessary. Related investigative actions include a detailed inspection for hydraulic fluid coking, heat discoloration, damage to sealant and primer, damage to leveling compound, cracking, and etching or pitting of the interior strut forward dry bay; a detailed and high frequency eddy current (HFEC) inspection for cracking, etching, or pitting of the bulkhead upper and lower fittings of the strut forward engine mount; and checking drain lines for blockage. Corrective actions include cleaning and restoring sealant, primer, and leveling compound of the detail parts in the strut forward dry bay; cleaning or replacing drain lines; and contacting the manufacturer for repair instructions and doing the repair.

The compliance time for the initial inspection is within 600 flight cycles or 12 months, whichever occurs first. The compliance times for the related investigative actions are before further flight. The compliance times for corrective actions vary between before further flight, and within 25 flight cycles or 10 days, whichever occurs first (depending on the condition). The repetitive inspection intervals do not exceed 1,200 flight cycles.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

Differences Between the Proposed AD and the Service Information

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

Costs of Compliance

We estimate that this proposed AD affects 55 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Repetitive general visual inspections.	5 work-hours × $85 per hour = $425 per inspection cycle.	$0	$425 per inspection cycle.	$23,375 per inspection cycle.

We estimate the following costs to do any actions that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these actions.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Detailed inspection	8 work-hours × $85 per hour = $680	$0	$680

ON-CONDITION COSTS—Continued

Action	Labor cost	Parts cost	Cost per product
Check drain lines (including cleaning or replacing)	5 work-hours × $85 per hour = $425	0	425
Detailed inspection and high frequency eddy current inspection.	8 work-hours × $85 per hour = $680	0	680
Clean and restore sealant, primer and leveling compound.	8 work-hours × $85 per hour = $680	0	680

We have received no definitive data that would enable us to provide a cost estimate for the on-condition repair specified in this proposed AD.

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2012–1221; Directorate Identifier 2012–NM–151–AD.

(a) Comments Due Date

We must receive comments by January 18, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777–200 and –300 series airplanes; certificated in any category; equipped with Pratt & Whitney 4000 engines; as identified in Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 54, Nacelles/pylons.

(e) Unsafe Condition

This AD was prompted by reports of hydraulic fluid contamination found in the strut forward dry bay. We are issuing this AD to detect and correct hydraulic fluid contamination of the strut forward dry bay, which could result in hydrogen embrittlement of the titanium forward engine mount bulkhead fittings, and consequent inability of the fittings to carry engine loads, resulting in the loss or departure of an engine. Hydraulic embrittlement could cause a through-crack formation across the fittings through which an engine fire could breach into the strut, resulting in an uncontained strut fire.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection

Except as provided by paragraph (h)(1) of this AD, at the times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012: Do a general visual inspection for hydraulic fluid contamination of the interior of the strut forward dry bay, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012, except as required by paragraph (h)(2) of this AD. Repeat the inspection thereafter at the times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012. Except as required by paragraph (h)(3) of this AD, do all applicable related investigative and corrective actions at the times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012.

(h) Exceptions

(1) Where the Compliance time column of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 777–54–0028, dated May 25, 2012, refers to the compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012, specifies to contact Boeing for repair: Except as required by paragraph (h)(3) of this AD, at the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 777–54–0028, dated May 25, 2012, repair, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(3) Where paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin

777–54–0028, dated May 25, 2012, specifies a compliance time of ''within 25 flight-cycles or 10 days, whichever occurs first,'' this AD requires compliance within 25 flight cycles or 10 days after the most recent inspection required by paragraph (g) of this AD, whichever occurs first.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9–ANM–Seattle–ACO–AMOC–Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Kevin Nguyen, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6501; fax: 425–917–6590; email: *kevin.nguyen@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 21, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–29177 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

Proposed Modification of the Miami, FL, Class B Airspace Area; and the Ft Lauderdale, FL, Class C Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meetings.

SUMMARY: This notice announces three fact-finding informal airspace meetings to solicit information from airspace users and others, concerning a proposal to revise the Class B airspace at Miami, FL, and the Class C airspace at Ft Lauderdale, FL. The purpose of these meetings is to provide interested parties an opportunity to present views, recommendations, and comments on the proposal. All comments received will be considered prior to any issuance of a notice of proposed rulemaking.

DATES: The informal airspace meetings will be held on Monday, January 28, 2013; Tuesday, January 29, 2013; and Wednesday, January 30, 2013. One meeting session will be held on January 28, beginning at 6:00 p.m. Two sessions will be held on January 29 and January 30, beginning at 2:00 p.m. and 6:00 p.m. Comments must be received on or before March 4, 2013.

ADDRESSES: (1) The meeting on Monday, January 28, 2013, will be held at the Wings Over Miami Air Museum, Kendall-Tamiami Executive Airport, 14710 SW 128th St., Miami, FL 33196 [Call 305–233–5197 for directions]; (2) The meeting on Tuesday, January 29, 2013, will be held at the Miami Dade College, 2460 NW 66th Avenue, Bldg. 701, Room 213, Miami, FL 33122 [Call 305–588–1959 for directions]; and (3) The meeting on Wednesday, January 30, 2013, will be held at the Miramar Town Center, 2050 Civic Center Place. Miramar, FL 33025 [Call 954–201–8084 for directions].

Comments: Comments on the proposal may be submitted by email to: *7-ASO-ESC-OSG-Airspace-Comments@faa.gov;* or by mail to: Barry Knight, Manager, Operations Support Group, Eastern Service Area, Air Traffic Organization, Federal Aviation Administration, P.O. Box 20636, Atlanta, GA 30320.

FOR FURTHER INFORMATION CONTACT: Tony Russo, Support Manager, Miami ATCT/TRACON, 6400 NW. 22nd St., Miami, FL 33122; Telephone: 305–869–5403.

SUPPLEMENTARY INFORMATION:

Meeting Procedures

(a) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(b) The meetings will be informal in nature and will be conducted by one or more representatives of the FAA Eastern Service Area. Each participant will be given an opportunity to make a presentation, although a time limit may be imposed. Each person wishing to make a presentation to the FAA panel will be asked to sign in so those time frames can be established. The meetings may be adjourned at any time if all persons present have had an opportunity to speak.

(c) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants submitting handout materials should present an original and two copies to the presiding officer. There should be an adequate number of copies for distribution to all participants.

(e) These meetings will not be formally recorded. However, a summary of comments made at the meetings will be filed in the docket.

Agenda for the Meetings

—Sign-in.

—Presentation of Meeting Procedures.

—Informal Presentation of the planned Airspace Modifications.

—Public Presentations and Discussions.

—Closing Comments.

There will be one session (beginning at 6:00 p.m.) on January 28 and two sessions (beginning at 2:00 p.m. and 6:00 p.m.) on both January 29 and January 30. FAA presentations will begin at the times listed. Each presentation will be the same, so attendees need not be present for both sessions. Attendees may arrive at any time at their convenience, and will not need to remain until the end. Following each FAA presentation there will be time for questions and presentations by attendees. Written comments may be submitted at any time during the meeting or via mail or email by March 4, 2013.

Information gathered through these meetings will assist the FAA in drafting a Notice of Proposed Rulemaking (NPRM). The public will be afforded the opportunity to comment on any NPRM published on this matter.

Issued in Washington, DC, on November 14, 2012.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2012–28991 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121, 125, 135

[Docket No.: FAA–2012–1059; Notice No. 12–08]

RIN 2120–AK11

Minimum Altitudes for Use of Autopilots

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to amend and harmonize minimum altitudes for use of autopilots for transport category airplanes. The proposed rule would enable the operational use of advanced autopilot and navigation systems by incorporating the capabilities of new and future autopilots, flight guidance systems, and Global Navigation Satellite System (GNSS) guidance systems while protecting the continued use of legacy systems at current autopilot minimum use altitudes. The proposed rule would accomplish this through a performance-based approach, using the certified capabilities of autopilot systems as established by the Airplane Flight Manual (AFM) or as approved by the Administrator.

DATES: Send comments on or before February 4, 2013.

ADDRESSES: Send comments identified by docket number Docket No.: FAA–2012–1059 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov*, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Kel O. Christianson, FAA, Aviation Safety Inspector, Performance Based Flight Systems Branch (AFS–470), Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone 202–385–4702; email *Kel.christianson@faa.gov.*

For legal questions concerning this action, contact Robert H. Frenzel, Manager, Operations Law Branch, Office of the Chief Counsel, Regulations Division (AGC–220), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone 202–267–3073; email *Robert.Frenzel@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. This rulemaking is promulgated under the authority described in 49 U.S.C. 44701(a)(5), which requires the Administrator to promulgate regulations and minimum standards for other practices, methods, and procedures necessary for safety in air commerce and national security. This amendment to the regulation is within the scope of that authority because it prescribes an accepted method for ensuring the safe operation of aircraft while using autopilot systems.

I. Overview of Proposed Rule

The FAA proposes to amend and harmonize minimum altitudes for use of autopilots for transport category airplanes in order to streamline and simplify these operational rules. The proposed rule would enable the operational use of advanced autopilot and navigation systems by incorporating the capabilities of new and future autopilots, flight guidance systems, and Global Navigation Satellite System (GNSS) guidance systems while protecting the continued use of legacy systems. This would allow the FAA to enable the benefits of Next Generation Air Transportation System (NextGen) technologies and procedures (Optimized Profile Descents, Performance Based Navigation (PBN)) to enhance aviation safety in the National Airspace System (NAS). The rule would accomplish this through a performance-based approach, using the certified capabilities of autopilot systems as established by the Airplane Flight Manual (AFM). The proposal would also give the FAA Administrator the authorization to require an altitude higher than the AFM if the Administrator believes it to be in the interest of public safety.

Currently, operators have a choice whether or not to update their aircraft with new autopilots as they are developed and certified by equipment manufacturers. This rule would not affect that decision-making process and would protect operators who choose to continue to operate as they do today. As a result, the proposed rule would not impose any additional costs on certificate holders that operate under parts 121, 125, or 135. Also, by setting new minimum altitudes for each phase of flight that certified equipment may operate to, the proposed rule would give manufacturers more certainty that new products could be used as they are developed.

In response to Executive Order 13563 issued by President Obama on January 18, 2011, the proposed rule was first identified for inclusion in the Department of Transportation Retrospective Regulatory Review (May 2011), noting that the current minimum altitudes for use of autopilots were unduly restrictive and would limit the ability to use new technologies. On May 10, 2012, President Obama signed Executive Order 13610, establishing the Retrospective Regulatory Review as an on-going obligation. The proposed rule would also be consistent with the requirement in Executive Order 13610 to modify or streamline regulations ''in light of changed circumstances, including the rise of new technologies.''

II. Background

A. Statement of the Problem

The FAA and Civil Aviation Authority (CAA) technical standards for autopilot systems date back to 1947. These standards have been revised eight times since 1959, but the operating rules for autopilot minimum use altitudes in 14 CFR 121.579, 125.329, and 135.93 have not been amended in any significant way since the recodification of the Civil Aviation Regulations (CAR) and Civil Aviation Manuals (CAM) on December 31, 1964.

By contrast, autopilot certification standards contained in § 25.1329 were updated as recently as April 11, 2006. Consequently, operational regulations in parts 121, 125, and 135 do not adequately reflect the capabilities of modern technologies in use today and thus make it difficult to keep pace with the FAA's implementation of NextGen.

B. History

1994 Notice of Proposed Rulemaking (NPRM)

The FAA published an NPRM in the **Federal Register** on December 9, 1994 (59 FR 63868) based on a recommendation from the Autopilot Engagement Working Group of the Aviation Rulemaking Advisory Committee (ARAC) to change the existing rules concerning engagement of autopilots during takeoff. The ARAC determined that the increased use of an autopilot during takeoff would enhance aviation safety by giving pilots greater situational awareness of what was going on inside and outside of the aircraft. This benefit would be realized by reducing the task loading required to manually fly the aircraft during the critical takeoff phase of flight. The FAA received seven comments in response to the NPRM, and all commenters supported an amendment to the rule.

1997 Rulemaking

In 1997, the FAA amended 14 CFR 121.579, 125.329, and 135.93 to permit certificate holders the use of an approved autopilot system for takeoff, based on the 1994 NPRM and an expectation that autopilot technology would continue to advance (62 FR 27922; May 21, 1997). This authorization was given to certificate holders through an Operations Specification (OpSpec), which was implemented as a stopgap measure. The rule itself was not changed to provide manufacturers and operators the guidance for producing and operating new aircraft capable of attaining lower autopilot minimum use altitudes. The amendment also failed to address autopilot minimum use altitudes on instrument approaches or harmonize 14 CFR parts 121, 125 and 135.

ARAC Efforts To Amend Autopilot Rules

Since 1997, multiple groups have been formed to review current regulations and autopilot technologies. The FAA Transport Airplane Directorate initiated an effort under the ARAC Flight Guidance Harmonization Working Group to evaluate the status of current autopilot technologies, rules and guidance along with the harmonization of U.S. policy and guidance with the Joint Aviation Authorities. Later, the Performance-based operations Aviation Rulemaking Committee, which established the Autopilot Minimum Use Height (MUH) action team, evaluated autopilot minimum use altitudes and made recommendations to the Associate Administrator for Aviation Safety. The team was specifically tasked with developing recommendations to address progress in the area of PBN and the subsets of area navigation (RNAV) and required navigation performance (RNP) operations. The team's conclusions aligned with the previous groups' acknowledgement that 14 CFR 121.579, 125.329 and 135.93 were outdated and recommended new rulemaking to take advantage of advancements in modern aircraft technologies and the certified capabilities of autopilot systems to create a performance-based structure to aid in the implementation of NextGen flight operations.

III. Discussion of the Proposal

A. Revise Minimum Altitudes for Use of Autopilot (§ 121.579, 125.329 and 135.93)

The FAA proposes a complete rewrite of 14 CFR 121.579, 125.329 and 135.93. The language in each section of the proposed regulations would be identical except for an additional paragraph in § 135.93 exempting rotorcraft. The proposed rule would harmonize these three parts of 14 CFR because the rule would be based on the performance capabilities of the equipment being utilized, not the operating certificate held. Nothing in the proposed rule would prevent or adversely affect the continued safe operation of aircraft using legacy navigation systems.

The proposed rule would align the autopilot operational rules with the new autopilot certification standards contained in § 25.1329, updated and effective April 11, 2006. The proposed rule would also be proactive by allowing for future technological advances within the scope of the rule, thus facilitating the implementation of NextGen into the National Airspace System.

In effect, the proposed rule would accommodate future technological changes by setting safe minimum altitudes in each phase of flight that certified autopilots could operate to. Once a new piece of equipment or system is certified and the new limitations incorporated in the AFM, as required in §§ 21.5, 25.1501 and 25.1581, a certificate holder might then make use of the new capabilities when authorized through OpSpecs. This change would enable new autopilots to utilize both current and future navigational systems. The current rule only references ground-based instrument approach facilities and Instrument Landing Systems (ILS).

Sections 121.579(a), 125.329(a), and 135.93(a) of the proposed rule would define altitude references for the different phases of flight, unlike the current rule which defines all altitudes with reference to terrain. All altitudes referring to takeoff, initial climb and go around/missed approach would be defined as being above airport elevation. All altitudes referring to enroute flight would be defined as being above terrain elevation. All altitudes referring to approach would be defined as being above Touchdown Zone Elevation (TDZE), except if the altitude is in reference to a Decision Altitude/Height (DA(H)) or Minimum Descent Altitude (MDA) in which case the altitude would be defined in relation to the DA(H) or MDA itself (*e.g.* 50 ft. below DA(H)). All altitudes defined as being above airport elevation, TDZE, or terrain would be considered to be above ground level (AGL).

As a result, the proposed rule would allow operators to add the applicable altitudes or heights published in the AFM to the airport and TDZE published on the instrument approach plate. This also would provide a standard reference for all operators and manufacturers using and producing Flight Management Systems (FMS).

The proposed rule would be formatted to model the actual phases of flight: Takeoff through landing or go-around. Each paragraph in the proposed rule would have a base minimum autopilot use altitude for the intended phase of flight that all aircraft may utilize. In order to protect the use of all legacy systems, the proposed base altitudes would remain identical to the altitudes in the current rule. Lower minimum use altitudes would be based on certification of the autopilot system and limitations found in the AFM. The

proposed enroute minimum use altitude would not change from the current rule. The minimum use altitude in each paragraph might also be raised by the Administrator if warranted by operational or safety need.

B. Takeoff and Initial Climb (§§ 121.579(b), 125.329(b) and 135.93(b))

The current rule defines the base minimum altitude at which all aircraft may engage the autopilot after takeoff as 500 ft. or double the autopilot altitude loss (as specified in the AFM) above the terrain, whichever is higher. The current rule also gives the Administrator the authority to use OpSpecs to authorize a lower minimum engagement altitude on takeoff, which must be specified in the AFM. This takeoff paragraph was added as an amendment to the original autopilot rule that applied only to enroute operations. Although the amendment provided a vehicle to allow lower autopilot minimum use altitudes through OpSpecs, it did not place the authority for the operations directly in the rule.

The proposed rule would retain the same minimum altitudes for all aircraft to protect legacy systems and would introduce the ability to use lower engagement altitude on takeoff/initial climb based upon the certified limits of the autopilot as specified in the AFM. The proposed rule would also give the Administrator the authority to specify an altitude above, but not below, that specified in the AFM.

As a result, the proposed rule would establish the AFM as a performance-based standard by which a certificate holder might be authorized for operations through its OpSpecs. Once an autopilot's capabilities and limitations are certified and reflected in the AFM, a certificate holder might request a change to its OpSpecs to authorize use of the new minimum use altitude specified in the AFM.

C. Enroute (§§ 121.579(c), 125.329(c) and 135.93(c))

The enroute paragraph of the current rule specifies a minimum use altitude of 500 ft. above terrain, or an altitude that is no lower than twice the autopilot altitude loss specified in the AFM, whichever is higher, for all operations. The proposed rule would maintain the same base minimum use altitude as the current rule. The proposed rule would also grant the Administrator the authority to specify a higher altitude.

D. Approach (§§ 121.579(d), 125.329(d), 135.93(d))

The base minimum use altitude for an approach for the proposed rule would remain the same as that of the current rule. No person may use an autopilot at an altitude lower than 50 ft. below the DA (H) or MDA of the instrument approach being flown. The current rule allows for exceptions to this altitude with the use of a coupled autopilot, instrument landing system (ILS), and in specified reported weather conditions. The proposed rule would maintain the limitation that no person may use an autopilot at an altitude lower than 50 ft. below the DA(H) or MDA of the approach being flown and provides weather criteria that would allow current aircraft to meet the same autopilot minimum use altitudes as today.

However, the proposed rule would enable properly equipped aircraft to use the autopilot with other certified navigation systems in certain specified weather conditions to attain the same minimum use altitudes currently allowed with the coupled ILS. These aircraft must be capable of flying a coupled approach with both vertical and lateral path references being provided to the autopilot for guidance. A typical vertical path reference is a flight path angle provided by the signal of an ILS, microwave landing system, GNSS landing system or a navigation flight path provided for RNAV operations by an onboard database. This change would allow a greater number of aircraft to safely use their autopilots to lower minimum use altitudes.

The remaining provisions in the approach paragraph would provide minimum use altitudes dependent on the type of autopilot certification found in the AFM. The potential lowest minimum use altitude allowed by the proposed rule would be 50 ft. above the elevation TDZE. The advantage of this provision, for example, is that it would allow operators to keep the autopilot engaged until over the runway during complex PBN approaches. This would enable a stable approach path in both Instrument Meteorological Conditions (IMC) and Visual Meteorological Conditions (VMC). In IMC, it would alleviate the transition from the autopilot to instrument hand flying during a critical segment of the approach. This would reduce the possibility of disorientation and a destabilized approach. In VMC, the same stabilized approach could be maintained while flightcrews monitor aircraft performance and watch for potential traffic conflicts. Currently, pilots must perform these tasks while disconnecting the autopilot half way through a descending final turn and continuing the approach manually. Although not being utilized, current technology exists to allow aircraft autopilot systems to remain engaged below the current allowable altitude using multiple forms of navigation. Such technology will eventually become a requirement for the implementation of NextGen. The proposed rule would provide a regulatory vehicle to meet this vision.

E. Go Around/Missed Approach (§§ 121.579(e), 125.329(e) and 135.93(e))

The proposed rule would also provide guidance for executing a missed approach/go-around that the current rule lacks. This guidance is first presented in the approach paragraph, wherein an aircraft does not need to comply with the autopilot minimum use altitude of that paragraph provided it is executing a coupled missed approach/go-around. A new subparagraph is also included to provide guidance on when the autopilot could be engaged on the missed approach/go-around, if a manual missed approach/go-around is accomplished.

F. Landing (§§ 121.579(f), 125.329(f) and 135.93(f))

The last paragraph proposed in the new rule would provide guidance for landing. Current language authorizes the Administrator, through OpSpecs, to allow an aircraft to touchdown with the autopilot engaged using an approved autoland flight guidance system. This authorization relies upon an ILS to meet this requirement. The proposed rule would state that minimum use altitudes do not apply to autopilot operations when an approved and authorized landing system mode is being used for landing. The difference in the two rules is that the proposed rule would stand alone and would not limit approved landing systems to be ground based systems, as the current rule does. The proposed rule would also allow new performance based landing systems to be approved and implemented for autoland operations as they become available.

G. Rotorcraft Operations (§ 135.93(g))

The current rule expressly excludes rotorcraft operations from the minimum altitudes for use of autopilots. The proposed rule would continue to exclude rotorcraft operations.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Public Law 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Public Law 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule. We suggest readers seeking greater detail read the full regulatory evaluation, a copy of which we have placed in the docket for this rulemaking.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this proposed rule. The reasoning for this determination follows:

Benefits

The rule would incorporate the capabilities of current autopilots and would allow operators to more readily utilize the capabilities of future autopilots, flight guidance systems, and GNSS guidance systems as they are developed. These new capabilities would enable and accelerate the benefits of NextGen technologies and procedures that depend upon flight guidance systems to enhance aviation safety in the NAS.

Costs

The proposed rule would specify autopilot minimum use altitudes for parts 121, 125 and 135 operators. The rule would be based on the capabilities of the aircraft and the minimum use altitudes or lack of minimum use altitudes published in the Airplane Flight Manual (AFM). The proposed rule would not affect the minimum use altitudes presently used by operators in the National Airspace System. Operators would have the option to operate as they currently do or pursue the proposed lower minimum use altitudes based on their aircraft certification. Operators with aircraft that are certified and wishing to immediately achieve the proposed lower minimum use altitudes might incur the cost of accelerated training. This accelerated training cost is a change in present value, but not in total cost, because this type of training would have occurred in the future. Additionally, operators would not incur certification costs for aircraft, avionics equipment, autopilot and flight management systems that have already been certificated. Also, by setting new minimum altitudes for each phase of flight that certified equipment might operate to, the proposed rule would give manufacturers more certainty that new products can be used as they are developed. The FAA recognizes some older airplanes are not certificated to utilize the lower proposed minimum use altitudes. The FAA believes these operators would not incur these costs because they would not seek to modify their aircraft in order to be certified for the lower minimum use altitudes. The FAA seeks public comments regarding these findings and requests that all comments be accompanied with detailed supporting data.

The FAA has, therefore, determined that this proposed rule would not qualify as a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Public Law 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This proposed rule would not impose any additional costs on operators that operate under parts 121, 125, or 135. Consequently, the FAA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Public Law 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would have only a domestic impact and therefore no effect on international trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an

expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This proposed rule would not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there would be no new requirement for information collection associated with this proposed rule.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances.

The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a ''significant energy action'' under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document.

The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The agency may change this proposal in light of the comments it receives.

B. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies* or

3. Accessing the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced in item (1) above.

List of Subjects

14 CFR Part 121

Air Carriers, Aircraft, Airmen, Aviation Safety, Charter Flights, Safety, Transportation.

14 CFR Part 125

Aircraft, Airmen, Aviation Safety.

14 CFR Part 135

Air taxis, Aircraft, Airmen, Aviation Safety.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of title 14, Code of Federal Regulations as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 46105.

2. Revise § 121.579 to read as follows:

§ 121.579 Minimum altitudes for use of autopilot.

(a) *Definitions.* For purpose of this section:

(1) Altitudes for takeoff/initial climb and go-around/missed approach are defined as above the airport elevation.

(2) Altitudes for enroute operations are defined as above terrain elevation.

(3) Altitudes for approach are defined as above the touchdown zone elevation (TDZE) unless the altitude is specifically in reference to DA(H) or MDA in which case the altitude is defined by reference to the DA(H) or MDA itself.

(4) Altitudes specified as above airport elevation, runway TDZE or terrain are considered to be above ground level (AGL).

(b) *Takeoff and initial climb.*

No person may use an autopilot for takeoff or initial climb below the higher of 500 feet or an altitude that is no lower than twice the altitude loss specified in the Airplane Flight Manual (AFM), except as follows:

(1) At a minimum engagement altitude specified in the AFM, or

(2) At an altitude specified by the Administrator, whichever is greater.

(c) *Enroute.*

No person may use an autopilot enroute, including climb and descent, below the following:

(1) 500 feet,

(2) At an altitude that is no lower than twice the altitude loss specified in the AFM for an autopilot malfunction in cruise conditions, or

(3) At an altitude specified by the Administrator, whichever is greater.

(d) *Approach.*

No person may use an autopilot at an altitude lower than 50 feet below the DA(H) or MDA for the instrument procedure being flown, except as follows:

(1) For autopilots with an AFM specified altitude loss for approach operations, the greater of:

(i) An altitude no lower than twice the specified altitude loss,

(ii) An altitude no lower than 50 feet higher than the altitude loss specified in the AFM when reported weather conditions are less than the basic VFR weather conditions in § 91.155 of this chapter, suitable visual references specified in § 91.175 of this chapter have been established on the instrument approach procedure, and the autopilot is coupled and receiving both lateral and vertical path references,

(iii) An altitude no lower than the higher of the altitude loss specified in the AFM or 50 feet above the TDZE when reported weather conditions are equal to or better than the basic VFR weather conditions in § 91.155 of this chapter, and the autopilot is coupled and receiving both lateral and vertical path references, or

(iv) An altitude specified by the Administrator.

(2) For autopilots with AFM specified approach altitude limitations, the greater of:

(i) The minimum use altitude specified for the coupled approach mode selected,

(ii) 50 feet, or

(iii) An altitude specified by Administrator.

(3) For autopilots with an AFM specified negligible or zero altitude loss for an autopilot approach mode malfunction, the greater of:

(i) 50 feet, or

(ii) An altitude specified by Administrator.

(4) If executing an autopilot coupled go-around or missed approach, using a certificated and functioning autopilot in accordance with paragraph (e) in this section.

(e) *Go-Around/Missed Approach.*

No person may engage an autopilot during a go-around or missed approach below the minimum engagement altitude specified for takeoff and initial climb in paragraph (b) in this section. An autopilot minimum use altitude does not apply to a go-around/missed approach initiated with an engaged autopilot. Performing a go-around or missed approach with an engaged autopilot must not adversely affect safe obstacle clearance.

(f) *Landing.*

Notwithstanding paragraph (d) of this section, autopilot minimum use altitudes do not apply to autopilot operations when an approved automatic landing system mode is being used for landing. Automatic landing systems must be authorized in an operations specification issued to the operator.

PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR MORE; AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

3. The authority citation for part 125 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44705, 44710–44711, 44713, 44716–44717, 44722.

4. Revise § 125.329 to read as follows:

§ 125.329 Minimum altitudes for use of autopilot.

(a) *Definitions.* For purpose of this section:

(1) Altitudes for takeoff/initial climb and go-around/missed approach are defined as above the airport elevation.

(2) Altitudes for enroute operations are defined as above terrain elevation.

(3) Altitudes for approach are defined as above the touchdown zone elevation (TDZE) unless the altitude is specifically in reference to DA(H) or MDA in which case the altitude is defined by reference to the DA(H) or MDA itself.

(4) Altitudes specified as above airport elevation, runway TDZE or terrain are considered to be above ground level (AGL).

(b) *Takeoff and initial climb.*

No person may use an autopilot for takeoff or initial climb below the higher of 500 feet or an altitude that is no lower than twice the altitude loss specified in the Airplane Flight Manual (AFM), except as follows:

(1) At a minimum engagement altitude specified in the AFM, or

(2) At an altitude specified by the Administrator, whichever is greater.

(c) *Enroute.*

No person may use an autopilot enroute, including climb and descent, below the following:

(1) 500 feet,

(2) At an altitude that is no lower than twice the altitude loss specified in the AFM for an autopilot malfunction in cruise conditions, or

(3) At an altitude specified by the Administrator, whichever is greater.

(d) *Approach.*

No person may use an autopilot at an altitude lower than 50 feet below the DA(H) or MDA for the instrument procedure being flown, except as follows:

(1) For autopilots with an AFM specified altitude loss for approach operations, the greater of:

(i) An altitude no lower than twice the specified altitude loss,

(ii) An altitude no lower than 50 feet higher than the altitude loss specified in the AFM when reported weather conditions are less than the basic VFR weather conditions in § 91.155 of this chapter, suitable visual references specified in § 91.175 of this chapter have been established on the instrument approach procedure, and the autopilot is coupled and receiving both lateral and vertical path references,

(iii) An altitude no lower than the higher of the altitude loss specified in the AFM or 50 feet above the TDZE when reported weather conditions are equal to or better than the basic VFR weather conditions in § 91.155 of this chapter, and the autopilot is coupled and receiving both lateral and vertical path references, or

(iv) An altitude specified by the Administrator.

(2) For autopilots with AFM specified approach altitude limitations, the greater of:

(i) The minimum use altitude specified for the coupled approach mode selected,

(ii) 50 feet, or

(iii) An altitude specified by Administrator.

(3) For autopilots with an AFM specified negligible or zero altitude loss for an autopilot approach mode malfunction, the greater of:

(i) 50 feet, or

(ii) An altitude specified by Administrator.

(4) If executing an autopilot coupled go-around or missed approach, using a certificated and functioning autopilot in accordance with paragraph (e) in this section.

(e) *Go-Around/Missed Approach.*

No person may engage an autopilot during a go-around or missed approach below the minimum engagement altitude specified for takeoff and initial

climb in paragraph (b) in this section. An autopilot minimum use altitude does not apply to a go-around/missed approach initiated with an engaged autopilot. Performing a go-around or missed approach with an engaged autopilot must not adversely affect safe obstacle clearance.

(f) *Landing.*

Notwithstanding paragraph (d) of this section, autopilot minimum use altitudes do not apply to autopilot operations when an approved automatic landing system mode is being used for landing. Automatic landing systems must be authorized in an operations specification issued to the operator.

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULE GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

5. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(g), 41706, 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722, 45101–45105.

6. Revise § 135.93 to read as follows:

§ 135.93 Minimum altitudes for use of autopilot.

(a) *Definitions.* For purpose of this section:

(1) Altitudes for takeoff/initial climb and go-around/missed approach are defined as above the airport elevation.

(2) Altitudes for enroute operations are defined as above terrain elevation.

(3) Altitudes for approach are defined as above the touchdown zone elevation (TDZE) unless the altitude is specifically in reference to DA(H) or MDA in which case the altitude is defined by reference to the DA(H) or MDA itself.

(4) Altitudes specified as above airport elevation, runway TDZE or terrain are considered to be above ground level (AGL).

(b) *Takeoff and initial climb.*

No person may use an autopilot for takeoff or initial climb below the higher of 500 feet or an altitude that is no lower than twice the altitude loss specified in the Airplane Flight Manual (AFM), except as follows:

(1) At a minimum engagement altitude specified in the AFM, or

(2) At an altitude specified by the Administrator, whichever is greater.

(c) *Enroute.*

No person may use an autopilot enroute, including climb and descent, below the following:

(1) 500 feet,

(2) At an altitude that is no lower than twice the altitude loss specified in the AFM for an autopilot malfunction in cruise conditions, or

(3) At an altitude specified by the Administrator, whichever is greater.

(d) *Approach.*

No person may use an autopilot at an altitude lower than 50 feet below the DA(H) or MDA for the instrument procedure being flown, except as follows:

(1) For autopilots with an AFM specified altitude loss for approach operations, the greater of:

(i) An altitude no lower than twice the specified altitude loss,

(ii) An altitude no lower than 50 feet higher than the altitude loss specified in the AFM when reported weather conditions are less than the basic VFR weather conditions in § 91.155 of this chapter, suitable visual references specified in § 91.175 of this chapter have been established on the instrument approach procedure, and the autopilot is coupled and receiving both lateral and vertical path references,

(iii) An altitude no lower than the higher of the altitude loss specified in the AFM or 50 feet above the TDZE when reported weather conditions are equal to or better than the basic VFR weather conditions in § 91.155 of this chapter, and the autopilot is coupled and receiving both lateral and vertical path references, or

(iv) An altitude specified by the Administrator.

(2) For autopilots with AFM specified approach altitude limitations, the greater of:

(i) The minimum use altitude specified for the coupled approach mode selected,

(ii) 50 feet, or

(iii) An altitude specified by Administrator.

(3) For autopilots with an AFM specified negligible or zero altitude loss for an autopilot approach mode malfunction, the greater of:

(i) 50 feet, or

(ii) An altitude specified by Administrator.

(4) If executing an autopilot coupled go-around or missed approach, using a certificated and functioning autopilot in accordance with paragraph (e) in this section.

(e) *Go-Around/Missed Approach.*

No person may engage an autopilot during a go-around or missed approach below the minimum engagement altitude specified for takeoff and initial climb in paragraph (b) in this section. An autopilot minimum use altitude does not apply to a go-around/missed approach initiated with an engaged autopilot. Performing a go-around or missed approach with an engaged autopilot must not adversely affect safe obstacle clearance.

(f) *Landing.*

Notwithstanding paragraph (d) of this section, autopilot minimum use altitudes do not apply to autopilot operations when an approved automatic landing system mode is being used for landing. Automatic landing systems must be authorized in an operations specification issued to the operator.

(g) This section does not apply to operations conducted in rotorcraft.

Issued in Washington, DC, on November 27, 2012.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2012–29274 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 240

Guides for Advertising Allowances and Other Merchandising Payments and Services

AGENCY: Federal Trade Commission.

ACTION: Request for public comments.

SUMMARY: The Federal Trade Commission (''Commission'') requests public comments on the overall costs and benefits of and the continuing need for its Guides for Advertising Allowances and Other Merchandising Payments and Services (''the Fred Meyer Guides'' or ''the Guides''), as part of the agency's review of all its current regulations and guides.

DATES: Written comments will be accepted until January 29, 2013.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Fred Meyer Guides Review'' on your comment. You may file your comment online at *https://ftcpublic.commentworks.com/ftc/fredmeyerguides,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex B), 600 Pennsylvania Ave. NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Neil W. Averitt (202) 326–2885, or Julie A. Goshorn (202) 326–3033, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Fred Meyer Guides are intended to help businesses comply with sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act (''the Act''). *See* 15 U.S.C. §§ 13(d)–(e). These sections of the Act generally require a seller to make advertising and promotional allowances or services available to all competing customers on proportionately equal terms. The Fred Meyer Guides help sellers meet these requirements by providing elaboration and examples of some of the statute's central provisions, such as the definition of ''competing customer'' and some of the permissible accounting means by which payments can be made proportional.

The Commission promulgated the Fred Meyer Guides under sections 5 and 6 of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 45–46, in 1969. Industry guides such as these are administrative interpretations of the law. Therefore, they do not have the force and effect of law and are not independently enforceable. The Guides are intended to reflect and interpret the requirements that courts have imposed upon sellers, in actions brought by private parties as well as by the Government. The Guides were most recently reviewed and amended in 1990. *See* 55 FR 33651 (Aug. 17, 1990).

The Guides contain a total of fifteen sections. The first seven of these consist of definitions and explanations that spell out the general scope of the Robinson-Patman Act and of the Guides themselves. Section 1 describes the purpose of the Guides, and emphasizes that, while they are intended to be consistent with the case law, they do not themselves have the force of law. Section 2 spells out systematically the jurisdictional prerequisites that must be met before 2(d) or 2(e) of the Robinson-Patman Act will apply, including, for example, having a seller of products, engaged in interstate commerce, who either directly or through an intermediary, makes certain payments or provides certain services. Section 3 defines the term ''seller'' explaining that the term reaches any person making sales for resale, that it includes intermediaries in the distribution chain such as wholesalers and distributors, and includes sales of goods that must be processed before being resold. Section 4 defines the term ''customer,'' clarifying that the term includes indirect purchasers and the headquarters of group buyers, but not the individual stores in such groups. Section 5 defines ''competing customers'' to include all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution (*e.g.,* a seller must offer the same promotion to a retailer that buys through a wholesaler as it offers to a retailer that buys directly from the seller if the two resell within the same geographic area). Section 6 defines ''interstate commerce,'' specifying that firms may be subject to the Robinson-Patman Act if there is any part of their business that in any way crosses state lines. Section 7 defines ''services'' and ''facilities'' to cover those that promote the resale of the seller's product by the customer, as distinct from services that relate primarily to the original sale (which are covered by section 2(a) of the Act).

The next three sections interpret the substantive requirements of the Robinson-Patman Act. Section 8 suggests that sellers should provide their promotional payments and services according to a pre-determined plan, and, if the plan is complex, that they would be well advised to put it in writing. Section 9 interprets the reference to ''proportionately equal terms'' and notes that no single way of proportionalizing is prescribed by law, but suggests that convenient and acceptable techniques for doing so would include providing benefits on the basis of the dollar volume or the unit quantity of the product purchased during a specified period. Section 10 explains that the seller should take reasonable steps to ensure that the benefits are useable in a practical sense by all competing customers, a principle that may require offering alternative forms of benefits for customers of different sizes or customers that use different sales channels.

The last five sections address a variety of administrative issues and affirmative defenses. Section 11 states that a seller may contract with intermediaries, such as wholesalers, to perform its obligations. Section 12 states that the seller should take ''reasonable precautions'' to ensure that customers expend the allowance solely for its intended purposes. Section 13 deals with the subject of customer liability, and notes that, although sections 2(d) and 2(e) of the Robinson-Patman Act apply only to sellers, the Commission may proceed under section 5 of the FTC Act against customers who induce sellers to violate the Robinson-Patman Act. Section 14 affirms that a ''meeting-competition'' defense is available to charges under 2(d) and 2(e), provided that the seller acts in good faith to meet those competing offers. Section 15 notes that it is no defense to a charge that an allowance violates the Act that the payment or service could be justified through savings in the cost of manufacture, sales or delivery (*i.e.,* there is no cost-justification defense to charges of violation of sections 2(d) and 2(e) of the Act).

II. Regulatory Review Program

The Commission periodically reviews all of its rules and guides. These reviews seek information about the costs and benefits of the agency's rules and guides, and their regulatory and economic impact. The information obtained assists the Commission in identifying those rules and guides that warrant modification or rescission. Therefore, the Commission solicits comments on, among other things, the economic impact of and the continuing need for the Fred Meyer Guides; possible developments in the case law that need to be reflected in the Guides; and the effect on the Guides of any technological, economic, or other industry changes.

III. Request for Comment

The Commission solicits written public comments on the following questions:

(1) Is there a continuing need for the Fred Meyer Guides?

(2) Have there been changes in the case law that are not, but should be, reflected in the Guides?

(3) How, if at all, should the Guides be revised to account for new methods of commerce introduced as a result of the growth of the Internet since 1990? In particular, how should the Guides address: (a) Support for Internet or other electronic promotion in various forms, such as pay-per-click, display ads, targeted ads, mobile ads, or other formats; (b) manufacturer support for different pages within a retailer's Web site (*e.g.,* support for display on the home or ''landing'' page of a Web site, versus support for display on an interior page); (c) general principles for distinguishing between price reductions and promotional allowances in an Internet context; (d) the definition of ''competing sellers'' as it applies to traditional and Internet retailers; (e) general principles of proportional equality, if any, that should apply to promotional support given to traditional and Internet retailers; and (f) any other aspects of the Guides that might need revision or clarification in light of the development and prominence of e-commerce?

(4) To what extent, if any, should § 240.13(a) of the Guides be revised to reflect cases discussing the possibility that what appears to be a discrimination in promotional allowances may support

a private action for inducing or receiving a discrimination in price? *See, e.g., American Booksellers Ass'n* v. *Barnes & Noble,* 135 F. Supp. 2d 1031 (N.D. Calif. 2001); *but see United Magazine Co.* v. *Murdoch Magazines Distribution,* 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001).

(5) What benefits and costs have the Guides had on businesses that grant promotional allowances and services?

(6) What benefits and costs have the Guides had for businesses who receive promotional allowances and services?

(7) What benefits and costs have the Guides had for ultimate consumers?

(8) What changes, if any, should be made to the Guides to increase their benefits to those who use them and to consumers? Are there terms in the statute or concepts in the case law that are not presently addressed in the Guides, and that might benefit from clarification? How would these changes affect the costs that the Guides impose on firms that conform to them?

(9) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on firms that conform to them? How would these changes affect the benefits provided by the Guides?

(10) Do the Guides overlap or conflict with other federal, state, or local laws or regulations? If so, what changes in the Guides, if any, would be appropriate?

(11) In addition to the issues mentioned in Question (3) above, since the Guides were last amended, what, if any, developments in technology or economic conditions require modification to the Guides? What modifications are required?

(12) What effects, if any, do the Guides have on the costs, profitability, competitiveness and employment of small business entities?

(13) Are there foreign or international laws, regulations, or standards concerning the avoidance of discriminatory allowances and services that the Commission should consider as it reviews the Guides? If so, what are they? (a) Should the Guides be changed to harmonize with these foreign or international laws, regulations, or standards? Why or why not? (b) How would harmonization affect the costs and benefits of the Guides for consumers? (c) How would harmonization affect the costs and benefits of the Guides for businesses, particularly small businesses?

(14) Are there any other problems occurring in the provision of promotional allowances and services covered by the Guides that are not dealt with in the Guides? If so, what mechanisms should be explored to address such problems?

IV. Instructions for Submitting Comments

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 29, 2013. Write ''Fred Meyer Guides Review'' on the 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 comments do not include any sensitive personal information, such as a 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, such as 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 * * * privileged or confidential,'' as discussed 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). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

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 must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). 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 comments to be withheld from the public record. 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 comment online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/fredmeyerguides,* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Fred Meyer Guides Review'' 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 B), 600 Pennsylvania Ave. 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 January 29, 2013. 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.*

By direction of the Commission.

Donald S. Clark

Secretary.

[FR Doc. 2012–29189 Filed 12–3–12; 8:45 am]

BILLING CODE 6750–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

[Release Nos. 33–9370, 34–68309, 39–2487, IA–3506, IC–30282; File No. S7–12–12]

List of Rules To Be Reviewed Pursuant to the Regulatory Flexibility Act

AGENCY: Securities and Exchange Commission.

ACTION: Publication of list of rules scheduled for review.

SUMMARY: The Securities and Exchange Commission is publishing a list of rules to be reviewed pursuant to Section 610 of the Regulatory Flexibility Act. The list is published to provide the public with notice that these rules are

scheduled for review by the agency and to invite public comment on them.

DATES: Comments should be submitted by January 3, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–12–12 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 No. S7–12–12. This file number should be included on the subject line if email is used. To help us 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/other.shtml*). Comments also are 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Anne Sullivan, Office of the General Counsel, 202–551–5019.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (''RFA''), codified at 5 U.S.C. 600–611, requires an agency to review its rules that have a significant economic impact upon a substantial number of small entities within ten years of the publication of such rules as final rules. 5 U.S.C. 610(a). The purpose of the review is ''to determine whether such rules should be continued without change, or should be amended or rescinded * * * to minimize any significant economic impact of the rules upon a substantial number of such small entities.'' 5 U.S.C. 610(a). The RFA sets forth specific considerations that must be addressed in the review of each rule:

- The continued need for the rule;
- The nature of complaints or comments received concerning the rule from the public;
- The complexity of the rule;
- The extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(c).

The Securities and Exchange Commission, as a matter of policy, reviews all final rules that it published for notice and comment to assess not only their continued compliance with the RFA, but also to assess generally their continued utility. The list below is therefore broader than that required by the RFA, and may include rules that do not have a significant economic impact on a substantial number of small entities. Where the Commission has previously made a determination of a rule's impact on small businesses, the determination is noted on the list.

The Commission particularly solicits public comment on whether the rules listed below affect small businesses in new or different ways than when they were first adopted. The rules and forms listed below are scheduled for review by staff of the Commission during the next twelve months. The list includes rules from 2001. When the Commission implemented the Act in 1980, it stated that it ''intend[ed] to conduct a broader review [than that required by the RFA], with a view to identifying those rules in need of modification or even rescission.'' Securities Act Release No. 6302 (Mar. 20, 1981), 46 FR 19251 (Mar. 30, 1981).

List of Rules To Be Reviewed

Title: Role of Independent Directors of Investment Companies.

Citation: 17 CFR 270.2a19–3; 17 CFR 270.10e–1; 17 CFR 270.32a–4.

Authority: 15 U.S.C. 80a–6(c), 80a–10(e), 80a–29(e), 80a–30, 80a–37(a).

Description: Rule 2a19–3 under the Investment Company Act (''Act'') exempts an individual from being disqualified as an independent director of a registered investment company (''Fund'') solely because he or she owns shares of an index fund that invests in the investment adviser or underwriter of the Fund, or their controlling persons. The exemption permits a director of a Fund to own shares of a registered investment company (including the Fund on which it serves) whose investment objective is to replicate the performance of one or more broad-based securities indices.

Rule 10e–1 under the Act suspends temporarily the board composition requirements of the Act and rules thereunder, if a Fund fails to meet those requirements by reason of the death, disqualification, or bona fide resignation of a director. Rule 10e–1 suspends the board composition requirements for 90 days if the board can fill the director vacancy, or 150 days if a shareholder vote is required to fill the vacancy.

Rule 32a–4 under the Act exempts Funds from the Act's requirement that shareholders vote on the selection of the Fund's independent public accountant if the Fund (i) establishes an audit committee composed solely of independent directors that oversees the fund's accounting and auditing processes; (ii) adopts an audit committee charter setting forth the committee's structure, duties, powers, and methods of operation, or sets out similar provisions in the Fund's charter or bylaws; and (iii) maintains a copy of such audit committee charter.

Prior Commission Determination Under 5 U.S.C. 604: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–24816, which was approved by the Commission on January 2, 2001. Comments on the proposing release and any comments on the Initial Regulatory Flexibility Analysis were considered at that time.

Title: Rule 35d–1.

Citation: 17 CFR 270.35d–1.

Authority: 15 U.S.C. 80a–8, 80a–29, 80a–33, 80a–34, and 80a–37.

Description: Rule 35d–1 under the Act requires that an investment company with a name that suggests that the company focuses its investments in a particular type of investment (e.g., the ABC Stock Fund or XYZ Bond Fund), country or geographic region (e.g., The ABC Japan Fund or The XYZ Latin America Fund), or a particular industry (e.g., the ABC Utilities Fund or the XYZ Health Care Fund) invest at least 80% of its assets in the type of investment suggested by the name. Rule 35d–1 also addresses names that indicate that a Fund's distributions are exempt from income tax or that its shares are guaranteed or approved by the United States government.

Prior Commission Determination Under 5 U.S.C. 604: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–24828, which was approved by the Commission on January

17, 2001. Comments on the proposing release and any comments on the Initial Regulatory Flexibility Analysis were considered at that time.

Title: Integration of Abandoned Offerings.

Citation: 17 CFR 230.155, 17 CFR 230.429, 17 CFR 230.457, 17 CFR 230.477.

Authority: 15 U.S.C. 77b, 15 U.S.C. 77f, 15 U.S.C. 77g, 15 U.S.C. 77h, 15 U.S.C. 77j, 15 U.S.C. 77s, and 15 U.S.C. 77z–3.

Description: Rule 155 provides safe harbors for a registered offering following an abandoned private offering, or a private offering following an abandoned registered offering, without integrating the registered and private offerings in either case. The rule amendments facilitate reliance on the public-to-private safe harbor by providing automatic effectiveness for any application to withdraw an entire registration statement before it becomes effective, permitting filing fees to be offset from withdrawn registration statements and providing other technical changes to the calculation of filing fees in order to reduce the financial risk of a registered offering that is withdrawn.

Prior Commission Determination Under 5 U.S.C. 604: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with Release No. 33–7943, approved by the Commission on January 26, 2001, which adopted the rule and rule amendments. Comments on the proposing release were considered at that time. The Commission solicited comments concerning the impact on small entities and the Regulatory Flexibility Act certification, but received no comments.

Title: Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers.

Citation: 17 CFR 240.17a–25.

Authority: 15 U.S.C. 78a *et seq.*

Description: Rule 17a–25 requires brokers and dealers to submit electronically to the Commission, upon request, information on customer and firm securities trading. Rule 17a–25 is designed to improve the Commission's capacity to analyze electronic submissions of transaction information, thereby facilitating Commission enforcement investigations and other trading reconstructions.

Prior Commission Determination Under 5 U.S.C. 604: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–44494, which was issued by the Commission on June 29, 2001. Comments on the proposing release and any comments on the Initial Regulatory Flexibility Analysis were considered at that time.

Title: Rule 5b–3.

Citation: 17 CFR 270.5b–3.

Authority: 15 U.S.C. 80a–1 et seq., 80a–34(d), 80a–37, 80a–39, unless otherwise noted.

Description: Rule 5b–3 under the Investment Company Act permits investment companies to treat a repurchase agreement as an acquisition of the underlying collateral, subject to certain conditions, in determining whether it is in compliance with the investment criteria for diversified funds set forth in section 5(b)(1) of the Act and the prohibition on fund acquisition of an interest in a broker-dealer in section 12(d)(3) of the Act. Rule 5b–3 also permits an investment company to treat the acquisition of a refunded security (which is a debt security whose principal and interest payments are to be paid by U.S. government securities that have been placed in an escrow account and are pledged only to the payment of the debt security) as an acquisition of the escrowed government securities, subject to certain conditions, for purposes of the diversification requirements of section 5(b)(1) of the Act.

Prior Commission Determination Under 5 U.S.C. 604: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of rule 5b–3 in Release No. IC–25058, which was approved by the Commission on July 5, 2001. Comments on the proposing release and any comments on the Initial Regulatory Flexibility Analyses were considered at that time.

Title: Registration of National Securities Exchanges Pursuant to Section 6(g) of the Securities Exchange Act of 1934 and Proposed Rule Changes of Certain National Securities Exchanges and Limited Purpose National Securities Associations.

Citation: 17 CFR 240.6a–2, 17 CFR 240.6a–3, 17 CFR 240.6a–4, 17 CFR 240.19b–4, 17 CFR 240.19b–7, 17 CFR 249.10, 17 CFR 249.819; 17 CFR 249.822.

Authority: 15 U.S.C. 78a *et seq.*

Description: The Commission adopted Rule 6a–4 under the Exchange Act and registration Form 1–N prescribing the requirements for designated contract markets and derivative transaction execution facilities to register as national securities exchanges pursuant to Section 6(g)(1) of the Exchange Act to trade security futures products. The Commission also adopted conforming amendments to Rules 6a–2 and 6a–3 under the Exchange Act and Rule 202.3 of the Commission's procedural rules. In addition, the Commission adopted Rule 19b–7, Form 19b–7, and amendments to Rule 19b–4 and Form 19b–4 to accommodate proposed rule changes submitted by national securities exchanges registered pursuant to Section 6(g) of the Exchange Act and limited purpose national securities associations registered pursuant to Section 15A(k) of the Exchange Act. These rules and forms, and amendments to existing rules and forms, were necessary to implement the Commodity Futures Modernization Act of 2000.

Prior Commission Determination Under 5 U.S.C. 605: Pursuant to 15 U.S.C. 605(b), the Chairman of the Commission certified that the adopted rules, forms, and conforming amendments would not have a significant economic impact on a substantial number of small entities. This certification, including the reasons therefor, was attached to Proposing Release No. 34–44279 (May 8, 2001) as Appendix A. The Commission solicited comments concerning the impact on small entities and the Regulatory Flexibility Act certification, but received no comments.

Title: Registration of Broker-Dealers Pursuant to Section 15(b)(11) of the Securities Exchange Act of 1934.

Citation: 17 CFR 240.15a–10, 17 CFR 240.15b2–2, 17 CFR 15b11–1, 17 CFR Part 248, 17 CFR Part 249.

Authority: 15 U.S.C. 78a *et seq.;* 15 U.S.C. 6801 *et seq.*

Description: The Commission adopted the following rules to implement provisions of the Commodity Futures Modernization Act of 2000 (''CFMA''). First, the Commission amended its broker-dealer registration requirements and adopted a new form to implement Section 203 of the CFMA to allow futures commission merchants and introducing brokers registered with the CFTC to register as broker-dealers by filing a notice with the Commission for the limited purpose of effecting transactions in security futures products. Second, the Commission adopted an exemption from registration under Section 15(a) of the Exchange Act to permit, subject to certain conditions, a broker-dealer registered by notice to trade security futures products regardless of the market on which the product was listed or traded. Third, the Commission adopted amendments to Regulation S–P to revise certain

provisions of Regulation S–P in light of Section 124 of the CFMA, which made the privacy provisions of the Gramm-Leach-Bliley Act applicable to activity regulated by the CFTC. These amendments also permitted futures commission merchants and introducing brokers registered by notice as broker-dealers to comply with Regulation S–P by complying with the CFTC's financial privacy rules.

Prior Commission Determination Under 5 U.S.C. 605: Pursuant to 15 U.S.C. 605(b), the Chairman of the Commission certified that the proposed rules, forms, and conforming amendments would not have a significant economic impact on a substantial number of small entities. This certification, including the reasons therefore, was attached to Proposing Release No. 34–44455 (June 20, 2001) as Appendix A. The Commission solicited comments concerning the impact on small entities and the Regulatory Flexibility Act certification, but received no comments.

Title: Method for Determining Market Capitalization and Dollar Value of Average Daily Trading Volume; Application of the Definition of Narrow-Based Security Index.

Citation: 17 CFR 240.3a55–1, 17 CFR 240.3a55–2, 17 CFR 240.3a55–3.

Authority: 15 U.S.C. 78a *et seq.*

Description: The CFTC and the SEC (collectively, ''Commissions'') adopted joint final rules to implement new statutory provisions enacted by the Commodity Futures Modernization Act of 2000. Specifically, the CFMA directed the Commissions to jointly specify by rule or regulation the method to be used to determine ''market capitalization'' and ''dollar value of average daily trading volume'' for purposes of the new definition of ''narrow-based security index,'' including exclusions from that definition, in the Commodity Exchange Act and the Exchange Act. The CFMA also directed the Commissions to jointly adopt rules or regulations that set forth the requirements for an index underlying a contract of sale for future delivery traded on or subject to the rules of a foreign board of trade to be excluded from the definition of ''narrow-based security index.''

Prior Commission Determination Under 5 U.S.C. 605: Pursuant to 15 U.S.C. 605(b), the Chairman of the Commission certified that the rules would not have a significant economic impact on a substantial number of small entities. This certification was attached to Proposing Release No. 34–44288 (May 9, 2001) as an Appendix. The Commission solicited comments concerning the impact on small entities and the Regulatory Flexibility Act certification, but received no comments.

Title: Options Disclosure Document.

Citation: 17 CFR 230.135b.

Authority: 15 U.S.C. 77b, 15 U.S.C. 77g, 15 U.S.C. 77j, 15 U.S.C. 77s, and 15 U.S.C. 77z–3.

Description: This rule clarifies that an options disclosure document prepared in accordance with Commission rules under the Securities Exchange Act of 1934 is not a prospectus and is not subject to civil liability under Section 12(a)(2) of the Securities Act. This amendment reduces legal uncertainty regarding whether such liability applies to these documents by codifying a long-standing interpretive position taken by the Division of Corporation Finance.

Prior Commission Determination Under 5 U.S.C. 605: Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Chairman of the Commission certified at the proposal stage on July 1, 1998 in Release No. 33–7550 that the rule revisions would not have a significant economic impact on a substantial number of small entities. The Commission solicited comments concerning the impact on small entities and the Regulatory Flexibility Act certification, but received no comments.

Dated: November 28, 2012.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–29149 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 150

[Docket No. FDA–1997–P–0007] (formerly Docket No. 1997P–0142)

Artificially Sweetened Fruit Jelly and Artificially Sweetened Fruit Preserves and Jams; Proposed Revocation of Standards of Identity

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA or we) is proposing to revoke the standards of identity for artificially sweetened jelly, preserves, and jams. We are taking this action primarily in response to a citizen petition submitted by the International Jelly and Preserve Association (IJPA). We are taking this action because we tentatively conclude that these standards are both obsolete and unnecessary in light of our regulations for foods named by use of a nutrient content claim and a standardized term. We also tentatively conclude that this action will promote honesty and fair dealing in the interest of consumers.

DATES: Submit electronic or written comments on the proposed rule by March 4, 2013.

ADDRESSES: You may submit comments, identified by Docket No. FDA–1997–P–0007 (formerly Docket No. 1997P–0142), by any of the following methods.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management, (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–1997–P–0007 (formerly Docket No. 1997P–0142) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket numbers found in brackets in the heading of this document into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.P≤FOR FURTHER INFORMATION CONTACT:

FOR FURTHER INFORMATION CONTACT: Daniel Reese, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–2371.

SUPPLEMENTARY INFORMATION:

I. Background

For more than 50 years, FDA has maintained standards of identity for

fruit jelly (jelly) (21 CFR 150.140) and fruit preserves and jams (preserves and jams) (21 CFR 150.160). The standards establish the common or usual name for these products and provide that these products may contain nutritive sweeteners (e.g., sugar). In 1959, FDA added new standards of identity for artificially sweetened fruit jelly (artificially sweetened jelly) (21 CFR 150.141) and artificially sweetened fruit preserves and jams (artificially sweetened preserves and jams) (21 CFR 150.161) (24 FR 8896; October 31, 1959) that permit the use of non-nutritive sweeteners (e.g., saccharin). Notably, §§ 150.141 and 150.161 limit the types of non-nutritive sweeteners that can be used in products that are governed by those standards of identity. Such products may only use saccharin, sodium saccharin, calcium saccharin, or any combination thereof, and may not use newer forms of non-nutritive sweeteners that have been established since the standard of identity regulations were issued.

The Nutrition Labeling and Education Act (NLEA) of 1990 amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to provide for a number of fundamental changes in food labeling, leading to a new regulatory framework for the naming of foods that do not fully comply with the relevant standards of identity. In response to NLEA, FDA established in part 101 (21 CFR part 101), among other things, definitions for specific nutrient content claims using terms such as ''free,'' ''low,'' ''light'' or ''lite,'' and ''less,'' and provided for their use in food labeling (58 FR 2302; January 6, 1993). FDA also prescribed at the same time in § 130.10 (21 CFR 130.10) a general definition and standard of identity for foods named by a nutrient content claim defined in part 101, such as ''low calorie'' or ''sugar free,'' in conjunction with a traditional standardized food term (58 FR 2431; January 6, 1993). A nutrient content claim applied to the standardized food ''grape jelly,'' for example, could be ''low calorie grape jelly.'' Section 130.10(d)(1) allows the addition of safe and suitable ingredients to a food named by use of a nutrient content claim and a standardized term when these ingredients are used to, among other things, add sweetness to ensure that the modified food is not inferior in performance characteristic to the standardized food even if such ingredients are not specifically provided for by the relevant food standard. Thus, under certain circumstances, § 130.10 permits manufacturers to use safe and suitable artificial sweeteners (e.g., aspartame) that are not expressly listed in §§ 150.141 and 150.161 in the manufacture of jelly, fruit preserves, and jams (collectively, ''fruit spreads''). Therefore, fruit spread products named with a nutrient content claim (for example, ''low calorie grape jelly'') may contain newer artificial sweeteners to add sweetness to fruit spread products so that they are not inferior in their sweetness compared to their standardized counterparts (for example, ''grape jelly''). The provisions of § 130.10 do not require these products to declare the presence of such non-nutritive sweeteners within the name of these foods. FDA took this action to assist consumers in maintaining healthy dietary practices by providing for a modified version of a traditional standardized food to achieve a nutrition goal (e.g., reduction in sugar consumption or calories) and that has a descriptive name that is meaningful to consumers. The provisions of § 130.10 do not, however, permit the use of nutrient content claims as part of the name of a food for foods governed by standards of identity that established the phrase ''artificially sweetened'' as part of the standard of identity. Accordingly, jelly, preserves, and jams, that use saccharin, sodium saccharin, calcium saccharin, or any combination thereof as non-nutritive sweeteners must still include the term ''artificially sweetened'' in their names and are not permitted to bear a nutrient content claim as part of the name; however, similar products that use newer non-nutritive sweeteners are governed by § 130.10 and must not include the term ''artificially sweetened'' in their names.

II. IJPA Petition and Grounds

IJPA is a national trade association representing the manufacturers of jelly, preserves, jams, and nonstandardized fruit spreads, and suppliers of goods and services to the industry, including ingredient suppliers of fruit, sweeteners, and pectin. IJPA submitted a citizen petition dated March 31, 1997 (now Docket No. FDA–1997–P–0007), requesting the revocation of the standards of identity for artificially sweetened jelly, preserves, and jams. IJPA submitted its petition in response to FDA's advance notice of proposed rulemaking announcing that FDA was planning to review its food standards regulations (60 FR 67492; December 29, 1995). In that document, we sought comments on, inter alia, the benefits or lack of benefits of such regulations in facilitating domestic and international commerce, the value of these regulations to consumers, and alternative means of accomplishing the statutory objective of food standards (i.e., to promote honesty and fair dealing in the interest of consumers in the manufacture and sale of food products covered by the standard of identity regulations).

IJPA asserts in its citizen petition that the standards of identity for artificially sweetened jelly, jams, and preserves are outdated. According to IJPA, the standards have not been updated to take into account new non-nutritive sweeteners that have been approved by FDA since 1959. The petition maintains that the general standard in § 130.10 provides fruit spread manufacturers with sufficient flexibility to use newer, intense non-nutritive sweeteners in lieu of traditional nutritive sweeteners, and it would be appropriate to rely on that general standard rather than seek piecemeal amendments to the standards of identity to reflect the development of any new sweeteners. IJPA stated that by using the general standard in § 130.10, manufacturers can create products with nutrient content claims for reductions in calories or sugar content that are established in FDA regulations. According to IJPA, nutrient content terms (e.g., ''low calorie'') also better communicate to the consumer the nutritional benefit of the use of non-nutritive sweeteners than does the term ''artificially sweetened,'' which is required to appear in the labels of products manufactured in conformity with §§ 150.141 and 150.161. Therefore, IJPA concluded in its petition that the standards of identity for artificially sweetened jelly, preserves, and jams are both obsolete and unnecessary, and requested that we revoke these standards. Finally, IJPA stated that as of the date of submission of its citizen petition, there were few products being manufactured under these two standards of identity and that some manufacturers are already using the general standard in § 130.10 to formulate products that have reduced sugar and caloric content. IJPA stated that if these standards are revoked, any products that are currently manufactured in conformity with the standards could remain on the market by operation of § 130.10.

III. The Proposal

We have reviewed IJPA's petition. We find merit in IJPA's argument that revoking the artificially sweetened standards of identity would allow manufacturers to more accurately and consistently describe the attributes of the fruit spreads that currently conform to those standards. We therefore tentatively conclude that revoking the standards would promote honesty and

fair dealing in the interest of consumers and is, thus, appropriate under section 401 of the FD&C Act (21 U.S.C. 341). We tentatively reach this conclusion because we find that nutrient content claims, such as ''low calorie'' or ''reduced sugar'' better characterize the nutritional profile of the affected fruit spreads than does the term ''artificially sweetened.'' Further, revoking §§ 150.141 and 150.161 provides manufacturers with the flexibility to use the three non-nutritive sweeteners listed in those standards while also naming their products using FDA-defined nutrient content claims, in accordance with § 130.10. Moreover, other safe and suitable artificial sweeteners that might be developed in the future could be used in these products under § 130.10 without the need to further revise relevant standards of identity.

Enactment of NLEA and the development of newer artificial sweeteners, thus, renders the standards of identity for artificially sweetened jelly, preserves, and jams in §§ 150.141 and 150.161 obsolete. They no longer serve their intended purpose of ensuring honesty and fair dealing while allowing for the use of artificial sweeteners in standardized fruit jelly and standardized fruit preserves and jams as firms may now use certain artificial sweeteners under § 130.10. The standards for artificially sweetened jelly and artificially sweetened preserves and jams predate the nutrient content claim provisions of § 130.10. Removal of the artificially sweetened standards of identity would mean that products that are currently subject to the requirements of §§ 150.141 and 150.161 would instead be subject to the requirements of § 130.10, the general definition and standard of identity for foods named by a nutrient content claim defined in part 101. Thus, these products would be named by use of a nutrient content claim (e.g., ''reduced calorie'' or ''no sugar added'') along with a standardized term (''jelly'' or ''jam''), in accordance with § 130.10. Revoking §§ 150.141 and 150.161 also would promote honesty and fair dealing in the interest of consumers by requiring manufacturers to more accurately and consistently describe the attributes of the food (e.g., less sugar or reduced calories); would allow any safe and suitable non-nutritive sweetener to be used in standardized jams, jellies, and preserves; and would allow better comparison to other jams, jellies, and preserves currently modified under the provisions of § 130.10. For example, under current requirements, a jelly that is sweetened with saccharin must be called ''artificially sweetened jelly'' (in accordance with § 150.141) whereas a similar jelly sweetened with aspartame may be named as ''reduced sugar jelly'' (in accordance with § 130.10 and provided it meets the requirements for the nutrient content claim ''reduced sugar'' in § 101.60.(c)(5)) to distinguish it from the standardized food (jelly in § 150.140). Revoking the standards would provide consistency and uniformity among such products because all fruit spreads sweetened with non-nutritive sweeteners would be subject to the same requirements. This proposed rule also is consistent with FDA's proposed general principles for modernizing food standards (70 FR 29214; May 20, 2005). In addition, this proposal is consistent with Executive Order 12866 of September 30, 1993 (58 FR 51735), and Executive Order 13653 of January 21, 2011 (76 FR 3821), regarding improving Agency regulations, regulatory planning, and regulatory review.

Considering the information in this document, we are proposing to revoke the standards of identity for artificially sweetened jelly, preserves, and jams in §§ 150.141 and 150.161, respectively. We request comments on our tentative conclusion that these two standards of identity are obsolete and unnecessary, and that revoking them would promote honesty and fair dealing in the interest of consumers.

IV. Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. We tentatively conclude that this proposed rule is not a significant regulatory action as defined by the Executive Orders.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because we have tentatively concluded, as set forth in this document, that this rule would not generate significant compliance costs, we expect that this proposed rule, if finalized, would not have a significant economic impact on a substantial number of small entities. We request comment on the impact of this rule on small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $139 million, using the most current (2011) Implicit Price Deflator for the Gross Domestic Product. We do not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

A. Need for This Regulation

We are proposing to revoke the standards of identity for artificially sweetened jelly, preserves, and jams because we have tentatively concluded that these standards are obsolete and unnecessary. The current standards of identity for artificially sweetened jelly (§ 150.141) and artificially sweetened preserves and jams (§ 150.161) provide that they may be manufactured only with specific, non-nutritive artificial sweeteners: saccharin, sodium saccharin, calcium saccharin, or any combination thereof. These standards of identity, therefore, do not permit the use of newer, safe and suitable artificial sweeteners, such as aspartame.

The development of newer artificial sweeteners and the enactment of the NLEA have made the current standards of identity for artificially sweetened jelly, preserves, and jams obsolete. The NLEA and § 130.10 permit the modification of a traditional standardized food to achieve a nutrition goal, such as a reduction in calories. Section 130.10(d)(1) allows the addition of safe and suitable ingredients to a food named by use of a nutrient content claim and a standardized term when these ingredients are used to, among other things, add sweetness to ensure that the modified food is not inferior in performance characteristic to the standardized food, even if such ingredients are not specifically provided for by the relevant food standard. Standardized jelly and standardized preserves and jams products modified under § 130.10 must use nutrient content claims to communicate the

modified standardized product's nutritional profile to consumers. Under § 130.10, nonspecific, safe and suitable artificial sweeteners other than the three named in §§ 150.141 and 150.161 can be used to make reduced calorie or reduced sugar products labeled with a nutrient content claim that is established in FDA regulations. Revoking the standards of identity, as proposed, would mean that any product subject to §§ 150.141 and 150.161 would instead be subject to § 130.10. This would allow consumers to better compare any fruit spreads currently covered by §§ 150.141 and 150.161 with other spreads that are named and modified under the provisions of § 130.10. Revoking the standards would also provide manufacturers with the flexibility to use the three non-nutritive sweeteners listed in §§ 150.141 and 150.161, while naming their products under the provisions of § 130.10 using a defined nutrient content claim.

B. Regulatory Options

In assessing our regulatory options, we considered the option of taking no action and the option of taking the action proposed by this rule. We have tentatively concluded that the proposed rule, if finalized as proposed, would not be an economically significant regulatory action. We are not quantitatively estimating the benefits and costs of the regulatory alternatives to the proposed rule. In the following paragraphs, we qualitatively compare the costs and benefits of the regulatory options to the costs and benefits of the proposed rule.

1. The Option of Taking No Action

By convention, we treat the option of taking no new regulatory action as the baseline for determining the costs and benefits of the other options. Therefore, we associate neither costs nor benefits with this option. The consequences of taking no action are reflected in the costs and benefits associated with taking the action set forth in this proposed rule.

2. The Option of Taking the Proposed Action

If the proposed rule is finalized as proposed, and we revoke §§ 150.141 and 150.161, products that are currently subject to the requirements of these standards of identity would no longer be required to use the phrase ''artificially sweetened'' as part of their product name. Furthermore, revoking §§ 150.141 and 150.161 would mean that these same products would be permitted to bear nutrient content claims along with a standardized term (e.g., ''reduced calorie jelly'' or ''no sugar added jam''), in accordance with § 130.10.

The costs of this proposed rule, if finalized as proposed, would result from the need to relabel any existing jelly, preserves, and jams that conform with the standards in §§ 150.141 and 150.161. Any products currently manufactured in accordance with the standards in §§ 150.141 and 150.161 would have to be relabeled in order to comply with § 130.10 if this proposed rule is finalized as proposed. Our review of supermarket scanner data for the years 2001 through 2010, however, revealed that no such products are currently being sold. Sales for products manufactured in accordance with §§ 150.141 and 150.161 were last reported in 2002. A memorandum summarizing the results of this scanner data can be found in Reference 1. The data support our tentative conclusion that most manufacturers most likely have discontinued production of artificially sweetened jelly, preserves, and jams, presumably because of a perception that the phrase ''artificially sweetened'' is unattractive to consumers. The data also support our tentative conclusion that it is unlikely that this proposed rule would generate significant compliance costs due to the need to relabel products. In fact, removal of the artificially sweetened standards of identity would allow manufacturers to re-introduce products covered under §§ 150.141 and 150.161 to be sold as products covered by § 130.10. That is, they would be named by use of a nutrient content claim in conjunction with a standardized term (e.g., ''reduced calorie jelly'' or ''no sugar added jam''), in accordance with § 130.10. Therefore, we tentatively conclude that any relabeling compliance costs would be negligible.

We do not classify as anticipated costs of this proposed rule, if finalized as proposed, any expenses that firms might voluntarily incur if they choose to change their product formulas or manufacturing practices in response to the proposed revocation of the ''artificially sweetened'' standards of identity. Any such costs are not costs that would be required by this proposed regulatory change. Instead, these costs would result from voluntary business decisions made by manufacturers.

We tentatively conclude that the principal benefits that would result from the proposed rule, if finalized as proposed, derive from increased information and flexibility. Revoking the artificially sweetened standards of identity would provide producers of jelly, preserves, and jams with the flexibility to use saccharin, sodium saccharin, calcium saccharin, or any combination thereof, in their formulations without having to include the term ''artificially sweetened'' in their product names. Manufacturers could instead name their products in accordance with approved nutrient content claims, as provided for under § 130.10, thus providing consumers with additional information about the nutritional profile of affected products. Additionally, revoking §§ 150.141 and 150.161 would assist consumers in comparing products covered by the standards with other similar jelly, preserves, and jams manufactured in accordance with § 130.10.

Accordingly, while we do not quantify the costs and benefits of this proposed rule, we tentatively conclude that potential benefits will outweigh any potential costs associated with the rule.

C. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because compliance costs, if any, generated by this proposed rule are expected to be negligible, we tentatively conclude that this proposed rule, if finalized, would not have a significant economic impact on a substantial number of small entities. We request comment on this tentative conclusion. The following analysis, in conjunction with the discussion in this document, constitutes our initial regulatory flexibility analysis as required by the Regulatory Flexibility Act.

This proposed rule, if finalized, would revoke the standards of identity for artificially sweetened jelly, preserves, and jams. The revocation of these artificially sweetened standards of identity would provide small fruit spread firms with the flexibility to use the three non-nutritive sweeteners listed in §§ 150.141 and 150.161 and to name their products with FDA-defined nutrient content claims in accordance with § 130.10, as is currently done for fruit spread products manufactured with other non-nutritive sweeteners.

We do not classify as costs of this proposed rule any expenses that some small firms might voluntarily incur because they choose to change their product formulas or manufacturing practices in ways that would be permitted by the proposed rule, if finalized. As discussed in this document, any such costs would not be costs required by this proposal, if finalized. We request comments on the provisions of this proposed rule that might require small firms to change their current practices.

V. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires Agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.''

Section 403A of the FD&C Act (21 U.S.C. 343–1) is an express preemption provision. Section 403A(a) of the FD&C Act provides that ''no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—(1) any requirement for a food which is the subject of a standard of identity established under section 401 that is not identical to such standard of identity or that is not identical to the requirement of section 403(g).''

The express preemption provision of section 403A(a) of the FD&C Act does not preempt any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food (section 6(c)(2) of the NLEA, Public Law 101–535, 104 Stat. 2353, 2364 (1990)).

This proposed rule, if finalized, would impose requirements that fall within the scope of section 403A(a) of the FD&C Act.

VI. Environmental Impact

We have determined under 21 CFR 25.32(a) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Paperwork Reduction Act

We conclude that the provisions of this proposed rule are not subject to review by the Office of Management and Budget because they do not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

VIII. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov.* It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

IX. Reference

The following source has 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, and is available electronically at *http://www.regulations.gov.*

1. Memorandum to the file, from Cristina McLaughlin, FDA, November 26, 2012.

List of Subjects in 21 CFR Part 150

Food grades and standards, Fruits.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, and redelegated to the Associate Commissioner for Policy and Planning, it is proposed that 21 CFR part 150 be amended as follows:

PART 150—FRUIT BUTTERS, JELLIES, PRESERVES, AND RELATED PRODUCTS

1. The authority citation for 21 CFR part 150 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 343, 348, 371, 379e.

§§ 150.141 and 150.161 [Removed]

2. Remove §§ 150.141 and 150.161.

Dated: November 27, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29181 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2012–F–1100]

DSM Nutritional Products; Filing of Food Additive Petition (Animal Use)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition.

SUMMARY: The Food and Drug Administration (FDA) is announcing that DSM Nutritional Products has filed a petition proposing that the food additive regulations be amended to provide for the safe use of benzoic acid as a feed acidifier in swine feed.

DATES: Submit either electronic or written comments on the petitioner's request for categorical exclusion from preparing an environmental assessment or environmental impact statement by January 3, 2013.

ADDRESSES: Submit electronic comments to: *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Isabel W. Pocurull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6853, email: *isabel.pocurull@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 2273) has been filed by DSM Nutritional Products, 45 Waterview Blvd., Parsippany, NJ 07054. The petition proposes to amend Title 21 of the Code of Federal Regulations (CFR) in part 573 *Food Additives Permitted in Feed and Drinking Water of Animals* (21 CFR part 573) to provide for the safe use of benzoic acid as a feed acidifier in swine feed.

The petitioner has requested a categorical exclusion from preparing an environmental assessment or environmental impact statement under 21 CFR 25.32(r). Interested persons may submit a single copy of either electronic or written comments regarding this request for categorical exclusion to the Division of Dockets Management (see **DATES** and **ADDRESSES**). Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: November 29, 2012.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2012–29202 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0007]

30 CFR Part 1206

Notice of Meeting for the Indian Oil Valuation Negotiated Rulemaking Committee

AGENCY: Office of Natural Resources Revenue, Interior.

ACTION: Notice of meeting.

SUMMARY: The Office of Natural Resources Revenue (ONRR) announces additional meetings for the Indian Oil Valuation Negotiated Rulemaking Committee (Committee). The seventh through ninth meetings of the Committee will take place on January 15 and 16, March 5 and 6, and April 17 and 18, 2013, in Building 85 of the Denver Federal Center. The Committee membership includes representatives from Indian tribes, individual Indian mineral owner organizations, minerals industry representatives, and other Federal bureaus. The public will have the opportunity to comment between 3:45 p.m. and 4:45 p.m. Mountain Time on January 15, 2013; March 5, 2013; and April 17, 2013.

DATES: Tuesday and Wednesday, January 15 and 16, 2013; Tuesday and Wednesday, March 5 and 6, 2013; and Wednesday and Thursday, April 17 and 18, 2013. All meetings will run from 8:30 a.m. to 5:00 p.m. Mountain Time for all dates.

ADDRESSES: ONRR will hold the meetings at the Denver Federal Center, 6th Ave and Kipling, Bldg. 85 Auditorium, Lakewood, CO 80225.

FOR FURTHER INFORMATION CONTACT: Mr. Karl Wunderlich, ONRR, at (303) 231–3663; or (303) 231–3744 via fax; or via email *karl.wunderlich@onrr.gov.*

SUPPLEMENTARY INFORMATION: ONRR formed the Committee on December 8, 2011, to develop specific recommendations regarding proposed revisions to the existing regulations for oil production from Indian leases, especially the major portion requirement. The Committee includes representatives of parties that the final rule will affect. It will act solely in an advisory capacity to ONRR and will neither exercise program management responsibility nor make decisions directly affecting the matters on which it provides advice.

Meetings are open to the public without advanced registration on a space-available basis. Minutes of this meeting will be available for public inspection and copying at our offices in Building 85 on the Denver Federal Center in Lakewood, Colorado, or are available at *www.onrr.gov/Laws_R_D/IONR.* ONRR conducts these meetings under the authority of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2, Section 1 *et seq.*).

Dated: November 27, 2012.

Gregory J. Gould,

Director, Office of Natural Resources Revenue.

[FR Doc. 2012–29282 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–T2–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0619; FRL–9754–8]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Control of Stationary Generator Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Delaware for the purpose of amending Regulation No. 1102, Appendix A to clarify the permitting requirements for owners of stationary generators. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by January 3, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0619 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0619, Kathleen Cox Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0619. 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.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street,

Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Cathleen Van Osten (215) 814–2746, or by email at *vanosten.cathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: November 6, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–28828 Filed 12–3–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2012–0174]

RIN 2127–AI27

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: NHTSA is proposing to restore the side marker lamp requirements, for vehicles that are over 80 inches wide, and also less than 30 feet in overall length, to the Federal motor vehicle safety standard (FMVSS) on lamps, reflective devices and associated equipment. These requirements were modified when the agency published a final rule reorganizing the standard on December 4, 2007.

DATES: Comments to this proposal must be received on or before January 3, 2013.

ADDRESSES: You may submit comments, identified by the docket number in the heading of this document, by any of the following methods:

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

Regardless of how you submit comments, you should mention the docket number of this document.

You may call the Docket Management Facility at 202–366–9826.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: *For technical issues:* Mr. Markus Price, Office of Crash Avoidance Standards, NHTSA, 1200 New Jersey Avenue SE., West Building, Washington, DC 20590 (Telephone: (202) 366–0098) (Fax: (202) 366–7002).

For legal issues: Mr. Thomas Healy, Office of the Chief Counsel, NHTSA, 1200 New Jersey Avenue SE., West Building, Washington, DC 20590 (Telephone: (202) 366–2992) (Fax: (202) 366–3820).

SUPPLEMENTARY INFORMATION:

I. Background

NHTSA published a notice of proposed rulemaking (NPRM) on December 30, 2005 [1] to reorganize FMVSS No. 108, *Lamps, Reflective Devices and Associated Equipment,* and improve the clarity of the standard's requirements thereby increasing its utility for regulated parties. It was the agency's goal during the rewrite process to make no substantive changes to the requirements of the standard.

Based on the comments received in response to the NPRM, NHTSA published a final rule on December 4, 2007,[2] amending FMVSS No. 108 by reorganizing the regulatory text so that it provides a more straightforward and logical presentation of the applicable regulatory requirements; incorporating important agency interpretations of the existing requirements; and reducing reliance on third-party documents incorporated by reference. The preamble of the final rule again stated that the rewrite of FMVSS No. 108 was administrative in nature and would have no impact on the substantive requirements of the standard.

A. 2005 Administrative Rewrite NPRM

On December 30, 2005, NHTSA published a NPRM to amend FMVSS No. 108 by reorganizing the regulatory text so that it provides a more straightforward and logical presentation of the applicable regulatory requirements.[3] NHTSA explained in the 2005 NPRM that reorganizing the regulatory text and importing requirements from applicable SAE International standards incorporated by reference into the regulatory text would assist various stakeholders in easily finding and comprehending the requirements contained in the standard. The agency also explained that this rewrite was administrative in nature and that the proposed requirements were not being increased, decreased, or substantively modified. The proposed text for the photometric requirements for side marker lamps, read as follows:

S7.4.1.1 Inboard photometry. For each motor vehicle less than 30 feet in overall length and less than 2032 mm. in overall width, the minimum photometric intensity requirements for a side marker lamp may be met for all inboard test points at a distance of 15 feet from the vehicle and on a vertical plane that is perpendicular to the longitudinal axis of the vehicle and located midway between the front and rear side marker lamps.

The Agency provided an analysis within Appendix B of the NPRM showing that this requirement was derived from both the regulatory text of FMVSS No. 108 S5.1.1.3 and SAE J592e, Jul 1972, Table I, Footnote b.[4]

[1] 70 FR 77454, (Dec. 30, 2005).

[2] 72 FR 68234, (Dec. 4, 2007).

[3] 70 FR 77454, (Dec. 30, 2005).

[4] 70 FR at 77582, (Dec. 30, 2005).

B. 2007 Administrative Rewrite Final Rule

On December 4, 2007 NHTSA adopted a final rule that amended FMVSS No. 108 based on the 2005 NPRM with modifications that furthered the objectives of the rewrite to make the requirements easier to find and understand. In the final rule NHTSA reiterated that the rewrite of the standard was administrative in nature and the requirements and obligations were not being increased, decreased, or substantively modified.

In the preamble to the final rule, the agency explained that the inboard photometry requirements for side marker lamps (contained in paragraph S7.4.13.2) were based on paragraph S5.1.1.8 of the standard prior to the rewrite which applied to vehicles less than 30 feet in overall length.[5] Additionally, the agency explained that Table 1 of SAE J592e, detailing the photometric requirements of side marker lamps, also contains a footnote 'b' further limiting the vehicles to which reduced photometric requirements could be applied. Footnote 'b' applies to vehicles that are less than 80 inches (2 meters) wide. The agency concluded that this was an example in which the text of an incorporated SAE document applied limitation beyond those contained in the text of FMVSS No. 108. Based on this conclusion, the agency made no revisions to the proposed text for the inboard photometric requirements for side marker lamps.

C. 1980 Side Marker Final Rule

The agency did not cite within its analysis in the 2007 final rule the 1980 final rule that originally created the regulatory text as it applies to the inboard photometric requirements, with respect to vehicle size.[6] The 1980 final rule was in response to a petition from Chrysler Corporation which wanted to use a common side marker design for its single-wheeled (less than 80 inches wide) and its dual-wheeled (greater than 80 inches wide) pickup trucks. Prior to the 1980 final rule, FMVSS No. 108 required that photometric requirements for side marker lamps be met at test points 45 degrees outboard and inboard of the lateral center line passing through the lamps. However if a vehicle was less than 80 inches in overall width, paragraph S4.1.1.8 allowed photometric measurements of side marker lamps to be met for all inboard test points at a distance of 15 feet from the vehicle and on a vertical plane that is perpendicular to the longitudinal axis of the vehicle and located midway between the front and rear side marker lamps.

The 1980 final rule explained that a reduced photometric angle allowance is more appropriate for vehicles that are short (less than 30 feet) rather than for those that are narrow (less than 80 inches wide), noting that vehicles that are 30 feet or longer are required to have an intermediate side marker lamp located between the front and rear side makers. The 1980 final rule revised FMVSS No. 108 by deleting the words 80 inches in overall width and substituting 30 feet in overall length.

II. The Agency's Proposal

In July, separately, General Motors Company (GM) and Ford Motor Company, (Ford) met with NHTSA and stated their concern that the 1980 final rule may not have been properly considered in the 2007 rewrite of FMVSS No. 108. Both manufacturers further stated that their current dual-wheeled pickup truck side marker designs would require an extensive redesign in order to meet the requirements of the 2007 final rule when it becomes effective on December 1, 2012.[7] Finally, the agency received a petition for rulemaking from the Alliance of Automotive Manufacturers requesting the restoration of side marker requirements to match those in existence prior to the 2007 rewrite.

Based on a review of the 1980 final rule, NHTSA recognizes that paragraph S5.1.1.8 of the standard prior to the 2007 rewrite was intended to replace the SAE J592e, Table 1, footnote b, and not to supplement it. We are proposing to restore the photometric requirements for side marker lamps on vehicles less than 30 feet in length so that the requirements may be met for all inboard test points at a distance of 15 feet from the vehicle on a vertical plane that is perpendicular to the longitudinal axis of the vehicle and located midway between the front and rear side marker lamps, regardless of the width of the vehicle. We seek comment on our current analysis and the impacts that such a modification to the 2007 rule will have on manufacturers.

NHTSA believes that a common single-wheeled and dual-wheeled pickup truck side marker design expressed in Chrysler Corporation's original petition that led to the 1980 final rule still exists and is currently being utilized. Therefore, NHTSA will not pursue compliance actions against manufacturers that install side marker lamps on vehicles that are greater than 80 inches wide and shorter than 30 feet that fail to meet the 45 degree inboard photometric requirements of the 2007 final rule, provided that they meet the photometric requirements at a distance of 15 feet from the vehicle and on a vertical plane that is perpendicular to the longitudinal axis of the vehicle and located midway between the front and rear side marker lamps until this rulemaking is either terminated or adopted as a final rule. NHTSA will consider a manufacturer's certification to FMVSS No. 108 complete if the vehicle that is being certified meets the requirements for side marker lamps that were in place prior to the 2007 final rule.

III. Costs, Benefits, and the Proposed Compliance Date

Because this proposal only restores an existing requirement to the standard, the agency does not anticipate that there would be any costs associated with this rulemaking action. The agency expects some minor unquantifiable benefits to manufacturers due to their ability to continue to use side marker lamps of the same design on both narrow and wide vehicles under 30 feet in length. Accordingly, the agency did not conduct a separate economic analysis for this rulemaking.

The National Highway and Motor Vehicle Safety Act states that an FMVSS issued by NHTSA cannot become effective before 180 days after the standard is issued unless the agency makes a good cause finding that a different effective date is in the public interest. The agency has tentatively concluded that it is in the public interest for this proposed rule to become effective as soon as possible after the final rule is issued, should the agency decide to issue a rule, because such an effective date would allow regulated parties to avoid unnecessarily modifying the design of their side marker lamps. The agency proposes an effective date of 30 days after the date of issuance of the final rule should one be issued.

IV. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments. Your comments must not be more than 15 pages long.[8] We established this limit to encourage you to write your primary comments in a

[5] 72 FR 68243, (Dec. 4, 2007).

[6] 45 FR 45287, (July 3, 1980).

[7] 74 FR 58213, (Nov. 12, 2009).

[8] *See* 49 CFR 553.21.

concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit your comments by any of the following methods:

- *Federal eRulemaking Portal:* go to *http://www.regulations.gov.* Follow the instructions for submitting comments on the electronic docket site by clicking on ''Help'' or ''FAQ.''
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using an Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.[9]

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the Office of Management and Budget (OMB) and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.* DOT's guidelines may be accessed at *http://dmses.dot.gov/submit/DataQualityGuidelines.pdf.*

How can I be sure that my comments were received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation.[10]

In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the Docket by one of the methods set forth above.

Will the agency consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments received after that date. Therefore, if interested persons believe that any new information the agency places in the docket affects their comments, they may submit comments after the closing date concerning how the agency should consider that information for the final rule.

If a comment is received too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (e.g., the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. You may also read the materials at the Docket Management Facility by going to the street address given above under **ADDRESSES**. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

V. Regulatory Notices and Analyses

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed by the Office of Management and Budget under E.O. 12866, ''Regulatory Planning and Review.'' It is not considered to be significant under E.O. 12866 or the Department's regulatory policies and procedures.

B. Executive Order 13609: Promoting International Regulatory Cooperation

The policy statement in section 1 of Executive Order 13609 provides, in part:

> The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

NHTSA requests public comment on whether (a) ''regulatory approaches taken by foreign governments'' concerning the subject matter of this rulemaking exist and (b) the above policy statement has any implications for this rulemaking.

C. National Environmental Policy Act

We have reviewed this proposal for the purposes of the National Environmental Policy Act and determined that it would not have a significant impact on the quality of the human environment.

D. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' 13 CFR 121.105(a). 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.

NHTSA has considered the effects of the proposed rule under the Regulatory Flexibility Act. I certify that this proposed rule would not have a

[9] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

[10] *See* 49 CFR 512.

significant economic impact on a substantial number of small entities. This proposal amends the photometry requirements for side marker lamps on vehicles less than 30 feet in overall length that were changed during the administrative rewrite of the standard. This proposal would not significantly affect any entities because it would restore the requirements for side mark lamps that are currently contained in the standard. Accordingly, we do not anticipate that this proposal would have a significant economic impact on a substantial number of small entities.

E. Executive Order 13132 (Federalism)

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rulemaking would not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The final rule would 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.''

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which ''[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' (49 U.S.C. 30103(e)). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of such State common law tort causes of action by virtue of NHTSA's rules, even if not expressly preempted. This second way that NHTSA rules can preempt is dependent upon there being an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer, notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Order 13132 and 12988, NHTSA has considered whether this proposed rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (e.g., the language and structure of the regulatory text) and objectives of today's proposed rule and finds that this proposed rule, like many NHTSA rules, would prescribe only a minimum safety standard. As such, NHTSA does not intend that this proposed rule would preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's proposed rule. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard proposed here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

Executive Order 12988 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729; Feb. 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties file suit in court; (6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The issue of preemption is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

F. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, ''Civil Justice Reform,'' [11] NHTSA has considered whether this rulemaking would have any retroactive effect. This proposed rule does not have any retroactive effect.

G. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of a proposed or final rule that includes a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995).

Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows NHTSA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted.

This proposed rule is not anticipated to result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector in

[11] 61 FR 4729, (Feb. 7, 1996).

excess of $100 million annually. The cost impact of this proposed rule is expected to be $0. Therefore, the agency has not prepared an economic assessment pursuant to the Unfunded Mandate Reform Act.

H. Paperwork Reduction Act

Under the procedures established by the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. This proposed rule does not contain any collection of information requirements requiring review under the PRA.

I. Executive Order 13045

Executive Order 13045 [12] applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and (2) concerns an environmental, health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the proposed regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us. This proposed rule does not pose such a risk for children.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA to evaluate and use existing voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law (*e.g.,* the statutory provisions regarding NHTSA's vehicle safety authority) or otherwise impractical.

Voluntary consensus standards are technical standards developed or adopted by voluntary consensus standards bodies. Technical standards are defined by the NTTAA as ''performance-based or design-specific technical specification and related management systems practices.'' They pertain to ''products and processes, such as size, strength, or technical performance of a product, process or material.''

Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the Society of Automotive Engineers (SAE), and the American National Standards Institute (ANSI). If NHTSA does not use available and potentially applicable voluntary consensus standards, we are required by the Act to provide Congress, through OMB, an explanation of the reasons for not using such standards.

This proposal would not adopt or reference any new industry or consensus standards that were not already present in FMVSS No. 108.

K. Executive Order 13211

Executive Order 13211 [13] applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. If the regulatory action meets either criterion, we must evaluate the adverse energy effects of the proposed rule and explain why the proposed regulation is preferable to other potentially effective and reasonably feasible alternatives considered by NHTSA.

This proposal amends the photometry requirements for side marker lamps on vehicles less than 30 feet in overall length that were changed during the administrative rewrite of the standard. Therefore, this proposed rule will not have any adverse energy effects. Accordingly, this proposed rulemaking action is not designated as a significant energy action.

L. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

M. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this proposal.

N. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an organization, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov/privacy.html*

List of Subjects in 49 CFR Part 571

Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, NHTSA proposes to amend 49 CFR part 571 as set forth below.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

1. The authority citation for Part 571 is revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, 30166; delegation of authority at 49 CFR 1.95.

2. Section 571.108 is amended by revising paragraph S7.4.13.2 to read as follows:

§ 571.108 Standard No. 108; Lamps, reflective devices, and associated equipment.

* * * * *

S7.4.13.2 Inboard photometry. For each motor vehicle less than 30 feet in overall length, the minimum photometric intensity requirements for a side marker lamp may be met for all inboard test points at a distance of 15 feet from the vehicle and on a vertical plane that is perpendicular to the longitudinal axis of the vehicle and located midway between the front and rear side marker lamps.

* * * * *

Issued on: November 28, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–29245 Filed 11–29–12; 4:15 pm]

BILLING CODE 4910–59–P

[12] 62 FR 19885 (Apr. 23, 1997).

[13] 66 FR 28355 (May 18, 2001).

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2012–0073; 4500030113]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List *Phoenix dactylifera* 'Sphinx' (Sphinx Date Palm)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list *Phoenix dactylifera* 'Sphinx' (sphinx date palm) as endangered or threatened under the Endangered Species Act of 1973, as amended (Act). We find that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted. We find that the petition does not identify an entity that is listable under the Act. Therefore, we are not initiating a status review for the sphinx date palm in response to this petition.

DATES: The finding announced in this document was made on December 4, 2012.

ADDRESSES: This finding is also available on the Internet at *http://www.regulations.gov* at [Docket No. FWS–R2–ES–2012–0073]. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021–4951. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, Arizona Ecological Services Office (see **ADDRESSES**), by telephone at (602) 242–0210, or by facsimile to (602) 242–2513. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time that the petition was submitted to us. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and to publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information for a listable entity was presented, we are required to promptly conduct a species status review, which we subsequently summarize in a 12-month finding.

Petition History

On July 11, 2011, we received a petition dated July 7, 2011, from Richard C. Malone, on behalf of the Mountgrove Property Owners Association (petitioner), requesting that the single existing grove of *Phoenix dactylifera* 'Sphinx' (sphinx date palm) be listed as endangered under the Act. For the purposes of this document, we will hereafter refer to *Phoenix dactylifera* 'Sphinx' as the sphinx date palm.

The petition discusses the origin and taxonomy of the sphinx date palm, and provides details of its life history. The petitioner mentions threats to the entity, and provides brief examples of potential population declines. The petition also discusses the petitioners' views on the advantages of protection for the sphinx date palm for research, education, propagation, as well as the economic advantages of the grove's production of high-quality fruit. The petition includes citations for various references and resources used to support the statements in the petition.

The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). This finding addresses the petition. Below, we address the petitioner's request to list *Phoenix dactylifera* 'Sphinx' as endangered.

Species Information

All information in this section is from the petition. The Service has no information in its files on the sphinx date palm beyond that presented in the petition.

The grove in Phoenix consists of 450 mature trees and is the only known stand (contiguous area occupied by trees of similar type) of sphinx date palm. The grove is located in the Mountgrove district, south of Lafayette Boulevard, north of the Arizona canal, bordered by 46th Place on the west and 47th place on the east in the Arcadia area of central Phoenix. There are a few additional individual palms in the Phoenix Metro and Yuma areas of Arizona, and two sphinx date palms are reported to exist in California.

The petitioner does not provide descriptive information specific to the sphinx cultivar. They do provide information for the date palm (*Phoenix dactylifera* Linnaeus), the taxon from which the sphinx date palm was cultivated. The date palm is an erect palm with solitary or clustered stems. It can reach heights of 30 to 35 meters (m) (100 to 115 feet (ft)) and grow to diameters of 50 centimeters (cm) (20 inches (in)). The trunk is covered from the ground up with overlapping diamond-shaped, woody leaf bases. Feather-like green-gray pinnae (leaves) are arranged irregularly on long (3 to 5 m (9 to 16 ft)) petioles (stalk or stem that connects the pinnae to the plant). Inflorescences (arrangements or clusters of multiple flowers on a stem) have waxy, cream-colored flowers and grow to 1 m (3.3 ft) on male plants and 2 m (2.6 ft) on female plants (these palms are dioecious; that is, individual palms contain either male reproductive parts or female reproductive parts).

The sphinx date palm has a lifespan of 100 to 130 years. Reproduction in the cultivar is vegetative (asexual; only one plant is involved and the offspring is genetically identical to its parent). Propagation is accomplished by removing offshoots (lateral shoot from the main stem of the plant) from mature palms. These offshoots must contain their own root ball (main mass of roots at the base of a plant). Propagation in this slow-growing cultivar is a long process, spanning 3 generations of 8 years each. Approximately 25 years were required to propagate the 450 offshoots needed to plant the grove. Pollination, and thus fruit production, is fully dependent on human intervention as male palms are not sufficiently numerous or near to date-bearing (female) palms for pollination to occur by natural means.

It is believed that Southwest Asia is the native region of the sphinx date palm's parent taxon, the date palm; however, its origin is not known with certainty. The sphinx date palm was

described in the late 1910s or early 1920s from a grove in Phoenix, Arizona, where it had been propagated from a seedling around 1917. The sphinx cultivar is thought to be a chance hybrid between Hayani (a variety of date palm) and another heirloom (a plant cultivated for multiple human generations and typically particular to a given region). Currently this entity is known only from cultivation.

The petition consistently refers to the sphinx date palm as a cultivar of *P. dactylifera.* The International Code of Nomenclature for Cultivated Plants defines a cultivar as ''an assemblage of plants that (a) has been selected for a particular character or combination of characters, (b) is distinct, uniform, and stable in these characters, and (c) when propagated by appropriate means, retains those characters'' (Art. 2.3). It further notes that cultivars vary in origin and modes of reproduction, and that plants ''which are asexually propagated from any part of a plant * * * may form a cultivar.'' By this definition, and as indicated in the petition, the sphinx date palm is a cultivar of the date palm (*Phoenix dactylifera* Linnaeus).

Previous Federal Actions

There have been no previous Federal actions for this entity.

Evaluation of Listable Entity

Upon receipt of a petition to list, delist, or reclassify a species, we are to consider whether such petition ''clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved'' (50 CFR 424.14(b)(2)(i)). Under the Act, a species is defined as including 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 (16 U.S.C. 1532).

The sphinx date palm, like many vascular plants, is of hybrid origin. We acknowledge that hybridization is an important mechanism of plant speciation, as hybrids can display new phenotypes and promote adaptive evolution. We also acknowledge that it is conceivable that over time, the sphinx date palm could become sufficiently reproductively isolated to accrue substantial genetic distinction from its parent species to become a species itself. At this time, however, Phoenix's grove of sphinx date palms is a collection of individuals which does not represent a cohesive population entity with an evolutionary lineage separate from its parent species. In modern taxonomic practice, entities such as the sphinx date palm hybrid do not constitute a species.

The sphinx date palm is a cultivar. Cultivars are not eligible for protection under the Act. Speaking to this distinction, there has been much litigation on the subject of the intent of the relative ambiguity of the term ''species'' in the Act. In *Trout Unlimited* v. *Lohn* (559 F. 3d 946 9th Cir. 2009), the 9th Circuit Court of Appeals found that ''the [Act's] primary goal is to preserve the ability of natural populations to survive in the wild.'' The Act (16 U.S.C. 1531(b)) states''[t]he purposes of this [Act] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species * * *.'' Regarding this provision, the court found ''[t]hat the purpose of the [Act] is to promote populations that are self-sustaining without human interference can be deduced from the statute's emphasis on the protection and preservation of the habitats of endangered and threatened species.'' The court also points to the use in the statute of the term [artificial] propagation as merely a means ''to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary'' (16 U.S.C. 1532(3)). *Trout Unlimited* v. *Lohn,* therefore, interprets the Act as a statutory means to protect animal and plant resources that are natural and self-sustaining. The sphinx date palm, as a cultivar whose propagation depends fully on human intervention, does not meet these criteria.

The Act defines a species as including ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' (16 U.S.C. 1532 (16)). The Service considers plant varieties and subspecies to be essentially identical (''Determination that 11 Plant Taxa are Endangered Species and 2 Plant Taxa are Threatened Species'', 43 FR 17910). Cultivar is a taxonomic level below that of subspecies and variety, and, therefore, cultivars are not listable entities as defined in the Act.

We conclude that the sphinx date palm is not a listable entity as defined under the Act. Therefore, after a review of the guiding regulations, we conclude that the petitioned entity does not constitute a ''listable entity'' and cannot be listed under the Act.

The District Court in the District of Oregon in their determination for *Alsea Valley Alliance* v. *Evans* (161 F. Supp. 2d 1154 D. Ore.), referenced cases in which it was found that ''[l]isting distinctions below that of subspecies or a DPS of a species are not allowed under the [Act]'' (*Southwest Center,* 980 F. Supp at 1085). The court noted that the ''term 'distinct population segment' was amended in the [Act] in 1978 so that it would 'exclude taxonomic [biological] categories below subspecies [smaller taxa] from the definition'' (H.R. CONF. REP. No. 95–1804, at 17 (1978) *reprinted in* 1978 U.S.C.C.A.N. 9485, 14855). Under the definition in the Act, and as analyzed above, the sphinx date palm does not meet the criteria for species or subspecies.

We conclude that the sphinx date palm is not a valid taxonomic entity and does not meet the definition of a species or a subspecies under the Act. Therefore, after a review of the guiding regulations and litigated precedents, we conclude that the petitioned entity does not constitute a ''listable entity'' and cannot be listed under the Act.

Finding

In summary, the petition does not present substantial information indicating that listing the Sphinx date palm as endangered is warranted, because the entity as petitioned is not listable under the Act.

Authors

The primary authors of this notice are the staff members of the Southwest Region of the U.S. Fish and Wildlife Service (see **ADDRESSES**).

Authority

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

Dated: September 5, 2012.

Rowan W Gould,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2012–29153 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2012–0079; 4500030113]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Prairie Gray Fox, the Plains Spotted Skunk, and a Distinct Population Segment of the Mearn's Eastern Cottontail in East-Central Illinois and Western Indiana as Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the prairie gray fox (*Urocyon cinereoargenteus ocythous*), the plains spotted skunk (*Spilogale putorius interrupta*), and a distinct population segment (DPS) of the Mearn's eastern cottontail (*Sylvilagus floridanus mearnsi*) in Illinois and western Indiana as endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition presents substantial scientific or commercial information that listing the prairie gray fox and the plains spotted skunk may be warranted. Therefore, with the publication of this notice, we initiate a review of the status of the prairie gray fox and the plains spotted skunk to determine if listing either of these subspecies is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding these subspecies. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

We also evaluated whether the petition presents substantial information to indicate whether or not the Mearn's eastern cottontail in east-central Illinois and western Indiana qualifies as a DPS that may be warranted for listing. Based on our review, we conclude that the petition does not provide substantial information indicating that population of Mearn's eastern cottontail in east-central Illinois and western Indiana is a listable entity under the Act. Because the petition does not present substantial information indicating that the population of Mearn's eastern cottontail in east-central Illinois and western Indiana may be a listable entity, we did not evaluate whether or not the information contained in the petition regarding threats to that population was substantial. We are not initiating a status review in response to this petition for Mearn's eastern cottontail in east-central Illinois and western Indiana. However, we ask the public to submit to us any new information that becomes available concerning the status of, or threats to, the Mearn's eastern cottontail or its habitat at any time.

DATES: The finding announced in this document was made on December 4, 2012.

We request that we receive information on or before February 4, 2013. The deadline for submitting an electronic comment using the Federal eRulemaking Portal (see **ADDRESSES** section, below) is 11:59 p.m. Eastern Time on this date. After February 4, 2013, you must submit information directly to the Division of Policy and Directives Management (see **ADDRESSES** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information on the prairie gray fox and the plains spotted skunk, by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R3–ES–2012–0079, which is the docket number for this action. Then click on the Search button. You may submit a comment by clicking on ''Comment Now!.''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R3–ES–2012–0079; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept email or faxes. We will post all information we receive on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R3–ES–2012–0079. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Rock Island, Illinois Ecological Service Field Office, 1511 4th Ave., Moline, IL 61265. Please submit any new information, materials, comments, or questions concerning the finding on the prairie gray fox and the plains spotted skunk to the Rock Island, Illinois Ecological Services Field Office at the above address.

FOR FURTHER INFORMATION CONTACT:

Prairie Gray Fox and Mearn's Eastern Cottontail

Richard Nelson, Field Supervisor, Rock Island, Illinois Ecological Service Field Office, 1511 4th Ave., Moline, IL 61265; by telephone at 309–757–5800; or by facsimile at 309–757–5804. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

Plains Spotted Skunk

Amy Salveter, Field Supervisor, Missouri Ecological Services Field Office, 101 Park DeVille Drive, Suite A, Columbia, MO 65203; by telephone at 573–234–2132; or by facsimile at 573–234–2181. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly initiate review of the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the prairie gray fox and the plains spotted skunk from governmental agencies, Native American tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) Information regarding overharvest and disease as potential ongoing threats to the plains spotted skunk and prairie gray fox.

(4) Information regarding the impacts of pesticides on food availability for the plains spotted skunk.

(5) Information regarding the impacts of predation by coyotes and bobcats on the prairie gray fox.

If, after the status review, we determine that listing the prairie gray fox or the plains spotted skunk is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act) under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, we also request data and information on:

(1) What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range currently occupied by the species;

(2) Where these features are currently found;

(3) Whether any of these features may require special management considerations or protection;

(4) Specific areas outside the geographical area occupied by the species that are ''essential for the conservation of the species''; and

(5) What, if any, critical habitat you think we should propose for designation if one or both of the species are proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

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. Section 4(b)(1)(A) of the Act directs that determinations 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.''

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly initiate a species status review, which we subsequently summarize in our 12-month finding.

Petition History

On July 18, 2011, we received a petition from Mr. David Wade and Dr. Thomas Alton, requesting that five or six entities of grassland thicket species or subspecies be listed as endangered or threatened under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioners, required at 50 CFR 424.14(a). However, while reviewing the petition, we determined that the petition did not clearly state which species were included in the petition. Therefore, in a September 2, 2011, letter to the petitioners, we provided the petitioners with an opportunity to revise the petition to clearly identify the petitioned entities, which the petitioners accepted in a September 12, 2011, response to our letter. On January 23, 2012, we received a revised petition from Mr. David Wade and Dr. Thomas Alton, requesting that the prairie gray fox (*Urocyon cinereoargenteus ocythous*), the plains spotted skunk (*Spilogale putorius interrupta*), and a DPS of the Mearn's eastern cottontail (*Sylvilagus floridanus mearnsi*) in Illinois and western Indiana be listed as endangered or threatened species under the Act. In a January 30, 2012, letter to the petitioners, we responded that we reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted as each of the three petitioned species has extant populations in several States and most of the threats mentioned in the petition are not immediate in nature. This finding addresses the petition.

Previous Federal Action(s)

To date, no Federal actions have been taken with regard to the prairie gray fox, the plains spotted skunk, or the Mearn's eastern cottontail.

Species Information

Plains Spotted Skunk (*Spilogale putorius interrupta*)

The plains spotted skunk is one of three recognized subspecies of the eastern spotted skunk (*Spilogale putorius*); the other two recognized subspecies are *S. p. ambarvalis* (no common name) and *S. p. putorius* (no common name) (Kinlaw 1995, p. 1). Spotted skunks are members of the Order Carnivora and Family Mephitidae. Eastern spotted skunks are distinct from western spotted skunks (*S. gracilis*) based on reproductive and geographic isolation (Kinlaw 1995, p. 1). Little variation in skull or body measurements exists among the plains spotted skunk subspecies (Van Gelder 1959, p. 270). The plains spotted skunk can be distinguished from other subspecies by the reduced amount of white on its body, particularly the entirely black tail (Van Gelder 1959, pp. 269–270). We accept the characterization of the plains spotted skunk as a subspecies because of morphological distinction of its color pattern from other subspecies of eastern spotted skunk (Van Gelder 1959, pp. 269–270). We consider information that refers to the eastern spotted skunk where it occurs in the delineated range of the plains spotted skunk to represent the plains spotted skunk.

Both the plains spotted skunk and striped skunk (*Mephitis mephitis*) have contrasting black and white markings;

however, they are easily distinguished by size (spotted skunks are substantially smaller) and color pattern. The plains spotted skunk is a small, slender mammal with short legs and a tail with prominent, long hairs. Body weight ranges from 300 to 1,300 grams (g) (0.75 to 2.75 pounds (lb)), and total length ranges from 36 to 61 centimeters (cm) (14 to 23.75 inches (in)) (Hazard 1982, p. 143; Schwartz and Schwartz 2001, p. 325). In contrast, the striped skunk's average weight is 6,300 g (14 lb), and its length is 80 cm (31.5 in). The plains spotted skunk is black overall with narrow, white stripes and spots. Four stripes on the neck, back, and sides run longitudinally from the head to the middle of the body. The four white stripes break into patches or spots on the hindquarters. There is a white spot on the forehead and in front of each ear (Hazard 1982, p. 143; Schwartz and Schwartz 2001, p. 325).

Habitat associations of this subspecies are likely influenced by whether it is using a natural or human-dominated landscape. The subspecies lives in a wide range of habitats including forests, prairies, brushy areas, farmyards, and cultivated land (Crabb 1948, pp. 212–215; Edmonds 1974, p. 12; Kinlaw 1995, p. 4; Schwartz and Schwartz 2001, p. 327). Regardless of habitat type used, the plains spotted skunk requires extensive vegetative cover. Brushy borders along fields, fence rows, farm buildings, wood piles, heavily vegetated gullies, leaf litter, or downed logs may provide the required extensive cover, which primarily provides protection from predators (Kinlaw 1995, p. 4; Schwartz and Schwartz 2001, p. 327; Lesmeister 2008, pp. 1517–1518). Nowak (1999, p. 734) notes that spotted skunks avoid dense forests; however, plains spotted skunks are more likely to occur where the landscape is composed of a high proportion of forest cover (Hackett 2008, pp. 52–54), and they use oak-hickory forests more than old fields or glades (McCullough 1983, pp. 40–43). Within forest habitats studied by McCullough (1983, p. 41) and Lesmeister (2007, p. 21), skunks used young, dense forest stands or stands with downed logs and slash more often than mature stands with open understories and clean forest floors. Spotted skunks also require an early successional (process by which ecological communities undergo changes following disturbance) component to their habitat to provide cover and denning areas (Lesmeister 2007, p. 56; Lesmeister *et al.* 2009, pp. 23–24).

Dens can be located above ground or below ground. In natural landscapes, plains spotted skunks den in grassy banks and crevices or cavities under rock piles, hollow logs, and stumps (Kinlaw 1995, p. 4; Schwartz and Schwartz 2001, p. 327). In landscapes dominated by humans, they den in shelterbelts (row of trees planted to provide shelter from wind), fencerows, farm buildings, haystacks, woodpiles, or corn cribs (Crabb 1948, pp. 214–215; Hazard 1982, p. 144; Jones *et al.* 1983, p. 302; Kinlaw 1995, p. 4; Schwartz and Schwartz 2001, p. 327). Plains spotted skunks might dig their own dens, but they often use burrows excavated by other animals, such as Franklin's ground squirrel (*Spermophilus franklinii*), thirteen-lined ground squirrel (*S. tridecemlineatus*), woodchuck (*Marmota monax*), long-tailed weasel (*Mustela frenata*), striped skunk, and woodrats (*Neotoma* spp.) (Crabb 1948, p. 212; Kinlaw, 1995, p. 4; Schwartz and Schwartz 2001, p. 327). Crabb (1948, p. 212) noted that skunks required dens that excluded light and afforded protection from inclement weather and predators. Dens are used by one or more members of the local population of plains spotted skunks, and individuals might den together during cold winter months (Schwartz and Schwartz 2001, p. 327).

During most of the year, individual plains spotted skunks remain in an area of approximately 40 hectares (ha) (98.8 acres (ac)), but the home range can vary based on habitat quality and food availability (Schwartz and Schwartz 2001, p. 327). The home range can vary seasonally as well; in spring, the range of males can expand to as much as 1,040 ha (2,569.9 ac) (Schwartz and Schwartz 2001, p. 327). In Missouri, home ranges varied from 55 to 4,359 ha (135.9 to 10,771.3 ac) (McCullough 1983, p. 34). Lesmeister *et al.* (2008, p. 21) reported that home ranges in the Ouachita Mountains of Arkansas varied by gender and season. The home ranges of males (222 to 1,824 ha (548.6 to 4,507.2 ac)) in the spring were 6.4 times larger than those of females (31 to 192 ha (76.6 to 474.4 ac)). Likewise, male home ranges were at least 2.5 times larger than females' ranges in the winter and summer, but not autumn. Overall, home range size varied from 19 to 1,824 ha (47.0 to 4,507.2 ac) for males and 21 to 192 ha (51.9 to 474.4 ac) for females (McCullough 1983, p. 34; Lesmeister *et al.* 2008, p. 21). Crabb (1948, p. 218) found that spotted skunks on an agricultural landscape in Iowa occurred at a density of approximately 5 skunks per square kilometer (km^2) (13 skunks per square mile (mi^2)).

The plains spotted skunk is omnivorous, but is primarily an insectivore and feeds on insects during all seasons of the year (Kinlaw 1995, p. 4). The proportion of different types of food items varies seasonally. Arthropods are the major dietary component during summer and autumn, with grasshoppers, crickets, ground beetles, and scarab beetles being the preferred food (Schwartz and Schwartz 2001, p. 328). In the winter, small mammals, including eastern cottontail (*Sylvilagus floridanus*), voles (*Microtus pennsylvanicus* and *M. ochrogaster),* and rats (*Rattus norvegicus*), are the dominant food source (Chapman and Feldhamer 1982, p. 668; Kinlaw 1995, p. 4). Other foods include birds, eggs, wild ducks that are injured or killed by hunters, fruit, corn, lizards, snakes, crayfish, salamanders, and mushrooms (Schwartz and Schwartz 2001, p. 328).

The plains spotted skunk currently (and historically) occurs between the Mississippi River and the Continental Divide from Minnesota to the Gulf of Mexico (Kinlaw 1995, p. 3). Historical records indicate that the plains spotted skunk was broadly distributed across its range through the early to mid-1900s and was one of the most common mesocarnivores (a carnivore whose diet consists of 50 to 70 percent meat) where suitable habitat occurred (Crabb 1948, p. 203; Choate *et al.* 1973, p. 226; Tyler and Lodes 1980, p. 102; McCullough 1983, p. 19; Wires and Baker 1994, p. 1; Schwartz and Schwartz 2001, p. 327). Likewise, harvest records in the Midwest indicate that population levels in most States were at their highest through the mid-1900s, during which harvest in most years exceeded 100,000 plains spotted skunks (Novak *et al.* 1987, pp. 223–226).

More contemporary records consistently show that the plains spotted skunk underwent declines in the mid- to late 1900s (Choate *et al.* 1973, pp. 227–230; McCullough 1983, pp. 19–25; Gompper and Hackett 2005, p. 196; Nilz and Finck 2008, pp. 5–14). Declines occurred first in Missouri and Oklahoma in the late 1930s and early 1940s, followed by Nebraska in the mid-1940s, and Kansas, Iowa, and Minnesota in the mid- to late 1940s (Wires and Baker 1994, p. 1; Gompper and Hackett 2005, p. 199). Harvest numbers for the plains spotted skunk from 1934–1935 were 248,062 (Service calculated from Novak *et al.* 1987, pp. 223–226, for States in the range of the subspecies). More recent harvest information for 1975–1976 showed that only 1,476 plains spotted skunks were harvested (Service calculated from Novak *et al.* 1987, pp. 223–226, for States in the range of the subspecies), which is less than 1 percent of the 1934–1935 harvest.

Gompper and Hackett (2005, p. 199) demonstrated rangewide declines in the plains spotted skunk based on harvest records and found that the decline was not an artifact of reduced trapper effort or demand for spotted skunk pelts.

The subspecies likely still occupies the same habitat types and occurs in all the States within its historical range (Arkansas, Colorado, Minnesota, Missouri, Nebraska, Oklahoma, South Dakota, Texas, and Wyoming), but in lower abundance (Choate *et al.* 1973, p. 231). Range fragmentation and reduced abundance of the subspecies is recorded through trapper records, fur buyer surveys, public surveys, and focused field surveys (Hammond and Busby 1994, pp. 1–4; Wires and Baker 1994, pp. 3–7); these records also document locations where viable populations likely occur (*e.g.,* Ozark Plateau (McCullough 1983, p. 52; Hackett 2005, pp. 51–52) and Ouachita Mountains (Lesmeister *et al.* 2010, pp. 54–58)).

Prairie Gray Fox (*Urocyon cinereoargenteus ocythous*)

Gray fox (*Urocyon cinereoargenteus*) are mammals of the Order Carnivora and Family Canidae. *U. c. ocythous* is a recognized subspecies of the gray fox. In this finding, we refer to the subspecies *U. c. ocythous* as the prairie gray fox, as this is the common name the petition uses, although there is no recognized common name for this subspecies. The prairie gray fox was first described by Bangs in 1899 (Fritzell and Haroldson 1982, p. 1; Hall 1981, p. 943). We accept the characterization of the prairie gray fox as a subspecies of the gray fox as noted in Chapman and Feldhammer (1982, p. 475), Fritzell and Haroldson (1982, p. 1), and Hall (1981, p. 943). Few references refer specifically, by name, to *U. c. ocythous;* therefore, we consider information available for the gray fox within the delineated prairie gray fox range to represent the petitioned subspecies.

The following characteristics describe the gray fox species in general, as they are similar to the characteristics of the prairie gray fox subspecies. The gray fox has a distinguishable appearance with gray fur on its upper body; reddish fur on its neck, the sides of the belly, and inner legs; and white on the rest of its underbody. The guard hairs (long, course hairs that protect soft underfur) are banded with white, gray, and black, which gives the fox's fur a grizzled appearance. It has a black tipped tail and a coarse dorsal mane of black-tipped hairs at the base of its tail (Chapman and Feldhammer 1982, p. 476; Fritzell and Haroldson 1982, p. 1; Hall 1981, p. 942; Hamilton and Whitaker 1979, p. 270). Gray fox are also distinguished from other canids by their widely separated temporal ridges that come together posteriorly in a U-shaped form (Chapman and Feldhammer 1982, p. 476; Fritzell and Haroldson 1982, p. 1; Hall 1981, p. 942; Hamilton and Whitaker 1979, p. 270). Gray fox are smaller than the red fox *(Vulpes vulpes),* with a total length of 80 to 112.5 centimeters (cm) (31.5 to 44. 3 inches (in)), weight of 3 to 7 kilograms (6.6 to 15.4 lb), and males are slightly larger than females (Fritzell and Haroldson 1982, p. 1). The size of gray fox varies with geographic location, with individuals in the northern part of the range larger than those in the south (Hamilton and Whitaker 1979, p. 270).

Gray fox are generally associated with wooded habitats (Haroldson and Fritzell 1984, p. 226; Fritzell and Haroldson 1982, p. 3; Hamilton and Whitaker 1979, p. 270). Gray fox use oak-hickory forests almost exclusively in southern Missouri, and are frequently found in dense stands of young trees during the day (Haroldson and Fritzell 1984, pp. 226–227). This study noted, however, that forest habitat was the most abundant habitat type in their study area and the importance of wooded habitat is dependent on its availability, and will be used disproportionately to its abundance when wooded habitat is scarce (Haroldson and Fritzell 1984, p. 226). Gray fox use woody cover in deciduous or pine forest, but they also use edge habitat and early old-fields (open habitats that are transitioning from field to forest and are dominated by forbs, grass, and shrubs and small trees) (Fritzell and Haroldson 1982, p. 3). The gray fox tends to select against agricultural areas (Fritzell and Haroldson 1982, p. 3). Cooper (2008, p. 24) found a greater relative abundance of gray fox in Illinois, where there was a greater dispersion of grassland patches into forested areas, and lower densities in areas with larger patches of agricultural fields. A notable characteristic of the gray fox is their ability to climb trees; gray fox are capable of climbing a tree trunk using their claws to grasp and pull themselves up or bounding from branch to branch (Fritzell and Haroldson 1982, p. 5; Hamilton and Whitaker 1979, p. 270). This behavior is used during foraging, predator avoidance, or resting (Fritzell and Haroldson 1982, p. 5).

Gray fox dens are usually located in wooded areas and include underground burrows, cavities in trees or logs, wood-piles, and rock outcrops or cavities under rocks (Jones *et al.* 1985, p. 264; Fritzell and Haroldson 1982, p. 189). Gray fox will use dens year-round, but predominantly when young are born. Gray fox mate at different times of the year, depending on their geographic location (Chapman and Feldhammer 1982, p. 476). For example, for the prairie gray fox, breeding lasts from late January through February in southern Illinois and from late January through March in Wisconsin (Fritzell and Haroldson 1982, pp. 3–4). The average litter size for the gray fox is 3.8 pups per female, with litters ranging from 1 to 7 pups (Fritzell and Haroldson 1982, p. 4).

The home range of the gray fox varies depending on the season and geographic location (Fritzell and Haroldson 1982, p. 4). Males in southern Illinois were found to have a home range of 136 ha (336.1 ac), and females a home range of 107 ha (264.4 ac) (Fritzell and Haroldson 1982, p. 4). A study by Haroldson and Fritzel (1984, p. 225) conducted in a Missouri oak-hickory forest indicated that nightly range use by gray fox was a fraction of the total monthly range. They also found composite (multiple month) home ranges (average 676 (+/−) 357 ha (1,670 (+/−) 882 ac)) are much larger than the individual month home ranges (average 299 (±) 155 ha (738 (±) 383 ac)) (Haroldson and Fritzel 1984, p. 223). Haroldson and Fritzel (1984, p. 226) also indicated that gray fox home ranges vary among populations. Gray fox are more active at night, with activity at sunrise sharply decreasing and increasing again at sunset (Haroldson and Fritzell 1984, p. 224).

The gray fox is primarily an opportunistic carnivore, with mammals composing most of its diet in the Midwest (Fritzell and Haroldson 1982, p. 4). According to Chapman and Feldhammer (1982, p. 480), the gray fox's diet depends highly on what is available. Although rabbits have been found to be one of their primary food sources, they routinely feed on small rodents and other mammals, birds, and reptiles (Jones *et al.* 1985, p. 264; Fritzell and Haroldson 1982, p. 4). In the summer, invertebrates have been found to be more important food items, while in the fall, the gray fox consumes more fruit and sometimes corn (Chapman and Feldhammer 1982, p. 476; Fritzell and Haroldson 1982, p. 4; Hamilton and Whitaker 1979, p. 272).

The plains gray fox ranges primarily west of the Mississippi and Illinois Rivers through portions of the central plain States. The historical range for this subspecies included western Wisconsin, Minnesota, Iowa, Missouri, Arkansas, and the eastern sections of North and South Dakota, Nebraska, Kansas, and Oklahoma in the United States, and the

southernmost sections of Ontario and Manitoba, Canada (Hall 1981, p. 944).

The petition asserts that prairie gray fox numbers have declined in many of the States within its range (Petition, unpaginated). The petition mentions that the Department of the Interior used scent stations to track the relative abundance of several predators, including the gray fox, in many western States. The average Statewide indices between the 1980 and 1981 surveys showed a decline in Minnesota from 2.4 to 1.9, and in Oklahoma from 2.0 to 1.0 (U.S. Department of the Interior 1981, pp. 42, 70; U.S. Department of the Interior 1980, pp. 44, 72). The Statewide indices for Kansas, Nebraska, North Dakota, South Dakota, and Wisconsin were zero in both 1980 and 1981 (U.S. Department of the Interior 1981, pp. 38, 52, 66, 78, 98; U.S. Department of the Interior 1980, pp. 40, 54, 68, 80, 100). There was an increase in the numbers of gray fox between 1980 and 1981 in Illinois; however, all of the scent stations recorded were outside the range of the prairie gray fox subspecies, so they were likely a different subspecies (U.S. Department of the Interior 1981, p. 36; U.S. Department of the Interior 1980, p. 36). The petitioners cite these numbers when asserting that the prairie gray fox was rare to absent in the plains States by 1980 (Petition, unpaginated). The petitioners cite the Minnesota Department of Natural Resources' annual carnivore scent station survey as including gray fox in their ''fox'' numbers (Petition unpaginated); however we can find no indication in this reference that gray fox were counted during those surveys (Erb 2010, p. 43–57).

The Missouri Department of Conservation's annual Archer's Index to Furbearer Populations shows a 75 percent decline in gray fox numbers since 1983 (petition unpaginated; Blair 2011, p. 31). The petitioners state that the number of gray fox in Wisconsin, as observed by the Wisconsin Department of Natural Resources during routine field work, was comparable to the badger, which is listed by the State as endangered (Petition, unpaginated). The report does indicate that the number of gray fox observed in 2010 was 0.78 observations per respondent, which is higher than the long-term average (during the 23 years of the study) of 0.42 observations per respondent (Kitchell 2010, unpaginated). The number of gray fox counted during the annual Bowhunter Observation Survey in Arkansas have been low but stable from 2005–2010 (Petition, unpaginated; Sasse 2011, unpaginated). The numbers of gray fox counted during the Iowa 2010 Bowhunter Observation Survey were fewer than the margin of error for some of the regions and showed an overall decline in the State (Petition, unpaginated; Roberts and Clark 2011, unpaginated). The petitioners attribute this decline to the loss of preferred habitat and the increase in agricultural habitat, which gray fox avoid (Petition, unpaginated; Cooper 2008, p. 24; Fritzell and Haroldson 1982, p. 189). Although the evidence included in the petition and within our files shows a decline in the population of the prairie gray fox for several States, there are no studies included that specifically indicate what the population of the prairie gray fox was prior to human settlement or how much the population has declined rangewide.

Mearn's Eastern Cottontail (*Sylvilagus floridanus mearnsi*)

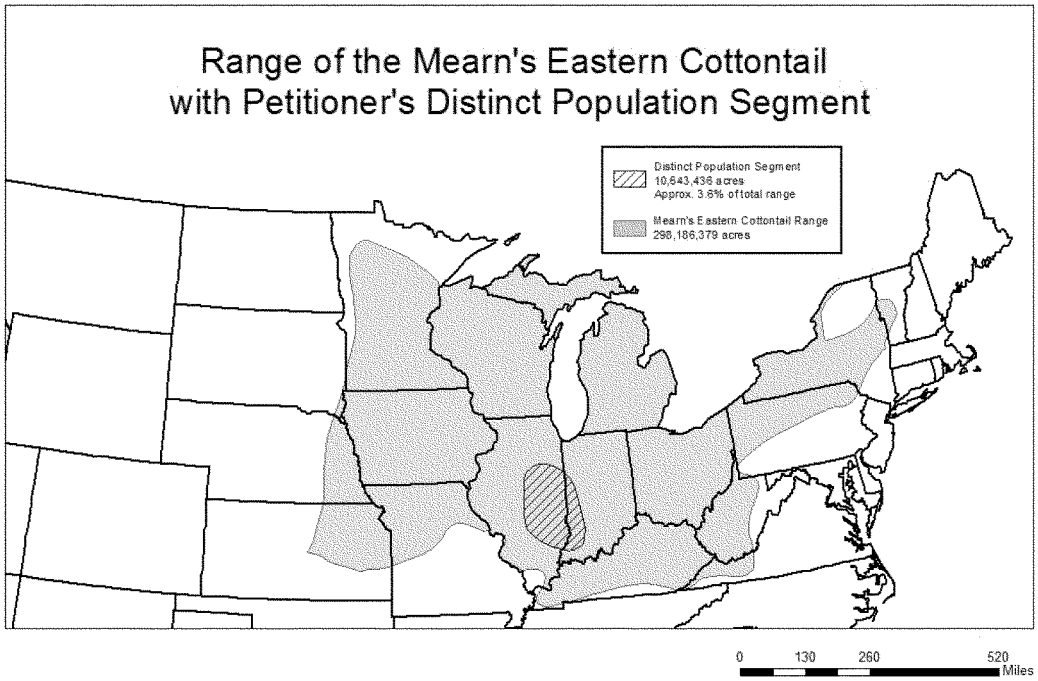
Eastern cottontail (*Sylvilagus floridanus*) are members of Order Lagomorpha and Family Leporidae. The Mearn's eastern cottontail (*Sylvilagus floridanus mearnsi*) is a recognized subspecies of the eastern cottontail, as first described in 1894 by J.A. Allen (Hall and Kelson 1981, p. 304; Chapman *et al.* 1980, p. 1). We accept the characterization of the Mearn's eastern cottontail (*S. f. mearnsi*) as a subspecies of the eastern cottontail rabbit as described in Chapman *et al.* (1980, p. 1), and Hall and Kelson (1959, p. 262). Few references relate specifically to the Mearn's eastern cottontail; therefore, we consider information available for the eastern cottontail to represent the petitioned subspecies.

The eastern cottontail is described as having a total length of 395 to 456 mm (15.6 to 18.0 in) and weighing 801 to 1,411 g (28.3 to 49.8 ounces (oz)) for males, and 400 to 477 mm (15.7 to 18.8 in) and weighing 842 to 1,533 g (29.7 to 54.1 oz) for females (Chapman *et al.* 1981, p. 136). They have dense fur, ranging from brownish to greyish in color, with white fur on the underside of the body and tail. The average home range for the eastern cottontail varies from approximately 1 to 2 acres (0.4 to 1 ha) in Wisconsin (Trent and Rungstad 1974) to around 4 acres (2 ha) in Pennsylvania, with male home ranges increasing to an average of 17 to 19 acres (7 to 8 ha) in spring and summer (Althoff and Storm 1989). The eastern cottontail is the most widely distributed cottontail species in North America (Scharine *et al.* 2011, p. 885; Hall and Kelson 1981, p. 300; Chapman *et al.* 1980, p. 2) and occurs sympatrically with six species of the genus *Sylvilagus* and six species of the genus *Lepus* (Chapman *et al.* 1980, p. 136).

In describing eastern cottontail habitat, Chapman *et al.* (1980, p. 2) stated, ''This cottontail is generally thought of as a mammal of farmlands, fields, and hedge rows; however, historically it occurred in natural glades and woodlands, deserts, swamps, prairies, hardwood forests, rain forests, and boreal forests.'' When comparing the eastern cottontail to the swamp rabbit (*S. aquaticus),* Scharine *et al.* (2011, p. 881) stated that the dense understory vegetation provided by early successional cover types are important habitat for both species; however, the eastern cottontail is a habitat generalist and occupies a larger distribution. Mankin and Warner (1999b, p. 960) identified eastern cottontails in old fields, grasslands, hedgerows, cropland, and urban areas, but found that the species preferred open shrub land.

The Mearn's eastern cottontail occurs across a large portion of the eastern cottontail's range, including the entire States of Iowa, Wisconsin, Michigan, Indiana, and Ohio; most of Minnesota, Illinois, and Kentucky; southwestern New York; northern Pennsylvania; western West Virginia; northern Missouri; northeastern Kansas; eastern Nebraska; a small portion of the southeastern corner of South Dakota; and the small portion of the western edge of Virginia (Figure 1) (Hall and Kelson 1981, p. 261; Chapman *et al.* 1980, p. 3).

Figure 1. Mearn's eastern cottontail range within the United States adapted from Hall and Kelson (1981, p. 303) and the hand-drawn map provided in the petition, georeferenced using ArcMap 10.



Distinct Population Segment Evaluation

Under the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (61 FR 4722, February 7, 1996), three elements are considered in the decision concerning the establishment and classification of a possible DPS. These are applied similarly for additions to or removal from the Federal List of Endangered and Threatened Wildlife. These elements include:

(1) The discreteness of a population in relation to the remainder of the taxon to which it belongs;

(2) The significance of the population segment to the taxon to which it belongs; and

(3) The population segment's conservation status in relation to the Act's standards for listing, delisting (removal from the list), or reclassification (*i.e.,* is the population segment endangered or threatened).

Our understanding of the petitioners' requested action is that the population of Mearn's cottontail in east-central Illinois and western Indiana (Figure 1) be considered a DPS and listed as endangered or threatened under the Act. Therefore, in this analysis, we evaluate whether the petition provides substantial information that the Mearn's eastern cottontail in east-central Illinois and western Indiana may constitute a DPS.

Discreteness

Under our DPS Policy, a population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

(1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.

(2) It is delimited by international governmental boundaries within which significant differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

The petitioners describe the area of the petitioned DPS in the revised petition submission (dated January 23, 2012) as follows: ''this region covers the former Grand Prairie region of Illinois and western Indiana.'' However, the submitted description does not provide exact boundaries or reference maps for the petitioned DPS. Therefore, the DPS we consider in our evaluation is based on a hand-drawn map submitted by the petitioners in the original petition submission (dated July 18, 2011) (not paginated). For our DPS evaluation, we considered references provided with the original July 18, 2011, petition submission, references provided with the revised January 23, 2012, petition submission, and other information readily available in our files.

The petition cites one study (Mankin and Warner 1999a) as the supporting evidence that the population of Mearn's eastern cottontail in east-central Illinois and western Indiana is: (1) Physically discrete from the rest of the subspecies; (2) ecologically distinct due to intensive agriculture leaving only artificial remnants of its original habitat; and (3) behaviorally distinct because individuals require home ranges averaging 7 times larger than other members of the eastern cottontail species.

The petitioners assert that the petitioned DPS occupies an ecologically distinct area where intensive agriculture has left only artificial remnants of its original habitat. Mankin and Warner (1999a, p. 940) state that east-central Illinois is one of the most intensively farmed regions in North America. This is supported by the findings of Ribic *et al.* (1998), which suggest a decrease in the quantity of upland wildlife habitat in Illinois from 1920 to 1987, and an increase in farming disturbance, indicating an intensification of agricultural practices for the State during that time period. They found that the western and southern portions of the State had higher wildlife habitat values than the rest of the State and that harvest of eastern cottontails was higher in counties with the most upland habitat and the lowest amount of farming disturbance (Ribic *et al.* 1998,

pp. 307, 311). This differentiation is also supported by Mankin and Warner (1999b, p. 962), who showed that counties in east-central Illinois had the greatest decline in cottontail abundance and the highest increase in intense row-cropping.

The petitioners also cite Mankin and Warner (1999a) in stating that the DPS represents a population of Mearn's cottontail that is broken into small populations and is behaviorally distinct from other Mearn's cottontails. Mankin and Warner (1999a) studied the responses of Mearn's eastern cottontails to intensive row-crop agriculture in Ford County, Illinois, which is in the center of the proposed DPS. They found that the Mearn's eastern cottontail had a home range 2.3 times larger during the growing season for the crops than during the non-growing season (Mankin and Warner 1999a, p. 943). The cottontails in the study also had an overall home range that was 7 to 8 times larger than those found by previous research (Mankin and Warner 1999a, p. 945). Mankin and Warner (1999a, p. 945) specifically compared their findings to home ranges of Mearn's eastern cottontail in Wisconsin by Trent and Rongstad (1974), and indicated they were 8 times larger than Wisconsin males' home ranges and 7 times larger than females'. Chapman *et al.* (1980, p. 136) indicate that there have been many studies of home ranges of the eastern cottontail, with a mean for males of 0.95 ha (2.34 acres) to 2.8 ha (6.9 acres) and for females of 0.95 ha (2.34 acres) to 1.2 ha (2.96 acres). Mankin and Warner (1999a, pp. 944–945) found the population of cottontails in the Ford County, Illinois study area to be sparse yet stable. Although the cottontails used the crop ground extensively and 23 percent of the home ranges occurred on farmsteads, farmsteads made up less than 2 percent of the available habitat.

Based on the information submitted with the petition and information in our files, we find that the petition presents substantial information to suggest there may be a markedly separate population of Mearn's eastern cottontail in east-central Illinois and western Indiana due to behavioral differences when compared to the subspecies located elsewhere. The population of Mearn's eastern cottontail in east-central Illinois and western Indiana may be discrete from the rest of the Mearn's population because they occupy an area of intensive agriculture that leads to the behavior of maintaining different home-range sizes than the subspecies in the rest of the range. Therefore, this population of Mearn's cottontail may meet the discreteness criterion that it is markedly separated from other populations of the same taxon based on behavioral reasons.

There are no international governmental boundaries associated with this subspecies that are significant. The population of Mearn's eastern cottontail in east-central Illinois and western Indiana lies wholly within the United States. Because this element is not relevant in this case for a finding of discreteness, it was not considered in reaching this determination.

Significance

If a population segment is considered discrete under one or more of the conditions described in our DPS policy, its biological and ecological significance will be considered in light of Congressional guidance that the authority to list DPSes be used ''sparingly'' while encouraging the conservation of genetic diversity. In making this determination, we consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. As precise circumstances are likely to vary considerably from case to case, the DPS policy does not describe all the classes of information that might be used in determining the biological and ecological importance of a discrete population. However, the DPS policy does provide four possible reasons why a discrete population may be significant. As specified in the DPS policy (61 FR 4722), this consideration of the population segment's significance may include, but is not limited to, the following:

(1) Persistence of the discrete population segment in an ecological setting unusual or unique to the taxon;

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon;

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; or

(4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

A population segment needs to satisfy only one of these criteria to be considered significant. Furthermore, the list of criteria is not exhaustive; other criteria may be used as appropriate.

The petitioners assert that the population of Mearn's eastern cottontail in east-central Illinois and western Indiana is significant because it represents approximately 20 percent of the range of the subspecies that was not hybridized by the introductions of other species, and thus its loss would result in a significant gap in the range of the subspecies. The petition cites one reference, Chapman and Morgan 1973, to support their assertion. Chapman and Morgan (1973, p. 6) discuss the introduction of many species and subspecies of rabbits into the eastern United States from 1920 to 1950, and the impacts on the native rabbit species in western Maryland and the nearby portions of West Virginia. They found evidence of hybridization between native eastern cottontails and other rabbit species and subspecies from other parts of the country and the hybridization of the subspecies *S. f. mallurus* with other subspecies. The intergrade (hybridization) zone of eastern cottontail in the East has expanded, and it now out-competes the New England cottontail (*S. transitionalis*) in its traditional habitat (Chapman and Morgan 1973, p. 51). Although the study suggests that the eastern cottontail subspecies interbreed where they overlap, it does not specifically discuss how much habitat may be lost by each subspecies to hybridization. Therefore, when determining how much of the Mearn's eastern cottontail range is included in the petitioned DPS, we used the range from Hall and Kelson (1981, p. 303) as cited in the petition and the hand-drawn map from the original petition to generate the map in Figure 1. Using ArcGIS, we calculated that the area petitioned as a DPS makes up 3.6 percent of the Mearn's cottontail range and not the approximate 20 percent asserted by the petitioners. To calculate the size of the proposed DPS, we scanned the hand-drawn map included in the petition, georeferenced it to a map of the United States, and digitized the DPS boundary from the georeferenced scanned map. We used the same procedures to georeference the range of the Mearn's eastern cottontail from Hall's map (Hall 1980, p. 303). We were able to calculate the total acres of both the DPS and the Mearn's eastern cottontail range with the new digitized georeferenced maps. We then clipped the DPS from the full range to calculate the difference in acres and the percentage of the Mearn's eastern cottontail range that the DPS includes. Although the population of Mearn's eastern cottontail in east-central Illinois and western Indiana is located in the center of the subspecies' range, the petition does not provide substantial information, nor is there information available in our files, to suggest that loss

of this population would result in a significant gap in the range of a taxon.

The petition does not present information to suggest the population of Mearn's eastern cottontail in east-central Illinois and western Indiana may persist in an ecological setting unusual or unique to the taxon, evidence that the population represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range, or evidence that the population differs markedly from other populations of the species in its genetic characteristics. Additionally, we do not have information in our files to indicate that these characteristics are met.

Substantial information is not presented in the petition, nor is it available in our files, to suggest that the population of Mearn's eastern cottontail in east-central Illinois and western Indiana is biologically or ecologically significant to the remainder of the taxon. Therefore, we determine, based on the information provided in the petition and in our files that the population of Mearn's eastern cottontail in east-central Illinois and western Indiana does not meet the significance criterion of the 1996 DPS policy.

Finding for Mearn's Eastern Cottontail

We reviewed the information presented in the petition and evaluated that information in relation to information readily available in our files. On the basis of this review, we find that neither the petition, nor information readily available in our files, suggests that the Mearn's eastern cottontail population in east-central Illinois and western Indiana meets the criteria for being significant under our DPS policy. Although the population may meet the criteria for being discrete under the DPS policy, neither the information in the petition, nor the information readily available in our files, suggests that this population of Mearn's eastern cottontail may be significant to the remainder of the taxon. Because both discreteness and significance are required to satisfy the DPS policy, we have determined that the Mearn's eastern cottontail population in east-central Illinois and western Indiana does not satisfy the elements of being a DPS under our 1996 policy and, therefore, is not a listable entity under section 3(16) of the Act. Because the petition does not present substantial information that the population of Mearn's eastern cottontail in east-central Illinois and western Indiana is a DPS, we did not evaluate whether the information contained in the petition regarding the conservation status was substantial.

We encourage interested parties to continue to gather data that will assist with the conservation of the population of Mearn's eastern cottontail in east-central Illinois and western Indiana. If you wish to provide information regarding the Mearn's eastern cottontail, you may submit your information or materials to the Field Supervisor at the Rock Island, Illinois Ecological Service Field Office (see **ADDRESSES**), at any time.

Evaluation of Information for This Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR part 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species may warrant listing as an endangered or threatened species as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively may not be sufficient to compel a finding that listing may be warranted. The information must contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of an endangered or threatened species under the Act.

In making this 90-day finding, we evaluated whether information regarding threats to the prairie gray fox and the plains spotted skunk, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

Plains Spotted Skunk (Spilogale putorius interrupta)

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

Information Provided in the Petition

The petitioners claim that threats to the plains spotted skunk include habitat loss and modification. The petition suggests that loss of grassland and early successional habitat has contributed to declining population trends of 90 to 100 percent throughout the subspecies' range (Petition, unpaginated). Plains spotted skunks require some early successional component to their habitat to provide cover and denning areas (Petition, unpaginated; Lesmeister 2007, p. 56; Lesmeister *et al.* 2009, pp. 23–24). Before European settlement, this need was satisfied by both natural disturbances (*e.g.,* fire, storms, beaver, elk, and bison) and disturbance by Native Americans (Petition, unpaginated; Sewell 2009, p. 11). Grasslands and successional habitats were prevalent across the landscape. However, anthropogenic changes lead to landscapes that were more conducive to species that need early successional habitat, such as the plains spotted skunk. Such species shifted their use from naturally created, early successional habitats to those that were created by humans, and the species now seem to depend on these human-created habitats to some extent (Petition, unpaginated; Sewell 2009, p. 12).

The petition claims that the plains spotted skunk has since declined (Petition, unpaginated; Gompper and Hackett 2005, pp. 199–200) because of changes in agriculture, silviculture, and climate. Because plains spotted skunks rely on early successional habitat, management activities or lack of management that reduce the occurrence of dense vegetative stands or modify forest structure to more open, mature stands could be detrimental to the subspecies (Petition, unpaginated; Lesmeister 2007, p. 56; Lesmeister 2009, pp. 23–24).

Evaluation of Information Provided in the Petition and Available in Service Files

The information readily available in our files supports the petitioners' claims that the plains spotted skunk may be declining rangewide due to loss, degradation, and modification of early successional habitat. The plains spotted skunk has apparently undergone long-term fluctuations in population (Choate *et al.* 1973, pp. 228–233; Novak *et al.*1987, pp. 223–226; Gompper and Hackett 2005, pp. 199–200). Increases in abundance in the early 1900s likely were facilitated by human presence and influence on the landscape, as were subsequent declines (Choate *et al.* 1973, pp. 228–233). Construction of houses, outbuildings, haystacks, and brush piles provided shelter, and the storage of crops provided a direct source of food, as well as an indirect food source (mice and rats that were attracted to stored grain) (Choate *et al.* 1973, p. 230). Exploitation of these novel features allowed the expansion and increase of the plains spotted skunk (Choate *et al.* 1973, p. 230). Subsequent removal of anthropogenic features, as small farms were deserted and incorporated into larger farms reduced the amount of available habitat (Choate *et al.* 1973, p. 231). However, the plains spotted skunk has declined throughout its range, not just in the parts of the range where the subspecies exists in anthropogenic landscapes. Harvest by fur trappers has consistently decreased from the mid-1940s to present (Novak *et al.* 1987, pp. 223–226). Gompper and Hackett (2005, pp. 199–200) analyzed harvest data from seven States (Iowa, Missouri, Nebraska, Kansas, Oklahoma, Minnesota, and Arkansas) in the range of the plains spotted skunk and confirmed the population decline, demonstrated that the timing of the onset of decline differed among States, and determined that the decline was not an artifact of harvest effort or pelt demand.

Although there does not appear to be a single cause of decline, a suite of potential factors are suggested consistently in the literature. The decline of small farms, the advent of agriculture practices that encourage removal of fence rows and brush piles, intensive use of pesticides, improved grain management practices, and the end of large haystack construction are implicated as potential causes for the species' decline in landscapes dominated by human activity (Choate *et al.* 1973, pp. 229–231; Gompper and Hackett 2005, p. 199). Following the Great Depression, many small farms were deserted and incorporated into larger agricultural units. Farm buildings were removed that had provided both shelter and sources of prey, such as rodents (Choate *et al.* 1973, p. 230; Nilz and Finck 2008, pp. 19–20). This change in the agricultural landscape was intensified by the drought of 1933–1940, during which thousands of small farmers moved to other areas, abandoning many of the farms that remained. Arid conditions impacted natural riparian habitats of plains spotted skunks along watercourses, likely making them uninhabitable. The continued introduction of technology and mechanization into farming operations caused further decline of small, diverse farms and replaced them with large monocultures (Choate *et al.* 1973, p. 231). Plains spotted skunks avoid expansive open areas, such as pasture lands, that are devoid of overhead cover, and plains spotted skunks are likely intolerant of this habitat type (Lesmeister *et al.* 2009, p. 23). Finally, the widespread application of insecticides, such as Dichloro-diphenyl-trichlorethane (DDT), in industrial farming might have contributed to the decline in the 1940s. Because the plains spotted skunk is primarily an insectivore, application of pesticide likely reduced the main food source for the subspecies. Foraging opportunities were historically and continue to be further limited by dietary preference; competition with other species, such as striped skunk and weasels, for an alternate food source; or both (Kinlaw 1995, p. 4; Nilz and Finck 2008, pp. 19–20).

Habitat loss or modification might also be currently occurring in more natural forested landscapes where the plains spotted skunk occurs. In the Ouachita Mountains and Ozark Plateau, use of forested areas was limited to young forest stands with closed canopy and dense understory, areas with fallen logs and brushpiles, ravine bottoms, or stands that had undergone timber stand improvement (TSI) and had high levels of ground litter and slash (McCullough 1983, pp. 40–41; Lesmeister *et al.* 2009, p. 23). Young shortleaf pine stands were the only early successional habitat present in the Ouachita Mountains study area and were preferred over the dominant habitat type, mature shortleaf pine. Mature shortleaf pine stands offer more open canopy conditions and are considered suboptimal habitat for the plains spotted skunk compared to young stands that provide more desirable structural characteristics (Lesmeister *et al.* 2009, p. 24). Similar to the results in the Ouachita Mountains, plains spotted skunks in the Ozark Plateau preferred young oak-hickory forest stands over mature oak-hickory forest (McCullough 1983, p. 41). Considering that the subspecies seems to require structural complexity provided by early successional habitats, management priorities that endeavor to create landscapes dominated by mature forest stands could negatively impact the plains spotted skunk. For example, such conflicts in habitat management might occur where the ranges of the red-cockaded woodpecker and plains spotted skunk are coincident. Red-cockaded woodpeckers require open, mature pine woodlands and savannahs maintained by frequent fire (USFWS 2003, p. 5). Management for red-cockaded woodpeckers focuses on restoration of pine forests to old, open stands with canopy and herbaceous layers but no hardwood midstory (USFWS 2003, pp. 2, 41). This type of pine restoration is currently occurring in Arkansas on the Ouachita National Forest (Hedrick *et al.* 2007, pp. 1–8).

In summary, we find that the information provided in the petition, as well as other information available in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to historical and currently ongoing habitat loss and degradation due to modifications of early successional habitat. Further assessment of population declines due to the loss of early successional habitat caused by changes in agricultural practices, changes in silvicultural practices, and reduction in food availability by intensive use of pesticides is necessary.

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

Information Provided in the Petition

The petitioners did not present information regarding the overutilization of the plains spotted skunk for commercial, recreational, scientific, or educational purposes.

Evaluation of Information Provided in the Petition and Available in Service Files

Harvest pressure on the plains spotted skunk during the 1930s has received little consideration for contributing to the decline of the subspecies, but might have been a factor historically (Nilz and Finck 2008, p. 19). Available harvest records from the 1930s to 1940s (Novak *et al.* 1987, pp. 223–226) show high harvest numbers for most States in the subspecies' range, but since the mid-1940s, harvest numbers have

consistently decreased. The population status and dynamics of plains spotted skunks during this period of heavy harvest are not fully understood, but the plains spotted skunk appears to have been common in most landscapes in the early 1900s (Choate *et al.* 1973, pp. 227–230). Based on information readily available in our files, overutilization appears to be a potential cause of historical decline, but we do not have information to indicate that the overutilization for commercial, recreational, scientific, or educational purposes is presenting an ongoing threat to the plains spotted skunk. However, as we proceed with the 12-month status review, we will further investigate this factor to determine whether overutilization for commercial, recreational, scientific, or educational purposes is an ongoing threat to the subspecies.

C. Disease or Predation

Information Provided in the Petition

The petitioners did not present information regarding diseases that may affect the plains spotted skunk. The petitioners claim that the plains spotted skunk is experiencing unnaturally high levels of predation, mainly by birds of prey, because of loss of protective cover provided by early successional habitat (Petition, unpaginated). Lesmeister *et al.* (2009, pp. 23–24) observed 18 mortalities of plains spotted skunks in the Ouachita Mountains, most of which were caused by avian predators and occurred in mature shortleaf pine forests that provide little in the way of protective cover. They noted that stands of young shortleaf pine seem to be less preferred by typical predators of plains spotted skunk, such as coyote (*Canis latrans*), bobcats (*Lynx rufus*), and great horned owls (*Bubo virginanus*), which prefer more open habitats. Open conditions in mature forest stands might be more favorable for the presence of predators and consequently less favorable to plains spotted skunks (Lesmeister *et al.* 2009, p. 24).

Evaluation of Information Provided in the Petition and Available in Service Files

Based on our review of information provided by the petitioners and readily available in our files, the plains spotted skunk may be declining rangewide due to predation. The most common natural predators of the plains spotted skunks are owls and mesocarnivores (Kinlaw 1995, p. 4; Schwartz and Schwartz 2001, p. 329). Lesmeister *et al.* (2010, pp. 54–58) observed a relatively low survival rate for plains spotted skunk in the Ouachita Mountains. Sixty-three percent of documented mortalities were attributed to avian predators, 26 percent to mammalian predators, and 11 percent to unknown causes. Eleven of the 12 avian-caused mortalities occurred in mature shortleaf pine stands with an open canopy and herbaceous understory, whereas all of the mammal-caused mortalities occurred in young shortleaf pine stands (Lesmeister *et al.* 2010, p. 54). These results suggest that there is a difference between the amount and source of predation that occurs in habitat that is considered optimal (young shortleaf pine) and suboptimal (mature shortleaf pine) for plains spotted skunk (Lesmeister *et al.* 2010, pp. 55–56). Plains spotted skunks avoided use of mature forest stands and selected young forest stands (Lesmeister *et al.* 2009, pp. 23–24); mortality due to predation was disproportionate to habitat use because the highest mortality occurred in the least-used mature forest habitat. While predation plays a natural role in the life history dynamics of the plains spotted skunk, there is some evidence that it may be occurring at a higher rate that could have a negative affect on populations of the species.

Diseases affecting the subspecies include pneumonia, coccidiosis, and rabies (Kinlaw 1995, p. 4). The plains spotted skunk, however, is often overrated as a carrier of rabies; fewer cases were documented in spotted skunks than in domestic cats, cattle, dogs, or striped skunks (Hazard 1982, p. 145). Viral disease, such as parvovirus, or mink enteritis virus, may contribute to localized population declines, and some viral diseases can exhibit rapid spread and long-term impacts to local population viability, but do not appear to impact the species as a whole (Gompper and Hackett 2005, p. 200). Based on information readily available in our files, disease may have been a cause of historical decline, but we do not have information to indicate that disease is presenting an ongoing threat to the plains spotted skunk. As we proceed with the 12-month status review, we will further investigate whether disease is an ongoing threat to the subspecies.

In summary, the petition and information in our files identifies excessive predation that may be occurring at a higher rate than naturally expected as a threat to the plains spotted skunk. Therefore, we find that the information provided in the petition, as well as other information readily available in our files, presents substantial scientific and commercial information to indicate that the plains spotted skunk may warrant listing due to predation.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petitioners state that there currently is no mechanism to protect habitat or garner appropriate resources for species conservation.

Evaluation of Information Provided in the Petition and Available in Service Files

We do not have any information in our files to indicate whether any regulatory mechanisms that are designed to alleviate threats to the species (*i.e.,* loss of early successional habitat due to changes in agricultural practices, changes in silvicultural practices, climatic fluctuations, reduction in food availability by intensive use of pesticides, or excessive predation) exist. Therefore, we find that the petition and the information readily available in our files do not provide substantial scientific or commercial information to indicate that the inadequacy of existing regulatory mechanisms is a threat to the plains spotted skunk such that the petitioned action may be warranted. However, as we proceed with the 12-month finding status review, we will further investigate whether the inadequacy of existing regulatory mechanisms may be a threat to the plains spotted skunk.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Information Provided in the Petition

Humans are reported as the main cause of mortality in less natural landscapes (Kinlaw 1995, p. 4). Death is caused by vehicle collision, poisoning, shooting, domestic dogs and cats, and trappers who target plains spotted skunks or take them incidentally when trapping for other species (Jones *et al.* 1983, p. 304; Wires and Baker 1994, p. 4). A common source of sightings for plains spotted skunks are those that are found as road kill. Of 72 total possible sightings of the plains spotted skunk within a 5-year period in Minnesota, 11 were road kills and an additional 13 were killed by the individual reporting the sighting (Wires and Baker 1994, p. 4).

Evaluation of Information Provided in the Petition and Available in Service Files

We do not have information in our files to indicate any potential threat to the plains spotted skunk due to other natural or manmade factors. Based on

information provided in the petition, direct human-caused mortality (*e.g.,* vehicle collision, poisoning, shooting, domestic dogs and cats, and trapping) may be impacting individual skunks, but we do not have information to indicate that such mortality is presenting a population-level threat to the plains spotted skunk. Therefore, we find that the petition and information readily available in our files do not provide substantial scientific or commercial information to indicate that other natural or manmade factors present a threat to the plains spotted skunk such that the petitioned action may be warranted. However, as we proceed with the 12-month status review, we will further investigate whether other natural or manmade factors, such as potential impacts from climate change and direct human-caused mortality, may be a threat to the plains spotted skunk.

Finding for Plains Spotted Skunk

We reviewed the information presented in the petition and evaluated that information in relation to information readily available in our files. On the basis of our determination under section 4(b)(3)(A) of the Act, we determine that the petition does present substantial scientific or commercial information indicating that listing the plains spotted skunk as an endangered or threatened species throughout its entire range may be warranted. This finding is based on information provided under factors A and C.

Because we have found that the petition presents substantial information indicating that listing the plains spotted skunk may be warranted, we are initiating a status review to determine whether listing the plains spotted skunk as an endangered or threatened species under the Act is warranted.

The ''substantial information'' standard for a 90-day finding differs from the Act's ''best scientific and commercial data'' standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

Prairie Gray Fox (Urocyon cinereoargenteus ocythous)

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

Information Provided in the Petition

The petitioners claim that habitat loss and modification are threats to the prairie gray fox. The petitioners state that the gray fox requires early successional cover, grassland, or dense forest, and that the decline of this habitat within the range of this subspecies has contributed to its decline (Petition, unpaginated). The gray fox's use of deciduous or pine woody habitat is well established in the literature (Chamberlain and Leopold 2000, p. 749; Jones *et al.* 1985, p. 264; Haroldson and Fritzell 1984, p. 226; Fritzell and Haroldson 1982, p. 4). Cooper (2008, p. 24) reported a lower relative abundance of gray fox for Illinois counties where agricultural patches were larger and occurred in a wider variety of shapes and sizes. Conversely, Cooper (2008, pp. 24–25) reported higher relative abundances of gray fox in Illinois counties that contained a greater availability of grassland dispersed into the landscape, with forest patch size highly variable and closer together. Haroldson and Fritzell (1984, p. 226) found that gray fox relied heavily on forested habitats in Missouri. They found that gray fox used dense stands of young trees during the day, stating that ''dense protective cover is characteristic of the diurnal retreats of gray fox throughout their range'' (Haroldson and Fritzell 1984, p. 227; Petition, unpaginated). The petitioners indicate that habitat important to the gray fox, such as early successional cover, grassland, or dense forest, are in decline (Petition, unpaginated; Gillen 2011). Gillen (2011, p. 9) evaluated the relationship of mast-producing trees (trees that produce acorns or nuts), small mammal densities, and the occurrence of carnivores in forests in southern Illinois and hypothesized that the decline of oak-dominated forests in the eastern United States may cause declines in small mammals that consume acorns, and in turn the carnivores that consume small mammals. Gillen (2011, p. 1) cited several studies that indicate oak-dominated forests are declining due to the reduced regeneration and secondary succession of shade-tolerant species such as maple and beech. Gillen (2011, p. 9) cited studies by Haroldson and Fritzell (1984, p. 226) that found that gray fox select forests with high densities of prey. Gillen (2011, p. 10) reported a decrease in red and gray fox populations in Illinois, and hypothesized that the decline may be worsened by additional succession of oak-dominated forests.

Evaluation of Information Provided in the Petition and Available in Service Files

The petitioners assert that the gray fox requires early successional cover, grassland, or dense forest and that the decline of this habitat type has contributed to the subspecies decline (Petition, unpaginated). Gray fox prefer wooded habitat, areas of mixed grassland and forest, and early successional areas (Cooper 2008, p. 4; Chamberlain and Leopold 2000, p. 749; Haroldson and Fritzell 1984, p. 226; Fritzell and Haroldson 1982, p. 4). Gray fox utilize this dense protective cover especially during the day when they are not as active (Haroldson and Fritzell 1984, p. 227). There is evidence that gray fox are more abundant in areas where there is woody or dense cover and less abundant in agricultural areas (Cooper 2008, p. 4). Cooper (2008, p. 26) suggests that habitat loss is one of the gray fox's biggest threats and that the changes in the landscape, predominantly to agriculture in the Midwest, have adversely affected gray fox populations. The petitioners have provided evidence of low or declining numbers of gray fox within the range of the prairie gray fox subspecies (Blair 2011, p. 31; Roberts and Clark 2011, unpaginated; Sasse 2011, unpaginated; Kitchell 2010, unpaginated; U.S. Department of the Interior 1981, pp. 38–98; U.S. Department of the Interior 1980, pp. 40–100). The conversion from native woody habitat to agricultural practices has likely impacted the prairie gray fox as all of the States within its range have agriculture to differing degrees. When settlers arrived in the Midwest, the forests were converted to agriculture before the technology was available to convert prairie lands (U.S. Geological Survey 1998, p. 4). For example, prior to 1860, forest areas were the primary source of cropland in Illinois (U.S. Geological Survey 1998, p. 4). Due to the conversion to agriculture, timber harvest, and development, approximately 70 percent of the available forest land in the Midwest has been lost since 1920 (U.S. Geological Survey 1998, p. 4), and landcover in the Midwest consists of approximately 44 percent agriculture (Mankin and Warner 1999a, p. 956). Although the petitioners do not provide information on the amount of habitat that has been lost throughout the prairie gray fox's range, we believe there is substantial

information to suggest that a decline in the population of this subspecies may be due to the loss of habitat.

In summary, we find that the information provided in the petition, as well as other information available in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to the loss of early successional cover, grassland, or dense forest habitat within the range of this subspecies.

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

Information Provided in the Petition

The petitioners state that the threats of continued human hunting and trapping of this subspecies is ''an additional stressor'' but do not provide information as to the numbers of gray fox being harvested in any of the States within the range of the prairie gray fox (Petition, unpaginated).

Evaluation of Information Provided in the Petition and Available in Service Files

Fritzel and Haroldson (1984, p. 4) state that ''undoubtedly the most important predator of gray fox is man,'' referencing specific citations indicating the importance of gray fox pelts in the 1970s. An estimated 26,109 gray fox pelts were harvested in the United States during the 1970–1971 season, increasing to 163,458 during the 1975–1976 season. It was estimated in 1977 that approximately half of the gray fox population in Wisconsin was harvested annually (Fritzel and Haroldson 1984, p. 4). Illinois hunters harvested 9,086 gray fox pelts in the winter of 1977–1978 (McFarland 2007, p. 9). More recently, during the 2010–2011 season, gray fox harvested in the State of Missouri increased 112 percent, while the annual Archer's Index to Furbearer Populations (where deer and turkey archery hunters record sightings of furbearers each fall) shows a 75 percent decline in gray fox numbers since 1983 (Petition, unpaginated; Missouri Department of Conservation 2011 Furbearer Program Annual Report, pp. 11–12; Blair 2011, p. 31). According to the Arkansas Game and Fish Commission 2010–2011 Furbearing Animal Report, 976 gray fox were purchased by licensed fur buyers in the State (Sasse 2011, unpaginated). The report indicates that there was an overall increase in pelts purchased for this season after an overall low in 2009–2010, with the number of pelts purchased increasing by 91 percent. The report also indicates actual numbers of furbearers harvested is likely underreported.

Although there is evidence in the literature that gray fox have been hunted in the past and continue to be harvested to some degree, which may have individual and localized impacts, neither the petition nor information readily available in our files indicates that harvest is affecting the subspecies overall. Therefore, based on information readily available in our files, overutilization may have occurred and may have potentially caused historical decline, but neither the petition nor the information readily available in our files indicate that the overutilization for commercial, recreational, scientific, or educational purposes is a current threat to the prairie gray fox. However, as we proceed with the 12-month status review, we will further investigate this factor to determine whether overutilization for commercial, recreational, scientific, or educational purposes is an ongoing threat to the subspecies.

C. Disease or Predation

Information Provided in the Petition

The petitioners did not present information regarding disease affecting the prairie gray fox. The petitioners claim that the loss of dense cover available to the prairie gray fox due to habitat degradation has made the subspecies more susceptible to predation from coyotes *(Canis latrans),* stating coyotes are the gray fox's only major non-human predator (Petition, unpaginated). The petitioners cite a personal communication with Stan Gehrt from Ohio State University asserting that gray fox in northern Illinois are being ''wiped out'' due to coyote predation because they do not have adequate cover (Petition, unpaginated). The petition states that Gehrt cited additional research suggesting that coyote killed gray fox; however, they did not consume them (Petition, unpaginated). The petitioners cite McFarland (2007), which discusses studies being conducted in Illinois on coyote-gray fox interactions in northern and southern Illinois, with Gehrt cited as one of the researchers. McFarland (2007, p. 11) quotes Gehrt in reference to the study: ''We identified a family of gray foxes living in a cemetery in an intensely urban area on the south side of Chicago, the amazing thing is, it was a place nobody would expect to find even a red fox. On top of that, coyotes still found their hiding spot and killed them.'' In McFarland (2007, p. 11), Gehrt suggests that gray fox have been unable to adapt to the increase in coyote predation like red fox have. McFarland (2007, p. 11) indicates that the increase in coyote numbers in Illinois may be due to a shift in agricultural practices and movement of humans to urban areas, and a subsequent decrease in coyote hunters and an increase in the coyote's food supply.

Evaluation of Information Provided in the Petition and Available in Service Files

Jones *et al.* (1985, p. 264) and Fritzell and Haroldson (1982, p. 5) both mention coyote and bobcat *(Lynx rufus)* as a predator of the gray fox. In their study of coyote, fox, and bobcat interactions in California, Fedriani *et al.* (2000, p. 262) predicted the dominance of coyote over the other two carnivores. During their 2-year study, Fedriani *et al.* (2000, p. 262) found 7 gray fox killed by coyote and 2 by bobcat, and found remains of gray fox in coyote feces. They suggested that ''the sum of population losses due to coyote predation plus the avoidance of areas of high coyote predation risk by fox limit the size and range of gray fox populations in the Santa Monica Mountains, whereas no evidence of food limitation is indicated'' (Fedriani *et al.* 2000, p. 268). Chamberlain and Leopold (2005, pp. 171–178) studied similar interactions among bobcat, coyote, and gray fox in central Mississippi. They found that the home ranges of coyote and gray fox intersected and that gray fox maintained home ranges within the larger range of the coyote (Chamberlain and Leopold 2005, p. 175). However, they found that the amount of overlap of core areas was negligible, suggesting that gray fox avoid areas of greater coyote concentration. They considered the interspecific competition between coyotes and gray fox minimal, as there were 2 deaths of gray fox from coyotes (of the 37 gray fox studied). Researchers also indicated there were two instances of den abandonment due to coyote disturbance (Chamberlain and Leopold 2005, p. 177). The coyote's range in the United States has expanded dramatically since pre-settlement; however it has always been a part of the prairie gray fox's range (Parker 1995, p. 17). Before the 1900s, coyote was limited to the prairies of the central United States from Canada south into Mexico (Parker 1995, p. 17). Although the available information shows that coyote and bobcat do prey on gray fox, it does not indicate whether the predation rate has increased beyond a natural level or that such predation is causing a population-level effect.

We found few sources in our files referencing the effects of disease on gray fox populations. Fritzell and Haroldson

(1982, p. 5) state that canine distemper virus (CDV) and rabies may affect local populations. Cooper 2008 (p. 1) also mentions that rabies, canine parvovirus, and CDV affect the gray fox. Cooper 2008 (p. 1) also states that CDV is, ''the most significant mortality factor for gray foxes,'' citing several references supporting the adverse effects CDV has had on gray fox populations.

The information provided by the petitioners and within our files indicates that the gray fox is being preyed on by coyotes and, to a lesser degree, bobcats; however, we do not have information as to whether the predation rate has increased beyond a natural level. Our files also contain some information that the impacts of disease may be detrimental to individual populations of the prairie gray fox, but we do not have information as to what impact disease is having on the subspecies.

Therefore, based on information readily available in our files, gray fox are currently being preyed on by coyotes, but we do not have information to indicate that disease or predation is an ongoing threat to the prairie gray fox. As we proceed with the 12-month status review, we will further investigate whether disease or predation are an ongoing threat to the subspecies.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

No information on this factor is provided in the petition.

Evaluation of Information Provided in the Petition and Available in Service Files

We do not have any information in our files to indicate the amount of protection currently being afforded the prairie gray fox within individual States. Therefore, we find that the petition and the information readily available in our files do not provide substantial scientific or commercial information to indicate that the inadequacy of existing regulatory mechanisms is a threat to the prairie gray fox such that the petitioned action may be warranted. However, as we proceed with the 12-month status review, we will further investigate whether the inadequacy of existing regulatory mechanisms may be a threat to the prairie gray fox.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Information Provided in the Petition

The petitioners did not present information on whether or how other natural or manmade factors are affecting the prairie gray fox.

Evaluation of Information Provided in the Petition and Available in Service Files

We do not have information in our files to indicate any potential threat to the prairie gray fox due to other natural or manmade factors. Therefore, we find that the petition and information readily available in our files do not provide substantial scientific or commercial information to indicate that other natural or manmade factors present a threat to the prairie gray fox such that the petitioned action may be warranted. However, as we proceed with the 12-month status review, we will further investigate whether other natural or manmade factors, such as potential impacts from climate change, may be a threat to the prairie gray fox.

Finding for Prairie Gray Fox

We reviewed the information presented in the petition and evaluated that information in relation to information readily available in our files. On the basis of our determination under section 4(b)(3)(A) of the Act, we determine that the petition does present substantial scientific or commercial information indicating that listing the prairie gray fox throughout its entire range may be warranted. This finding is based on information provided under factor A.

Because we have found that the petition presents substantial information indicating that listing the prairie gray fox may be warranted, we are initiating a status review to determine whether listing the prairie gray fox under the Act is warranted.

The ''substantial information'' standard for a 90-day finding differs from the Act's ''best scientific and commercial data'' standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Rock Island, Illinois Ecological Service Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this notice are the staff members of the Columbia, Missouri, and Rock Island, Illinois Ecological Services Field Offices.

Authority

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

Dated: November 20 2012.

Rowan Gould,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2012–29188 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 77, No. 233

Tuesday, December 4, 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

Submission for OMB Review; Comment Request

November 28, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: 7 CFR 1744–C, Advance and Disbursement of Funds—Telecommunications.

OMB Control Number: 0572–0023.

Summary of Collection: Section 201 of the Rural Electrification Act (RE Act) of 1936 authorizes the Administrator of the Rural Utilities Service (RUS) to make loans for the purpose of providing telephone service to the widest practicable number of rural subscribers. A borrower requesting loan advances must submit RUS Form 481, *''Financial Requirement Statement''*. Along with the Form 481 the borrower must also submit a description of the advances and upon request copies of backup documentation relating to the transactions. Within a reasonable amount of time, funds are advanced to the borrower for the purposes specified in the statement of purposes. The borrower must immediately deposit all advanced money into a Special Construction account until disbursed.

Need and Use of the Information: The information collected is used by RUS to record and control transactions and verify that the funds advanced in the construction fund are related directly to loan purposes. If the information were not collected, RUS would not have any control over how loan funds are spent or a record of the balance to be advanced.

Description of Respondents: Business or other for-profit.

Number of Respondents: 177.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,223.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–29159 Filed 12–3–12; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 28, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 burden including the validity of the methodology and assumptions used; (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 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 regarding this information collection received by January 3, 2013 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725–17th Street NW., Washington, DC, 20503. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Residue and Biomass Field Survey.

OMB Control Number: 0535–NEW.

Summary of Collection: The primary function of the National Agricultural Statistics Service (NASS) is to prepare and issue official State and national estimates of crop and livestock production, disposition and prices. The purpose of this collection is for NASS and the Agricultural Research Service/Hydrology and Remote Sensing Laboratory to make an objective

connection between the amounts of organic matter produced and how crop residues impact future crop yields. General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204(a) which specifies that ''The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain * * * by the collection of statistics * * * and shall distribute them among agriculturists.'' 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.

Need and Use of the Information: This study will investigate the effect crop residue removal has on soil and water quality. The study will use, as a sampling universe fields in the South Fork watershed in central Iowa. The study will be conducted in several phases. Permission forms will be presented to farm operators. With the farmers permission the field enumerators will return several times during the growing season to measure and collect samples from the target areas. Measurements of crop residues will be compared with remote sensed data to measure crop residue cover and soil tillage intensity for the entire watershed. After measurements and samples are taken the farm operators will be asked to complete a questionnaire and, if possible provide a yield map. The questionnaire and yield maps help associate measured residue and biomass to specific field management plans and provide realistic operation files for the water and soil quality models. Without this collection, our knowledge of the management practices in the watershed would be severely limited.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 100.

Frequency of Responses: Reporting: One time.

Total Burden Hours: 52.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–29162 Filed 12–3–12; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–LS–12–0047]

Mandatory Country of Origin Labeling of Covered Commodities: Notice of Request for Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget, for an extension and revision to the currently approved information collection of the Mandatory Country of Origin Labeling (COOL) of Covered Commodities.

DATES: Comments must be received by February 4, 2013.

Comments: Comments should be submitted electronically at *http://www.regulations.gov*. Comments may also be submitted to Julie Henderson, Director, COOL Division, Livestock, Poultry, and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture (USDA); STOP 0216; 1400 Independence Avenue SW., Room 2620–S; Washington, DC 20250–0216. All comments should reference docket number AMS–LS–12–0047 and note the date and page number of this issue of the **Federal Register**.

Submitted comments will be available for public inspection at *http://www.regulations.gov* or at the above address during regular business hours. Comments submitted in response to this Notice will be included in the records and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the above address.

FOR FURTHER INFORMATION CONTACT: Julie Henderson, Director, COOL Division, AMS, USDA, by telephone at (202) 720–4486, or email at *julie.henderson@ams.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Mandatory Country of Origin Labeling of Covered Commodities.

OMB Number: 0581–0250.

Expiration Date of Approval: March 31, 2013.

Type of Request: Request for Revision of a Currently Approved Information Collection

Abstract: The 2002 and 2008 Farm Bills amended the Agricultural Marketing Act of 1946 to require retailers to notify their customers of the country of origin of muscle cuts and ground beef (including veal), lamb, pork, chicken, and goat; wild and farm-raised fish and shellfish; perishable agricultural commodities; peanuts, pecans, and macadamia nuts; and ginseng. An interim final rule for mandatory COOL for fish and shellfish became effective on April 4, 2005. An interim final rule for the remaining covered commodities became effective on September 30, 2008. On January 15, 2009, a final rule was published for all covered commodities which became effective March 16, 2009. Enforcement activities have been conducted since 2006 utilizing cooperative agreements established with State agencies.

Individuals who supply covered commodities, whether directly to retailers or indirectly through other participants in the marketing chain, are required to establish and maintain country of origin and, if applicable, method of production information for the covered commodities and supply this information to retailers. As a result producers, handlers, manufacturers, wholesalers, importers and retailers of covered commodities are affected.

This public reporting burden is a necessary to ensure accuracy of country of origin and method of production declarations relied upon at the point of sale at retail. The public reporting burden also assures that all parties involved in supplying covered commodities to retail stores maintain and convey accurate information as required.

Estimate of Burden: Public reporting burden for recordkeeping storage and maintenance is estimated to average 19 hours per year per individual.

Respondents: Retailers, wholesalers, producers, handlers, and importers.

Estimated Number of Respondents: 1,655,905.

Estimated Total Annual Responses: 31,437,002.

Estimated Number of Responses per Respondent: 19.

Estimated Total Annual Burden on Respondents: 31,437,002.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and

clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: November 28, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–29167 Filed 12–3–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0092]

Notice of Request for Extension of Approval of an Information Collection; National Management Information System

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with cooperative wildlife damage management programs.

DATES: We will consider all comments that we receive on or before February 4, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0092-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0092, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0092* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the national management information system for cooperative wildlife damage management programs, contact Mr. Robert Myers, Wildlife Biologist, Wildlife Services, APHIS, 4700 River Road Unit 87, Riverdale, MD 20737; (301) 651–8845. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: National Management Information System.

OMB Number: 0579–0335.

Type of Request: Extension of approval of an information collection.

Abstract: As authorized by the Animal Damage Control Act of 1931 (7 U.S.C. 426–426c; 46 Stat. 1468), as amended, the Secretary of Agriculture may conduct activities and enter into agreements with States, local jurisdictions, individuals, public and private agencies, organizations, and institutions in the control of nuisance mammals and birds and those mammal and bird species that are reservoirs for zoonotic diseases.

Wildlife Services (WS) of the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, cooperates with Federal agencies, State and local governments, and private individuals to research and implement the best methods of managing conflicts between wildlife and human health and safety, agriculture, property, and natural resources.

Program activities usually consist of either cooperative direct control or technical assistance programs. As part of its program, WS enters into agreements to document the terms and conditions for cooperating with parties outside of APHIS (those parties are referred to as ''cooperators''). In response to requests for assistance in managing wildlife damage, WS collects information about organizations, industry, Federal and non-Federal entities, and members of public as part of its program. Information is collected through the use of work initiation documents, cooperative agreement forms, supply order forms and sales records, project reports, and a resource values survey. The information collected through these forms is used by the Agency to:

- Identify cooperators appropriately.
- Identify lands on which WS personnel will work.
- Differentiate between cooperators (i.e., property owners, land managers, or resource owners) who request assistance in managing damage caused by wildlife.
- Identify the land areas on which wildlife damage management activities would be conducted.
- Identify the relationship between resources or property, WS' protection of such resources or property, and the damage caused by wildlife.
- Determine the methods or damage management activities to deal with the damage.
- Establish a record that a cooperative agreement has been entered into with a cooperator.
- Document that permission has been obtained from landowners to go on the cooperator's property.
- Record wildlife damage occurrences on cooperator's property and steps to address them.
- Record occurrences that may have affected non-target species or humans during, or related to, WS project actions.
- Determine satisfaction with service to help WS evaluate, modify, and improve its program.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate 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;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.04623497 hours per response.

Respondents: Federal, State, and local agencies, and the public who request services from WS or engage in wildlife damage management projects with WS.

Estimated annual number of respondents: 117,768.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 117,768.

Estimated total annual burden on respondents: 5,445 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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.

Done in Washington, DC, this 28th day of November, 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–29225 Filed 12–3–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0091]

Notice of Request for Extension of Approval of an Information Collection; Importation of Mangoes From India Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the importation of mangoes from India into the continental United States.

DATES: We will consider all comments that we receive on or before February 4, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0091-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0091, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0091* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of mangoes from India, contact Mr. William Wesela, Regional Director, Preclearance and Offshore Programs, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737; (301) 851–2229. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Mangoes From India Into the Continental United States.

OMB Number: 0579–0312.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. As authorized by the PPA, APHIS regulates the importation of fruits and vegetables into the United States from certain parts of the world as provided in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–56).

In accordance with these regulations, APHIS allows the importation of mangoes from India into the continental United States under certain conditions to prevent the introduction of plant pests into the United States. These conditions involve the use of information collection activities, one of which is a phytosanitary certificate. As a condition of entry, the mangoes must undergo irradiation treatment and be accompanied by a phytosanitary certificate with additional declaration statements providing specific information regarding the treatment and inspection of the mangoes and the orchards in which they are grown. The additional information collection activities that are required include a preclearance workplan, trust fund agreement, compliance agreement, monitoring and certification of inspections and treatments, and recordkeeping.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate 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;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.53 hours per response.

Respondents: Importers and the national plant protection organization of India.

Estimated annual number of respondents: 152.

Estimated annual number of responses per respondent: 33.61.

Estimated annual number of responses: 5,109.

Estimated total annual burden on respondents: 2,685 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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.

Done in Washington, DC, this 28th day of November 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–29283 Filed 12–3–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–932]

Certain Steel Threaded Rod From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') preliminarily determines that imports from the People's Republic of China (''PRC'') of certain steel threaded rod products with 1.25 percent or more chromium, by weight, produced by Gem-Year Industrial Co., Ltd. (''Gem-Year''), and otherwise meeting the description of in-scope merchandise, are within the class or kind of merchandise subject to the *Order.*[1]

DATES: *Effective Date:* December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Toni Dach, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1655.

SUPPLEMENTARY INFORMATION:

Scope of the Antidumping Duty Order

The merchandise covered by the order is steel threaded rod.[2] Certain steel threaded rod subject to the order is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090, and 7318.15.2095. Although the subheadings are provided for convenience and customs purposes, the written product description remains dispositive.[3]

Scope of the Circumvention Inquiry

The merchandise subject to this antidumping circumvention inquiry consists of steel threaded rod from the PRC produced by Gem-Year containing greater than 1.25 percent chromium, by weight, and otherwise meeting the requirements of the scope of the *Order* as listed under the ''Scope of the Antidumping Duty Order'' section above.

Methodology

The Department has conducted this preliminary determination of circumvention in accordance with section 781(c) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.225. For a full description of the methodology underlying our conclusions, please see the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a proprietary document with a public version, and the public version is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete public version of the Preliminary Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/*. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Findings

As detailed in the Preliminary Decision Memorandum, we preliminarily determine that imports from the PRC of certain steel threaded rod products with 1.25 percent or more chromium, by weight, produced by Gem-Year, and otherwise meeting the description of in-scope merchandise, are subject to the *Order.* This preliminary determination applies only to merchandise produced by Gem-Year.

Suspension of Liquidation

In accordance with 19 CFR 351.225(l)(2), we are directing U.S. Customs and Border Protection (''CBP'') to suspend liquidation of entries of merchandise subject to this inquiry produced by Gem-Year, and entered, or withdrawn from warehouse, for consumption on or after January 5, 2012, the date of the initiation of this inquiry. We will also instruct CBP to require a cash deposit of estimated duties at the applicable rates for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after January 5, 2012, the date of the initiation of this inquiry, in accordance with 19 CFR 351.225(l)(2).

Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments according to a schedule released by the Department concurrent with this notice. Interested parties will be notified by the Department of the location and time of any hearing, if one is requested. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 20 days after the date of publication of this notice.[4] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined.[5] Parties should confirm by telephone the date, time, and location of the hearing.

This preliminary determination of circumvention is in accordance with section 781(c) of the Act and 19 CFR 351.225.

Dated: November 23, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–29275 Filed 12–3–12; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Certain Steel Threaded Rod from the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 17154 (April 14, 2009) (''*Order*'').

[2] *See* Preliminary Analysis Memorandum for the Circumvention Inquiry of the Antidumping Duty Order on Certain Steel Threaded Rod from the People's Republic of China, for the Producer Known as Gem-Year Industrial Co., Ltd. (''Preliminary Decision Memorandum'') issued concurrently with this notice for a complete description of the Scope of the Order.

[3] *See Order.*

[4] *See* 19 CFR 351.310(c).

[5] *See* 19 CFR 351.310.

DEPARTMENT OF COMMERCE

International Trade Administration

Ohio University, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscope

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 3720, U.S. Department of Commerce, 14th and

Constitution Avenue NW., Washington, DC.

Docket Number: 12–038. *Applicant:* Ohio University, 166 Stocker Center, Athens, OH 45701. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 77 FR 65863, October 31, 2012.

Docket Number: 12–040. *Applicant:* University of North Carolina Wilmington, 601 South College Road, Wilmington, NC 28403–5915. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, Czech Republic. *Intended Use:* See notice at 77 FR 65863, October 31, 2012.

Docket Number: 12–041. *Applicant:* Institute for Imaging & Analytical Technologies, Mississippi State University, Clay Lyle Entomology Building, Mississippi State, MS 39762. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 77 FR 65863, October 31, 2012.

Docket Number: 12–042. *Applicant:* Kansas State University, College of Veterinary Medicine, K206 Moiser Hall, Manhattan, KS 66505. *Instrument:* Electron Microscope. *Manufacturer:* FEI, Czech Republic. *Intended Use:* See notice at 77 FR 65863, October 31, 2012.

Docket Number: 12–043. *Applicant:* Cleveland Clinic Foundation, 2111 East 96th Street, Cleveland, OH 44106. *Instrument:* Electron Microscope. *Manufacturer:* FEI, Czech Republic. *Intended Use:* See notice at 77 FR 65863, October 31, 2012.

Docket Number: 12–044. *Applicant:* University of Colorado, 347 University of Colorado Boulder, Boulder, CO 80309. *Instrument:* Electron Microscope. *Manufacturer:* FEI, Czech Republic. *Intended Use:* See notice at 77 FR 65863–64, October 31, 2012.

Docket Number: 12–045. *Applicant:* Walter Reed Army Institute of Research, 2460 Linden Lane, Building #503, Silver Spring, MD 20910. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 77 FR 65863–64, October 31, 2012.

Docket Number: 12–046. *Applicant:* Battelle Memorial Institute, 790 6th Street, Richland, WA 99354. Instrument: Electron Microscope. *Manufacturer:* FEI, Czech Republic. *Intended Use:* See notice at 77 FR 65863–64, October 31, 2012.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as this instrument is intended to be used, is being manufactured in the United States at the time the instrument was ordered. *Reasons:* Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: November 27, 2012.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2012–29288 Filed 12–3–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Trade Mission to Egypt and Kuwait

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Amendment to notice.

SUMMARY: The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service is amending the Notice regarding the Trade Mission to Egypt and Kuwait March 10–14, 2013, published at 77 FR 33439, June 6, 2012 to revise the application deadline from December 14, 2012 to the new deadline of January 18, 2013.

SUPPLEMENTARY INFORMATION: In June 2012 the Department of Commerce initiated recruitment for participation in the U.S. Trade Mission to Egypt and Kuwait March 10–14, 2013, published at 77 FR 33439, June 6, 2012. Due to the Thanksgiving holidays and disruptions related to Hurricane Sandy, it has been determined that additional time is needed to allow for additional recruitment and marketing in support of the mission. Applications now will be accepted through January 18, 2013. Interested firms that have not already submitted an application are encouraged to apply. Applications will be accepted after the deadline only to the extent that space remains and scheduling constraints permit.

Amendments

The Timeframe for Recruitment and Applications section of the Trade Mission to Egypt and Kuwait is amended to read as follows:

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including posting Export.gov—and other Internet Web sites; publication in trade publications and association newsletters; direct outreach to the Department's clients; posting in the **Federal Register**; and announcements at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin June 6, 2012 and conclude no later than January 18, 2013. Applications received after January 18, 2013 will be considered only if space and scheduling constraints permit. We will inform applicants of selection decisions as soon as possible after January 18, 2013.

FOR FURTHER INFORMATION CONTACT:

U.S. Commercial Service Cairo, Egypt	U.S. Commercial Service Washington, DC
Dennis Simmons, Deputy Senior Commercial Officer, Embassy of the United States of America, Email: *Dennis.Simmons@trade.gov,* Tel: 2 (02) 2797–2610.	Anne Novak, U.S. Commercial Service, Washington, DC, Tel: (202) 482–8178, Email: *Anne.Novak@trade.gov.*

Elnora Moye,

Trade Program Assistant.

[FR Doc. 2012–29289 Filed 12–3–12; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Infrastructure Trade Mission to Colombia and Panama; Bogotá, Columbia and Panama City, Panama, May 13–16, 2012

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

Mission Description

The United States Department of Commerce is organizing a Trade Mission to Bogotá, Colombia and Panama City, Panama. Dates are May 13–16, 2013. This will be an executive-led mission, which will focus on helping U.S. companies launch or increase their export business in the promising sectors within the transportation infrastructure markets of these two countries. The mission will include business-to-business matchmaking appointments with local companies, as well as market briefings, and networking events. In both Colombia and Panama the governments and private sector are investing some $30 billion in infrastructure projects. As a result, the mission will focus on export-ready U.S. firms in the following sectors: Building products, construction equipment, electrical power systems, safety and security equipment, airport supplies, logistics and distribution solutions providers, port equipment, and intelligent transportation systems (ITS).

Commercial Setting

Colombia

Colombia ranks solidly with the group of progressive, industrializing countries worldwide that have diversified agriculture, resources, and productive capacities. Despite the global economic crisis, Colombia's economic prospects are positive. In 2011, Colombia enjoyed 5.9% GDP growth and should maintain 4% in 2012. Colombia is attracting record amounts of foreign direct investment (FDI), which is further leading to rapid industrial development, necessitating the need for improved infrastructure. In 2011, Colombia attracted $13 billion in FDI, and is on pace to attract $15 billion in 2012. In addition, per capita income continues to grow as Colombia's middle class has doubled in the past 10 years.

Colombia is the third largest market in the region, after Mexico and Brazil, and is ranked 22nd as a market for U.S. exports globally. Over the past 10 years, Colombia has become one of the most stable economies in the region. Improved security, sound government policies, steady economic growth, moderate inflation and a wide range of opportunities make it worthwhile for U.S. exporters to take a serious look at Colombia.

Bogotá, the capital of Colombia, generates approximately 30 percent of the country's total gross domestic product (GDP). Bogotá offers diverse business opportunities in almost all economic sectors.

The overall improvement in the national safety and security situation in Colombia has allowed the government to focus on improving its infrastructure development, which along with a boom in the extractive industries, has fueled the growth of U.S. exports to Colombia, including opportunities generated by highway, hotel and housing construction in Bogotá and coastal cities such as Cartagena and Barranquilla. The government of Colombia has earmarked $26 billion over the next 4 years for primarily road projects. However, on-going and future projects exist in airport modernization, sea and river port developments, and rail line upgrades. In addition, most major cities in Colombia are looking for solutions to improve internal transportation, including mass transit. A recently completed U.S. Trade Development Agency reverse trade mission focused on ITS highlights the opportunities that exist in Colombia across the board in transportation infrastructure.

Colombia's traditional acceptance of U.S. brands as well as U.S. and international standards provide a solid foundation for U.S. firms seeking to do business there. Moreover, the implementation of the US-Colombia Free Trade Agreement on May 15, 2012 provided immediate duty-free entry for 80 percent of U.S. consumer and industrial exports to Colombia, with remaining tariffs phased out over the next 10 years. The Agreement also opens the market for remanufactured goods and provides greater protection for intellectual property rights (IPR).

Panama

Panama has historically served as the crossroads of trade for the Americas. Its strategic location as a bridge between two oceans and the meeting of two continents has made Panama not only a maritime and air transport hub, but also an international trading, banking, and services center. Panama's global and regional prominence is being enhanced by recent trade liberalization and privatization, and it is participating actively in the hemispheric movement toward free trade agreements. Panama's dollar-based economy offers low inflation in comparison with neighboring countries and zero foreign exchange risk. Its government is stable and democratic and actively seeks foreign investment in all sectors, especially services, tourism and retirement properties.

Panama and the U.S. recently implemented a Trade Promotion Agreement (TPA) that has had the effect of eliminating some 90% of tariffs and duties on U.S. exports to Panama. But even before the implementation of the TPA, the U.S. was Panama's most important trading partner, with about 30% of the import market, and U.S. products have enjoyed a high degree of acceptance in Panama. In 2011, U.S. exports to Panama jumped 34% to $8.25 billion—in no small part due to the fact that Panama's economy grew 10.5%. However, international competition for sales is strong across sectors including telecommunications equipment, automobiles, heavy construction equipment, consumer electronics, computers, apparel, gifts, and novelty products.

Panama now enjoys investment grade rating status, granting the Government of Panama international recognition for recent tax reforms and its record of steady GDP growth while keeping its deficits under control (even in 2009, a dismal year for the world economy, Panama's economy grew 2.9% and the Government of Panama's deficit was only 1% of GDP). Not only does the investment-grade rating lower the cost of borrowing for the Government of Panama, but it sends a strong market signal that Panama, even while carrying a debt ratio that is relatively high, is one of only five Latin American countries to achieve this distinction.

Panama's economy is based primarily on a well-developed services sector, accounting for about 75% of GDP. Services include the Panama Canal, banking, the Colon Free Zone, insurance, container ports, and flagship registry. Panama is currently engaged in the Panama Canal expansion project. This project, in conjunction with the expansion of the capacities of its ports on both the Atlantic and Pacific coasts, will solidify Panama's global logistical advantage in the Western Hemisphere.

This logistical platform has aided the success of the Colon Free Zone (CFZ), the second largest in the world after Hong Kong, which has become a vital trading and transshipment center serving the region and the world. CFZ imports—a broad array of luxury goods, electronic products, clothing, and other consumer products—arrive from all over

the world to be resold, repackaged, and reshipped, primarily to regional markets. Because of this product mix, U.S. brand market share is significant, even if most of those products are made in Asia.

Mission Goals

This trade mission is designed to help U.S. firms initiate or expand their exports to Colombia and Panama by providing business-to-business introductions and market access information.

Mission Scenario

The mission will stop in Panama City, Panama and Bogotá, Colombia. In each city, participants will meet with pre-screened potential agents, distributors, and representatives, as well as other business partners and government officials. They will also attend market briefings by U.S. Embassy officials, as well as networking events offering further opportunities to speak with local business and industry decision-makers.

Proposed Time Table

Monday, May 13, 2013, Panama City, Panama	Market Briefing. Matchmaking appointments. Networking reception.
Tuesday, May 14, 2013, Panama City, Panama and Bogota, Colombia	Matchmaking appointments and/or site visits. Travel to Bogota in late afternoon/early evening.
Wednesday, May 15, 2013, Bogota, Colombia	Market Briefing. Matchmaking appointments. Networking reception.
Thursday, May 16, 2013, Bogota, Colombia	Matchmaking appointments and/or site visits.

Participation Requirements

All parties interested in participating in the Executive-led Trade Mission to Colombia and Panama must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 15 U.S. companies and/or trade associations and maximum of 17 companies and/or trade associations will be selected to participate in the mission from the applicant pool. U.S. companies or trade associations already doing business with Colombia and Panama, as well as U.S. companies or trade associations seeking to enter these countries for the first time may apply.

Fees and Expenses

After a company and/or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee will be $3,980 for large firm or trade association and $2,675 for a small or medium-sized enterprise (SME).[1] The fee for each additional firm representative (large firm, SME, or trade association) is $450. Expenses for travel, lodging, most meals, and incidentals will be the responsibility of each mission participant.

Conditions of Participation

- An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.
- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content. In the case of a trade association or trade organization, the applicant must certify that, for each company to be represented by the trade association or trade organization, the products and services the represented company seeks to export are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content.

Selection Criteria for Participation

Selection will be based on the following criteria, listed in decreasing order of importance:

- Suitability of the company's (or, in the case of a trade association or trade organization, represented companies') products or services for the Colombian and Panamanian markets
- Company's (or, in the case of a trade association or trade organization, represented companies') potential for business in Colombia and Panama, including likelihood of exports resulting from the mission
- Consistency of the applicant's goals and objectives with the stated scope of the trade mission

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register** (*http://www.gpoaccess.gov/fr*), posting on ITA's trade mission calendar—*http://export.gov/trademissions*—and other Internet Web sites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment will begin immediately and conclude no later than Friday, February 15, 2013. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis until the maximum of fifteen participants is reached. We will inform all applicants of selection decisions as soon as possible after the applications are reviewed. Applications received after the February 15th deadline will be considered only if space and scheduling constraints permit.

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (see *http://www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html)*. Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (see *http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

How To Apply

Applications can be downloaded from the trade mission Web site or can be obtained by contacting Arica Young, Carlos Suarez or Enrique Tellez at the U.S. Department of Commerce (see contact details below.) Completed applications should be submitted to Arica Young, Carlos Suarez or Enrique Tellez.

Contacts

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Elnora Moye,

Trade Program Assistant.

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BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Trade Mission to Asia in Conjunction With Trade Winds—Asia, The Philippines, Hong Kong, Korea, Japan and Taiwan, May 9–17, 2013

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

Mission Description

The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service (CS) is organizing a trade mission to Asia, that will include the Trade Winds—Asia business forum in Seoul, Korea, May 2013. U.S. trade mission members will participate in the Trade Winds—Asia business forum in Seoul, Korea (which is also open to U.S. companies not participating in the trade mission). Trade mission participants may participate in their choice of mission stops. On the first leg of the trade mission, prior to the Korean trade mission stop, participants may choose to participate in a trade mission stop in either: The Philippines and/or Hong Kong. Trade mission participants may then choose to participate in a trade mission stop in Korea, during which trade mission participants may participate in the Trade Winds—Asia business forum. Following the trade mission stop in Seoul, Korea, trade mission participants may choose to participate in a trade mission stop in either: Japan and/or Taiwan.

Each trade mission stop will include one-on-one business appointments with pre-screened potential buyers, agents, distributors and joint-venture partners, and networking events. Trade mission participants electing to participate in the Trade Winds—Asia business forum may attend regional and industry-specific sessions and consultations with CS Senior Commercial Officers based in Asia.

This mission is open to U.S. companies and trade associations from a cross section of industries with growth potential in The Philippines, Hong Kong, Korea, Japan and Taiwan, including but not limited to: Aerospace and aviation, automotive electronics, computer services & software, consumer goods, defense industry equipment, food processing systems, education, electrical power systems, electronic components, energy (both new and renewable, entertainment and media, environmental technologies and services, financial services, franchising, healthcare & medical, hotel/restaurant equipment, housing products, industrial chemical, info. & comm. technology, information security services, logistics development, machine tools and equipment, medical equipment and pharmaceuticals, outbound travel and tourism, pet products, pleasure boats and accessories, pollution control equipment, port construction, retail, safety and security equipment, semiconductors, specialty chemicals, telecommunications equipment, transportation infrastructure, travel and tourism services.

Commercial Setting

Korea (Seoul)

On March 15, 2012, the Korea-U.S. Free Trade Agreement (KORUS) went into force, becoming our nation's largest Free Trade Agreement (spell out) since NAFTA. The agreement has the potential to increase U.S. exports to Korea by approximately $10–12 billion, and it will be especially beneficial for U.S. small and medium enterprises (spell out).

The amount of trade between, the U.S. and Korea exceeded $100 billion for the first time ever. U.S. exports reached an all-time high of $43.5 billion and also increased 12% over 2010 levels.

Korea is the United States' seventh-largest trading partner. The U.S. is the third-largest exporter to Korea, with a 9% market share. Key competitors include: China, with 16.8%; Japan, with 15.3%; and the EU (27 nations), with 10%. Since the EU had already implemented its FTA with Korea, U.S. firms will now be in a stronger competitive situation following KORUS implementation.

Korea's projected 2012 GDP growth is forecasted at around 3.6%, but could come in slightly lower given global economic sluggishness. Its commercial banks maintain strong reserves, in case of a possible worldwide slowdown or difficulties within the Euro zone. Korea will continue to focus its development on key growth sectors. Patents and trademarks issued by the Korean Patent Office exceeded 362,000 filings in 2010. The increasing trend in local patent and trademark filings reflects the move toward more technology-intensive and capital-intensive industries and services.

Best market prospects for Korea include: The aerospace Industry, specialty chemicals; cosmetics; defense industry equipment; education services; new and renewable energy, entertainment and media, franchising; medical equipment and devices, pollution control equipment; semiconductors, and travel & tourism.

Taiwan (Taipei)

With a population of 23 million, Taiwan is a thriving democracy, vibrant market economy, and a highly attractive export market, especially for U.S. firms. In 2011, Taiwan was ranked as the tenth-largest trading partner in goods with the U.S., putting it ahead of markets such as India and Italy. It is also the sixth-largest agricultural market for the U.S., and the fifth-largest source of foreign students in U.S. higher education. Taiwan is the world's fourth-largest holder of foreign exchange reserves, with over $385 billion in 2011. The Taiwan economy softened slightly after 2010, but still enjoyed 4% GDP growth in 2011. Unemployment has remained relatively low, and an appreciating currency makes U.S. goods and services attractive to Taiwan buyers.

Taiwan's real GDP increased by 4% in 2011, and this growth was mainly driven by strong export growth and private-investment expansion. In addition, the tariff reductions and exemptions from the Economic Cooperation Framework Agreement (ECFA), which became effective on January 1, 2011, helped spur Taiwan's exports to China.

However, Taiwan's export growth may be significantly impacted by the New Taiwan dollar's appreciation against the U.S. dollar. Local private consumption is expected to expand continuously as a result of the recent

economic recovery and low unemployment. Improving ties with China is expected to ease the current cross-strait and investment restrictions and encourage more foreign investments in Taiwan. With these changing factors, local officials forecast that economic growth for 2012 will be moderate, at an annual rate of about 3.91%.

Taiwan's best prospect sectors for U.S. exports include information communications and technologies, safety and security equipment, renewable energy technologies, publishing services, education and training services, travel and tourism, electronic components, pet products, and medical devices and equipment.

Japan (Tokyo)

Japan is the world's third largest economy, after the United States and China, with a GDP of roughly $5.9 trillion. Japan is our fourth largest export market, receiving $66.2 billion in goods and $47.6 billion in services from the United States in 2011. Japan is also the second largest foreign investor in the United States, with more than $257 billion invested.

Japan's economy is highly efficient and competitive and its reservoir of industrial leadership and technicians, well-educated and industrious work force, high savings and investment rates, and intensive promotion of industrial development and trade has produced a mature industrial economy. Japan has few natural resources, and trade helps the nation earn the foreign exchange needed to purchase raw materials for its economy. Tokyo alone forms the core of an urban area that boasts a total population of over 35 million, roughly equivalent to the New York and Los Angeles metropolitan areas combined, and accounts for about one-third of Japan's total GDP. Consumers are highly sophisticated and discerning and are on the vanguard of the latest technological developments, trends and fashions, while the rapidly aging population is creating demand for new and innovative solutions across all areas of the economy. All of this creates demand for high-quality, innovative Made-in-USA goods and services. And with the continued strength of the Japanese yen against the U.S. dollar, American goods and services have never been more affordable for Japanese buyers. Best prospect sectors include: Aerospace, computer software, cosmetics/toiletries, education and corporate training, electronic components, medical equipment, pharmaceuticals, renewable energy, safety and security, soil remediation and engineering services, telecommunications equipment, and travel/tourism, along with hot new emerging sectors such as biotechnology, healthcare IT and nanotechnology.

Most globally competitive American and international firms compete heavily in the Japanese market, and partner with Japanese firms worldwide. Savvy observers agree that an active engagement with the Japanese market remains critical to the success of American firms both large and small, whether in Japan, in other world markets, or even back home in the United States.

Hong Kong

Hong Kong, a Special Administrative Region of the People's Republic of China (PRC) since its reversion in 1997, has proven resilient in past economic crises. Dominant and sustained drivers of economic growth include private consumption (retail), transportation and logistics, and business services, real estate development (bolstered by ongoing public infrastructure works), and tourism. Hong Kong has benefited from continued economic integration with mainland China's strong economy. In particular, Beijing's policy of opening its service sector and gradually expanding the scope of the offshore Renminbi (RMB—the PRC's currency) market in Hong Kong and the sustained high numbers of mainland Chinese visitors (28 million in 2011) have strengthened Hong Kong's economy.

Hong Kong is an ideal platform for doing business in Asia, especially for mainland China. Hong Kong is a free port that does not levy any customs tariffs and has limited excise duties. Its strong rule of law and respect for property rights make it a strategic platform for U.S. companies, especially small- and medium-sized firms, seeking to do business in Asia. Hong Kong's statutory trade promotion body, the Trade Development Council, seized upon this unique positioning to create the Pacific Bridge Initiative in late 2010, the first such agreement with a foreign government affiliate explicitly supporting the United States.

Hong Kong's businesses enjoy close links to mainland China and the rest of Asia. According to Hong Kong Government statistics, there are 1,328 subsidiaries of U.S. parent companies in Hong Kong, making the United States the largest source of subsidiaries in Hong Kong. Among those U.S. subsidiaries, 840 are regional headquarters or regional offices. Hong Kong's key characteristics are its openness, and promotion of tourism, trade and investment.

In 2011, U.S. exports to Hong Kong were $27.3 billion, which constituted 5.6% of Hong Kong's imports (2011) and ranked the territory as the U.S.'s 10th largest export market. Its major trading partners: Mainland China, United States, EU, Japan, and Taiwan. Hong Kong has world-class infrastructure; a free flow of information; no restrictions on inward or outward investment; no foreign-exchange controls; no nationality restrictions on corporate or sectoral ownership; a simple, low-tax regime; and is a global financial hub. In addition, Hong Kong citizens speak excellent English and the Hong Kong Dollar is pegged to the U.S. Dollar.

The Philippines (Manila)

United States goods exports to the Philippines in 2011 were USD7.7 billion, up 4.5% (USD330 million) from 2010, but down 12.3% from 2000. The top export categories (2-digit HS) in 2011 were: Electrical machinery, machinery, cereals (wheat), optic and medical instruments, and food waste and animal feed (soybean residues). U.S. service exports to the Philippines totaled USD2.2 billion in 2011.

U.S. exports of agricultural products to the Philippines totaled USD2.1 billion in 2011, the 11th-largest U.S. Ag export market. Leading categories include: Wheat, soybean meal, dairy products, and red meats fresh/chilled/frozen.

U.S. exports of private commercial services (i.e., excluding military and government) to the Philippines were USD2.2 billion in 2011 (latest data available), 17% more than the 2009 level. The private-services category (business, professional, and technical services) and travel category accounted for most of U.S. service exports in 2010.

Philippine GDP growth slowed to 3.7% in 2011 following one-off factors in 2010 (election spending and heavy post-typhoon reconstruction); lower-than-targeted government expenditures; and adverse developments globally. The Government reverted to a deficit reduction path in 2011 after opting for higher deficits in 2008 to 2010 to help support economic growth and generate employment. However, the Government spent significantly below target, contributing to the economy's weaker-than-expected expansion.

Mission Goals

The goal of the Asia trade mission is to help participating firms gain market insights, make industry contacts, solidify business strategies, and advance specific projects, with the goal of increasing U.S. exports to Korea, Taiwan, Japan, Hong Kong and The Philippines. The delegation will have access to CS Senior Commercial Officers

and Commercial Specialists during the mission, learn about the many business opportunities in Asia, and gain first-hand market exposure. U.S. trade mission participants already doing business in Korea, Taiwan, Japan, Hong Kong and the Philippines will have opportunities to further advance business relationships and projects in those markets.

Scenario & Timetable

May 9–10 ...	Trade Mission stops in Hong Kong and/or the Philippines (Choice of one stop).
May 11	Travel Day to Korea.
May 13	Korea: Asia Business Forum.
May 14–15	Korea: Asia Business Forum, consultations with CS Senior Commercial Officers and Trade Mission one-on-one meetings (Schedule will vary among participating firms, depending on their needs and interests).
May 16–17	Trade Mission stops in Japan and/or Taiwan (Choice of one stop).

Participation Requirements

All parties interested in participating in the U.S. and Foreign Commercial Service Trade Mission to Asia must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below.

A minimum of 65 companies and/or trade associations will be selected to participate in the mission from the applicant pool on a rolling basis. Additional delegates will be accepted based on available space. Each of the trade mission stops (Japan, Taiwan, Hong Kong, the Philippines) is designed for participation of a maximum of 30 participants. U.S. companies and/or trade associations already doing business in, or seeking to enter Japan, Taiwan, Korea, Hong Kong and the Philippines for the first time may apply.

Fees and Expenses

After a company has been selected to participate in the mission, a payment to the Department of Commerce in the form of a participation fee is required.

For one mission stop, the participation fee will be $2,450 for a small or medium-sized enterprise (SME) [1] and $3,400 for large firms.

Each additional mission stop will result in an additional participation fee of $1,000 for both small or medium sized enterprises and large firms alike.

An additional representative will require an additional fee of $325 per mission stop for both small or medium sized enterprises and large firms alike.

Expenses for travel, lodging, meals, and incidentals (e.g., local transportation) will be the responsibility of each mission participant.

Conditions for Participation

• An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. Applicant should specify in their application and supplemental materials which trade mission stops they are interested in participating in. If the Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.

• Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the U.S., or, if not, marketed under the name of a U.S. firm and have at least 51% U.S. content of the value of the finished product or service. In the case of a trade association or trade organization, the applicant must certify that, for each company to be represented by the trade association or trade organization, the products and services the represented company seeks to export are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one % U.S. content.

Selection Criteria for Participation

Selection will be based on the following criteria:

• Suitability of the company's (or, in the case of a trade association or trade organization, represented companies') products or services to each of the markets the company has expressed an interest in visiting as part of this trade mission.

• Company's (or, in the case of a trade association or trade organization, represented companies') potential for business in each of the markets the company has expressed an interest in visiting as part of this trade mission.

• Consistency of the applicant's goals and objectives with the stated scope of the mission.

Diversity of company size, sector or subsector, and location may also be considered during the review process.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar, and other Internet Web sites, press releases to the general and trade media, direct mail and broadcast fax, notices by industry trade associations and other multiplier groups and announcements at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately and conclude no later than March 30, 2013. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis beginning December 17, 2012, until the minimum of 65 participants is selected. After March 30, 2013, companies will be considered only if space and scheduling constraints permit.

U.S. Contact Information

Bill Burwell, U.S. Export Assistance Center—Baltimore, *Bill.Burwell@trade.gov,* Tel: 410–962–3097

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Korea Contact Information

James Sullivan, U.S. Commercial Service—Korea, *James.Sullivan@trade.gov*

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Elnora Moye,

Trade Program Assistant.

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[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (see *http://www.sba.gov/services/contracting_opportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (see *http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC272

Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Programs

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

ACTION: Notification of standard prices and fee percentage.

SUMMARY: NMFS publishes individual fishing quota (IFQ) standard prices and fee percentage for the IFQ cost recovery program in the halibut and sablefish fisheries of the North Pacific. The fee percentage for 2012 is 2.1%. This action is intended to provide holders of halibut and sablefish IFQ permits with the 2012 standard prices and fee percentage to calculate the required payment for IFQ cost recovery fees due by January 31, 2013.

DATES: Effective December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Troie Zuniga, Fee Coordinator, 907–586–7231.

SUPPLEMENTARY INFORMATION:

Background

NMFS Alaska Region administers the halibut and sablefish individual fishing quota (IFQ) programs in the North Pacific. The IFQ programs are limited access systems authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northern Pacific Halibut Act of 1982. Fishing under the IFQ programs began in March 1995. Regulations implementing the IFQ program are set forth at 50 CFR part 679.

In 1996, the Magnuson-Stevens Act was amended to, among other things, require the Secretary of Commerce to ''collect a fee to recover the actual costs directly related to the management and enforcement of any * * * individual quota program.'' This requirement was further amended in 2006 to include collection of the actual costs of data collection, and to replace the reference to ''individual quota program'' with a more general reference to ''limited access privilege program'' at section 304(d)(2)(A). This section of the Magnuson-Stevens Act also specifies an upper limit on these fees, when the fees must be collected, and where the fees must be deposited.

On March 20, 2000, NMFS published regulations implementing the IFQ cost recovery program (65 FR 14919), which are set forth at § 679.45. Under the regulations, an IFQ permit holder incurs a cost recovery fee liability for every pound of IFQ halibut and IFQ sablefish that is landed on his or her IFQ permit(s). The IFQ permit holder is responsible for self-collecting the fee liability for all IFQ halibut and IFQ sablefish landings on his or her permit(s). The IFQ permit holder is also responsible for submitting a fee liability payment to NMFS on or before the due date of January 31 of the year following the year in which the IFQ landings were made. The dollar amount of the fee due is determined by multiplying the annual IFQ fee percentage (3 percent or less) by the ex-vessel value of all IFQ landings made on a permit and summing the totals of each permit (if more than one).

Standard Prices

The fee liability is based on the sum of all payments made to fishermen for the sale of the fish during the year. This includes any retro-payments (e.g., bonuses, delayed partial payments, post-season payments) made to the IFQ permit holder for previously landed IFQ halibut or sablefish.

For purposes of calculating IFQ cost recovery fees, NMFS distinguishes between two types of ex-vessel value: Actual and standard. Actual ex-vessel value is the amount of all compensation, monetary or non-monetary, that an IFQ permit holder received as payment for his or her IFQ fish sold. Standard ex-vessel value is the default value on which to base fee liability calculations. IFQ permit holders have the option of using actual ex-vessel value if they can satisfactorily document it; otherwise, the standard ex-vessel value is used.

Regulations at § 679.45(c)(2)(i) require the Regional Administrator to publish IFQ standard prices during the last quarter of each calendar year. These standard prices are used, along with estimates of IFQ halibut and IFQ sablefish landings, to calculate standard values. The standard prices are described in U.S. dollars per IFQ equivalent pound for IFQ halibut and IFQ sablefish landings made during the year. IFQ equivalent pound(s) is the weight (in pounds) for an IFQ landing, calculated as the round weight for sablefish, and headed and gutted net weight for halibut. NMFS calculates the standard prices to closely reflect the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings by month and port or port-group. The standard prices for IFQ halibut and IFQ sablefish are listed in the tables that follow the next section. Data from ports are combined as necessary to protect confidentiality.

Fee Percentage

Section 304(d)(2)(B) of the Magnuson-Stevens Act specifies a maximum fee of 3 percent of the ex-vessel value of fish harvested under an IFQ Program. NMFS annually sets a fee percentage for sablefish and halibut IFQ holders that is based on the actual annual costs associated with certain management and enforcement functions, as well as the standard ex-vessel value of the catch subject to the IFQ fee for the current year. The method used by NMFS to calculate the IFQ fee percentage is described at § 679.45(d)(2)(ii).

Regulations at § 679.45(d)(3)(i) require NMFS to publish the IFQ fee percentage for the halibut and sablefish IFQ fisheries in the **Federal Register** during or before the last quarter of each year. For the 2012 sablefish and halibut IFQ fishing season, an IFQ permit holder is to use a fee liability percentage of 2.1% to calculate his or her fee for landed IFQ in pounds. The IFQ permit holder is responsible for submitting the fee liability payment to NMFS on or before January 31, 2013.

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2012 IFQ SEASON

Landing location	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
Cordova	February 28		
	March 31		
	April 30	6.02	
	May 31	6.15	
	June 30		
	July 31	6.33	

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2012 IFQ SEASON—Continued

Landing location	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
	August 31	6.34	
	September 30	6.01	
	October 31	6.01	
	November 30	6.01	
Dutch Harbor	February 28		
	March 31		
	April 30		
	May 31	5.53	3.61
	June 30	5.21	4.29
	July 31	5.17	3.32
	August 31	5.43	3.43
	September 30	5.18	2.46
	October 31	5.18	2.46
	November 30	5.18	2.46
Homer	February 28		
	March 31		
	April 30		
	May 31	6.20	5.80
	June 30	6.13	5.94
	July 31	6.13	
	August 31	5.92	
	September 30	5.24	
	October 31	5.24	
	November 30	5.24	
Ketchikan	February 28		
	March 31		
	April 30		
	May 31		
	June 30		
	July 31	6.41	
	August 31	6.42	
	September 30		
	October 31		
	November 30		
Kodiak	February 28		
	March 31	5.49	
	April 30	5.94	4.29
	May 31	6.05	4.27
	June 30	5.97	4.41
	July 31	5.89	3.83
	August 31	5.73	3.71
	September 30	5.41	3.61
	October 31	5.41	3.61
	November 30	5.41	3.61
Petersburg	February 28		
	March 31		
	April 30		
	May 31	6.37	
	June 30	6.48	
	July 31	6.55	
	August 31	6.22	
	September 30	6.25	
	October 31	6.25	
	November 30	6.25	
Seward	February 28		
	March 31		
	April 30		
	May 31		
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2012 IFQ SEASON—Continued

Landing location	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
Sitka	February 28		
	March 31		
	April 30		
	May 31		
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		
Yakutat	February 28		
	March 31		
	April 30		
	May 31		
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		

Port group	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
Bering Sea [1]	February 28		
	March 31		
	April 30	5.60	3.36
	May 31	5.45	3.97
	June 30	5.28	4.34
	July 31	5.27	3.54
	August 31	5.47	3.57
	September 30	5.22	2.74
	October 31	5.22	2.74
	November 30	5.22	2.74
Central Gulf [2]	February 28		
	March 31	6.23	4.42
	April 30	6.15	4.33
	May 31	6.14	4.28
	June 30	6.06	4.31
	July 31	5.99	3.85
	August 31	5.87	3.73
	September 30	5.66	3.55
	October 31	5.66	3.55
	November 30	5.66	3.55
Southeast [3]	February 28		
	March 31	6.40	4.14
	April 30	6.27	4.35
	May 31	6.34	4.84
	June 30	6.39	4.73
	July 31	6.26	4.46
	August 31	6.25	3.95
	September 30	6.10	3.93
	October 31	6.10	3.93
	November 30	6.10	3.93
All [4]	February 28		
	March 31	6.29	4.18
	April 30	6.17	4.30
	May 31	6.10	4.42
	June 30	6.00	4.47
	July 31	5.82	3.96
	August 31	5.78	3.74
	September 30	5.66	3.67
	October 31	5.66	3.67

Port group	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
	November 30	5.66	3.67

[1] *Landing Locations Within Port Group—Bering Sea:* Adak, Akutan, Akutan Bay, Atka, Bristol Bay, Chefornak, Dillingham, Captains Bay, Dutch Harbor, Egegik, Ikatan Bay, Hooper Bay, King Cove, King Salmon, Kipnuk, Mekoryuk, Naknek, Nome, Quinhagak, Savoonga, St. George, St. Lawrence, St. Paul, Togiak, Toksook Bay, Tununak, Beaver Inlet, Ugadaga Bay, Unalaska.

[2] *Landing Locations Within Port Group—Central Gulf of Alaska:* Anchor Point, Anchorage, Alitak, Chignik, Cordova, Eagle River, False Pass, West Anchor Cove, Girdwood, Chinitna Bay, Halibut Cove, Homer, Kasilof, Kenai, Kenai River, Alitak, Kodiak, Port Bailey, Nikiski, Ninilchik, Old Harbor, Palmer, Sand Point, Seldovia, Resurrection Bay, Seward, Valdez, Whittier.

[3] *Landing Locations Within Port Group—Southeast Alaska:* Angoon, Baranof Warm Springs, Craig, Edna Bay, Elfin Cove, Excursion Inlet, Gustavus, Haines, Hollis, Hoonah, Hyder, Auke Bay, Douglas, Tee Harbor, Juneau, Kake, Ketchikan, Klawock, Metlakatla, Pelican, Petersburg, Portage Bay, Port Alexander, Port Graham, Port Protection, Point Baker, Sitka, Skagway, Tenakee Springs, Thorne Bay, Wrangell, Yakutat.

[4] *Landing Locations Within Port Group—All:* For Alaska: All landing locations included in 1, 2, and 3. For California: Eureka, Fort Bragg, Other California. For Oregon: Astoria, Aurora, Lincoln City, Newport, Warrenton, Other Oregon. For Washington: Anacortes, Bellevue, Bellingham, Nagai Island, Edmonds, Everett, Granite Falls, Ilwaco, La Conner, Port Angeles, Port Orchard, Port Townsend, Ranier, Fox Island, Mercer Island, Seattle, Standwood, Other Washington. For Canada: Port Hardy, Port Edward, Prince Rupert, Vancouver, Haines Junction, Other Canada.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 28, 2012.

Lindsay Fullenkamp,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29145 Filed 12–3–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC375

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a one-day meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will start at 9 a.m. on Thursday, December 20, 2012.

ADDRESSES: The meeting will be held at the Sheraton Colonial Hotel, One Audubon Road, Wakefield, MA 01880; telephone: (781) 245–9300; fax: (781) 245–0842.

Council Address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Thursday, December 20, 2012

Following introductions and any announcements, the Council will make final decisions on Framework Adjustment 48 to the Northeast Multispecies Fishery Management Plan. Specifically it is scheduled to review and select preferred alternatives concerning the following issues:

- Acceptable biological catch and annual catch limits for fishing year 2013 and beyond;
- Management measures for sector vessels (including measures related to at-sea and dockside monitoring of sector trips);
- Sector vessel access to parts of the year-round closed areas; and
- Changes to the accountability measures for commercial and recreational vessels, gear requirements for small-mesh bottom trawl vessels fishing on Georges Bank, and several other issues.

The Council also will review proposed monitoring requirements for a sector exemption request designed to facilitate the targeting of redfish. Any other related business that has not been covered under the stated agenda items listed above will be considered before adjournment at the end of the day.

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: November 29, 2012.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29242 Filed 12–3–12; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 12–1 and CPSC Docket No. 12–2]

Notice of Telephonic Prehearing Conference

AGENCY: U.S. Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: Notice of telephonic prehearing conference for the consolidated case: In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC and ZEN MAGNETS, LLC, CPSC Docket No. 12–1 and CPSC Docket No.12–2.

DATES: January 10, 2013, 12:30 p.m. Mountain/1:30 p.m. Central/2:30 p.m. Eastern.

ADDRESSES: Members of the public are welcome to attend the prehearing conference at the Courtroom of Hon. Dean C. Metry at 601 25th Street, 5th Floor Courtroom, Galveston, Texas 77550.

FOR FURTHER INFORMATION CONTACT: Jan Emig, Paralegal Specialist, U.S. Coast Guard ALJ Program, (409) 765–1300.

SUPPLEMENTARY INFORMATION: Any or all of the following shall be considered during the prehearing conference:

(1) Petitions for leave to intervene;

(2) Motions, including motions for consolidation of proceedings and for certification of class actions;

(3) Identification, simplification and clarification of the issues;

(4) Necessity or desirability of amending the pleadings;

(5) Stipulations and admissions of fact and of the content and authenticity of documents;

(6) Oppositions to notices of depositions;

(7) Motions for protective orders to limit or modify discovery;

(8) Issuance of subpoenas to compel the appearance of witnesses and the production of documents;

(9) Limitation of the number of witnesses, particularly to avoid duplicate expert witnesses;

(10) Matters of which official notice should be taken and matters which may be resolved by reliance upon the laws administered by the Commission or upon the Commission's substantive standards, regulations, and consumer product safety rules;

(11) Disclosure of the names of witnesses and of documents or other physical exhibits which are intended to be introduced into evidence;

(12) Consideration of offers of settlement;

(13) Establishment of a schedule for the exchange of final witness lists, prepared testimony and documents, and for the date, time and place of the hearing, with due regard to the convenience of the parties; and

(14) Such other matters as may aid in the efficient presentation or disposition of the proceedings.

Telephonic conferencing arrangements to contact the parties will be made by the court. Mary Murphy, Esq. and Jennifer Argabright, Esq., Counsel for the U.S. Consumer Product Safety Commission, shall be contacted by a third party conferencing center at (301) 504–7809. David C. Japha, Esq., Counsel for ZEN MAGNETS, LLC (Respondent) shall be contacted by a third party conferencing center at (303) 964–9500. Eric C. Tew, Esq. and Paul M. Laurenza, Esq., Counsel for MAXFIELD AND OBERTON HOLDINGS, LLC (Respondent) shall be contacted by a third party conferencing center at (202) 906–8646.

Authority: Consumer Product Safety Act, 15 U.S.C. 2064.

Dated: November 26, 2012.

Todd A. Stevenson,

Secretary.

[FR Doc. 2012–29236 Filed 12–3–12; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2012–ICCD–0061]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Student Assistance General Provisions—Readmission for Servicemembers

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 3, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2012–ICCD–0061 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E117, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. 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: Student Assistance General Provisions—Readmission for Servicemembers.

OMB Control Number: 1845–0095.

Type of Review: Extension of an existing information collection.

Respondents/Affected Public: Individuals or households; Private Sector (Not-for-profit institutions), State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 13,975.

Total Estimated Number of Annual Burden Hours: 2,260.

Abstract: This is a request for an extension of the current information collection. As provided by the Higher Education Opportunity Act, the regulations state the requirements under which an institution must readmit servicemembers with the same academic status they had at the institution when they last attended (or where they were accepted for attendance). The regulations require institutions to charge readmitted servicemembers, for the first academic year of their return, the same institutional charges they were charged for the academic year during which they left the institution (see section 484C of the Higher Education Act).

Dated: November 28, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–29271 Filed 12–3–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request with the Office of Management and Budget (OMB).

Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, 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 respondents, including through the use of automated collection techniques or other forms of information technology. This information collection request pertains to the Human Reliability Program (HRP). This information collection request consists of forms that will certify to DOE that respondents were advised of the requirements for occupying or continuing to occupy a HRP position. The forms include: Human Reliability Program Certification (DOE F 470.3), Acknowledgement and Agreement to Participate in the Human Reliability Program (DOE F 470.4), Authorization and Consent to Release Human Reliability Program (HRP) Records in Connection with HRP (DOE F 470.5), Refusal of Consent (DOE F 470.6), and Human Reliability Program (HRP) Alcohol Testing Form (DOE F 470.7). The HRP is a security and safety reliability program for individuals who apply for or occupy certain positions that are critical to the national security. It requires an initial and annual supervisory review, medical assessment, management evaluation, and a DOE personnel security review of all applicants or incumbents. It is also used to ensure that employees assigned to nuclear explosive duties do not have emotional, mental, or physical conditions that could result in an accidental or unauthorized detonation of nuclear explosives.

DATES: Comments regarding this proposed information collection must be received on or before February 4, 2013. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Regina Cano, U.S. Department of Energy, Office of Health, Safety and Security (HS–50), 1000 Independence Ave. SW., Washington, DC 20585, telephone at (301) 903–3473, by fax at (301) 903–6961, or by email at *regina.cano@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Regina Cano, U.S. Department of Energy, Office of Health, Safety and Security, HS–50, 1000 Independence Ave. SW., Washington, DC 20585, telephone at (301) 903–3473, by fax at (301) 903–6961, or by email at *regina.cano@hq.doe.gov.* Information about the collection instrument may be obtained at: *http://www.hss.doe.gov/pra.html.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. 1910–5122; (2) *Information Collection Request Title:* Human Reliability Program; (3) *Type of Review:* renewal; (4) *Purpose:* This collection provides for DOE management to ensure that individuals who occupy HRP positions meet program standards of reliability and physical and mental suitability; (5) *Annual Estimated Number of Respondents:* 43,960; (6) *Annual Estimated Number of Total Responses:* 43,999; (7) *Annual Estimated Number of Burden Hours:* 3,873; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden;* $349,002 (9) *Response Obligation:* Mandatory.

Statutory Authority: 42 U.S.C. 2165; 42 U.S.C. 2201; 42 U.S.C. 5814–5815; 42 U.S.C. 7101 *et seq.* ; 50 U.S.C. 2401 *et seq.* ; E.O. 10450, 3 CFR 1949–1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended; 3 CFR Chap. IV.

Issued in Washington, DC, on November 21, 2012.

Stephen A. Kirchhoff,

Director, Office of Resource Management, Office of Health, Safety and Security.

[FR Doc. 2012–29235 Filed 12–3–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Notice of Change to the Publication of Natural Gas Wellhead Prices

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice of a discontinuation of series in the publication of natural gas wellhead prices and request for comments.

SUMMARY: EIA is announcing the discontinuation of the natural gas wellhead price series. Beginning in January 2013, EIA will discontinue publishing wellhead prices, and will begin publishing a natural gas spot price at the Henry Hub and an NGL composite spot price at Mont Belvieu. Comments are invited on the proposed change. Please provide a description of your current use of the wellhead price data if applicable.

DATES: Comments must be filed by February 4, 2013. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Comments should be mailed to Jose Villar, EI–24, Forrestal Building, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Jose Villar at (*jose.villar@eia.gov*) or telephone at 202–586–9613.

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion
III. Current Actions

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic statistics. This information is used to assess the adequacy of energy resources to meet both near- and longer-term domestic demands.

EIA requests public comment on the discontinuation of the natural gas wellhead price data in an effort to reduce data and conceptual issues associated with the series.

Historically, the EIA published natural gas wellhead prices on an annual basis by state and on a monthly basis nationally. EIA has defined the wellhead price as the per-unit value at the mouth of the well (i.e., the wellhead price is considered to be the sales price obtainable from a third party in an arm's length transaction). These data appeared in the *Natural Gas Monthly, http://www.eia.gov/naturalgas/monthly/,* the *Natural Gas Annual, http://www.eia.gov/naturalgas/annual/,* and others.

II. Discussion

EIA will terminate its natural gas wellhead price series in December 2012 in an effort to reduce data quality and conceptual issues associated with the series. The data quality issues associated with the wellhead price series are closely related to the data

quality problems that resulted in the termination of the survey Form EIA–895 *Annual Quantity and Value of Natural Gas Production Report* in 2012. The Form EIA–895 was designed to obtain monthly information on an annual and voluntary basis from the appropriate state agencies that collect data related to natural gas production. EIA discontinued the Form EIA–895 as a result of disparities in the quality of the data submissions and problems with enforcement and compliance with survey requirements. Some examples of these quality and compliance issues included delayed survey responses and incomplete submissions of key requested data elements that directly affected the EIA wellhead price estimation, such as associated volumes and revenues of marketed natural gas production. Since the termination of the Form EIA–895, EIA has explored possibilities for continuing the wellhead price series while also avoiding the shortcomings of the discontinued survey.

Conceptual issues associated with the wellhead price also contribute to the data quality problems. The wellhead price is defined as the per-unit value of natural gas at the mouth of the well. However, in practice, the concept of the wellhead price is problematic as a result of the complexities of the long-term and short-term transactions that occur between natural gas producers, processors, marketers, and consumers along the natural gas value chain, as well as to the heterogeneity of natural gas production at the wellhead. The differing quality and thermal content of natural gas at the wellhead makes comparison of prices resulting from transactions across differing regions difficult because it is often unclear whether the gas in a given transaction contains marketable hydrocarbon liquids or unmarketable nonhydrocarbon gases. Natural gas production and revenue data supplied by the states is not sufficiently detailed for making these kinds of distinctions.

As an alternative upstream price, EIA has explored using spot or bidweek prices from established hubs, such as prices for natural gas at the Henry Hub in Louisiana and the prices of selected NGLs at the Mont Belvieu location in Texas. Natural gas spot price information could resolve some of the issues associated with obtaining upstream wellhead prices for natural gas because these prices result from transactions for pipeline quality gas, which is a well-defined, uniform commodity. In theory, a wellhead price could be derived from nearby spot prices, assuming that transportation, processing, and related costs are known or knowable. However, obtaining this kind of information about the natural gas value chain leading to the market hub would likely be burdensome, and EIA currently has no plans to undertake such an analysis. As a result, EIA has begun to publish natural gas spot prices at the Henry Hub and a composite NGL price, excluding liquids produced at crude oil refineries, at the Mont Belvieu market location.

Historically, EIA has estimated preliminary values for the monthly U.S. natural gas wellhead price using a time-series econometric model, which incorporates data from historical wellhead prices, the New York Mercantile Exchange (Nymex) futures final settlement price for near-month delivery at the Henry Hub, and reported spot market prices at four major trading hubs: Carthage, Texas; Katy, Texas; Waha, Texas; and El Paso non-Bondad, New Mexico (see *Natural Gas Monthly,* Appendix A, June 2012, for details). These model-based estimates were replaced with the data submissions reported on the Form EIA–895, when the data became available. Wellhead prices have been estimated using this model through 2012. However, the growth in natural gas production in other parts of the contiguous U.S. outside of Texas has reduced the reliability of the model estimates. Moreover, with the discontinuation of the Form EIA–895, updating these estimates with reported values is no longer feasible.

EIA proposes discontinuation of the wellhead price series because wellhead price data is not readily available and spot price information can provide a reasonable substitute. Further, obtaining wellhead price information would require a comprehensive study that could prove costly and burdensome to the public and seems impractical given current resource constraints. Absent a source of wellhead price information, EIA cannot objectively verify its model-based wellhead price estimates of the national average wellhead price. Finally, natural gas spot and bidweek prices, in conjunction with NGL spot prices, provide a reasonable proxy for upstream natural gas prices.

III. Current Actions

In September 2012, EIA began publishing the Henry Hub natural gas spot price and a Mont Belvieu NGL composite spot price in the *Natural Gas Monthly.* Beginning in January 2013, EIA will discontinue publishing wellhead prices.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, on November 28, 2012.

Stephanie Brown,

Director, Office of Survey Development and Statistical Integration, U.S. Energy Information Administration.

[FR Doc. 2012–29232 Filed 12–3–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–306–000.
Applicants: Ryckman Creek Resources, LLC.
Description: Notice of Withdrawal.
Filed Date: 11/27/12.
Accession Number: 20121127–5146.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–311–000.
Applicants: Cimarron River Pipeline, LLC.
Description: Cimarron River Pipeline, LLC submits Cash Out Refund Report.
Filed Date: 11/27/12.
Accession Number: 20121127–5049.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–312–000.
Applicants: Alliance Pipeline L.P.
Description: December 2012 Capacity Auction to be effective 12/1/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5200.
Comments Due: 5 p.m. ET 12/10/12.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–1113–001.
Applicants: Ryckman Creek Resources, LLC.
Description: Ryckman Creek Compliance Filing to be effective 12/1/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5162.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP12–490–001.

Applicants: Northwest Pipeline GP.
Description: NWP Settlement Rates Compliance Filing to be effective 1/1/2013.
Filed Date: 11/27/12.
Accession Number: 20121127–5130.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–49–001.
Applicants: Gulfstream Natural Gas System, L.L.C.
Description: RP13–49–000 Compliance Filing to be effective 12/1/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5215.
Comments Due: 5 p.m. ET 12/10/12.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 28, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29205 Filed 12–3–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–308–000.
Applicants: Chandeleur Pipe Line Company.
Description: Chandeleur—FLLA Annual Filing to be effective 1/1/2013.
Filed Date: 11/26/12.
Accession Number: 20121126–5022.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–309–000.
Applicants: Cameron Interstate Pipeline, LLC.
Description: Cameron Interstate Pipeline Annual Adjustment of Fuel Retainage Percentage to be effective 1/1/2013.
Filed Date: 11/26/12.
Accession Number: 20121126–5084.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–310–000.
Applicants: Vector Pipeline L.P.
Description: Petition for Temporary Exemption From Tariff Provisions of Vector Pipeline L.P.
Filed Date: 11/26/12.
Accession Number: 20121126–5274.
Comments Due: 5 p.m. ET 11/29/12.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–318–005.
Applicants: Texas Eastern Transmission, LP.
Description: Reservation Charge Credit Response Filing to be effective 12/31/9998.
Filed Date: 11/26/12.
Accession Number: 20121126–5216.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–52–001.
Applicants: Cimarron River Pipeline, LLC.
Description: NAESB Version 2.0 Tariff Compliance Filing to be effective 12/1/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5032.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–53–001.
Applicants: Dauphin Island Gathering Partners.
Description: Dauphin Island Gathering Partners submits tariff filing per 154.203: Tariff Compliance Filing NAESB Version 2.0 to be effective 12/1/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5034.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: RP13–59–001.
Applicants: Tuscarora Gas Transmission Company.
Description: RP13–59–000 NAESB Compliance to be effective 12/1/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5021.
Comments Due: 5 p.m. ET 12/10/12.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 27, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29196 Filed 12–3–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2719–010; ER10–2718–010; ER10–2578–012; ER10–2633–010; ER10–2570–010; ER10–2717–010; ER10–3140–009.
Applicants: East Coast Power Linden Holding, L.L.C., Cogen Technologies Linden Venture, L.P., Fox Energy Company LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, L.L.C., EFS Parlin Holdings, LLC, Inland Empire Energy Center, LLC.
Description: Supplement to November 6, 2012 Notice of Non-Material Change in Status of East Coast Power Linden Holding, L.L.C., *et al.*
Filed Date: 11/26/12.
Accession Number: 20121126–5023.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER12–1914–002.
Applicants: ISO New England Inc.
Description: Compliance filing-Rel. Review of Rejected List Bids to be effective 8/1/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5095.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER12–1928–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: G551 Compliance Filing to be effective 6/2/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5096.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–413–001.
Applicants: USG Oregon LLC.
Description: USG Oregon Amended Tariff Filing to be effective 1/17/2013.

Filed Date: 11/26/12.
Accession Number: 20121126–5147.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–453–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: SA 2492 MSCPA–METC Project 1 to be effective 11/27/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5097.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–454–000.
Applicants: NDR Energy Group, LLC.
Description: NDR Energy Group, LLC Rate Schedule FERC No. 1 Baseline Filing to be effective 11/26/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5099.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–455–000.
Applicants: Tucson Electric Power Company.
Description: TEP Concurrence to Navajo Co-Tenancy Agmt and Navajo Southern Trans. Op. Agmt to be effective 1/22/2013.
Filed Date: 11/26/12.
Accession Number: 20121126–5124.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–456–000.
Applicants: Tucson Electric Power Company
Description: RS No. 120, TEP Concurrence to Navajo Western Trans. Op. Agmt. to be effective 3/20/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5129.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–457–000.
Applicants: Dominion Energy Kewaunee, Inc.
Description: New Baseline Refile to be effective 11/27/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5135.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–458–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: J183 Amended GIA to be effective 11/27/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5154.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–459–000.
Applicants: Southwest Power Pool, Inc.
Description: 1911R2 Kansas City Power & Light Company LGIA to be effective 10/29/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5175.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–460–000.
Applicants: Noble Great Plains Windpark, LLC.
Description: Request for Category 1 Status to be effective 11/27/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5192.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–461–000.
Applicants: Pacific Gas and Electric Company.
Description: 2nd Amendment of the Kirkwood Meadows PUD Engineering Agreement to be effective 11/28/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5000.
Comments Due: 5 p.m. ET 12/18/12.

Docket Numbers: ER13–462–000.
Applicants: Duke Energy Carolinas, LLC.
Description: Joint OATT Attachment C–3 amendment to be effective 1/1/2013.
Filed Date: 11/27/12.
Accession Number: 20121127–5090.
Comments Due: 5 p.m. ET 12/18/12.

Docket Numbers: ER13–463–000.
Applicants: NorthWestern Corporation.
Description: SA 605—NITSA with Bonneville Power Administration to be effective 11/28/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5091.
Comments Due: 5 p.m. ET 12/18/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 27, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29198 Filed 12–3–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–450–000.
Applicants: Dominion Energy Manchester Street, Inc.
Description: Dominion Energy Manchester Street, Inc. submits tariff filing per 35.1: New Baseline Refile to be effective 11/27/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5031.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–451–000.
Applicants: Florida Power Corporation.
Description: Rate Schedule No. 197 of Florida Power Corporation to be effective 12/28/2012.
Filed Date: 11/26/12.
Accession Number: 20121126–5085.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: ER13–452–000.
Applicants: Florida Power Corporation.
Description: Rate Schedule No. 220 of Florida Power Corporation to be effective 1/1/2013.
Filed Date: 11/26/12.
Accession Number: 20121126–5086.
Comments Due: 5 p.m. ET 12/17/12.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES13–9–000.
Applicants: Montana Alberta Tie Ltd, MATL LLP.
Description: Montana Alberta Tie Ltd, *et al.* submits Supplement to Application.
Filed Date: 11/21/12.
Accession Number: 20121121–5222.
Comments Due: 5 p.m. ET 12/5/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 26, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29197 Filed 12–3–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9757–6]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Georgia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the State of Georgia's request to revise certain of its EPA-authorized programs to allow electronic reporting.

DATES: EPA's approval is effective December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under subpart D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On April 16, 2012, the Georgia Department of Natural Resources (GA DNR) submitted an application titled ''Network Discharge Monitoring Report (NetDMR)'' electronic document receiving system for revision of its EPA-authorized programs under title 40 CFR. EPA reviewed GA DNR's request to revise its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Georgia's request for revision to its 40 CFR part 123– National Pollutant Discharge Elimination System (NPDES) State Program Requirements and part 403—General Pretreatment Regulations for Existing and New Sources of Pollution EPA-authorized programs for electronic reporting of information submitted under 40 CFR parts 122 and 403 is being published in the **Federal Register**.

GA DNR was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Dated: November 19, 2012.

Andrew Battin,

Director,

Office of Information Collection.

[FR Doc. 2012–29252 Filed 12–3–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Advisory Committee Meeting

ACTION: Notice of open meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank).

TIME AND PLACE: Friday, December 14, 2012 from 9:00 a.m. to 12:30 p.m. The meeting will be held at the Export-Import Bank in Room 326, 811 Vermont Avenue NW., Washington, DC 20571.

SUMMARY: The Advisory Committee was established November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

AGENDA: Agenda items include a briefing for new 2013 Advisory Committee members regarding bank programs (including programs that support textile exports) as well as competitiveness and ethics overview.

PUBLIC PARTICIPATION: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 14, 2012, Richard Thelen, 811 Vermont Avenue NW., Washington, DC 20571, Voice: (202) 565–3515 or TDD (202) 565–3377.

FURTHER INFORMATION: For further information, contact Richard Thelen, 811 Vermont Ave. NW., Washington, DC 20571, (202) 565–3515.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–29262 Filed 12–3–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Meeting Schedule for 2013

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October, 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) will meet on the following dates in room 7C13 of the US Government Accountability Office (GAO) Building (441 G St., NW) unless otherwise noted:

—Wednesday and Thursday, February 27 and 28, 2013
—Wednesday and Thursday, April 24 and 25, 2013
—Wednesday and Thursday, June 19 and 20, 2013
—Wednesday and Thursday, August 28 and 29, 2013
—Wednesday and Thursday, October 23 and 24, 2013
—Wednesday and Thursday, December 18 and 19, 2013

The purpose of the meetings is to discuss issues related to:

—Reporting Entity
—Property, Plant and Equipment
—Natural Resources

—Risk Assumed
—Leases
—Public Private Partnerships
—Technical Agenda, and
—Any other topics as needed.

Any interested person may attend the meetings as an observer. Board discussion and reviews are open to the public. GAO Building security requires advance notice of your attendance. Please notify FASAB of your planned attendance by calling 202–512–7350 at least one day prior to the respective meeting.

FOR FURTHER INFORMATION CONTACT: Wendy Payne, Executive Director, at (202) 512–7350.

Authority: Federal Advisory Committee Act, Public Law 92–463.

Dated: November 28, 2012.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. 2012–29247 Filed 12–3–12; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

DATE & TIME: Thursday, December 6, 2012 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of the Minutes for the Meeting of November 15, 2012
Draft Advisory Opinion 2012–34: Freedom PAC and Friends of Mike H
Draft Advisory Opinion 2012–35: Global Transaction Services Group, Inc.
Draft Advisory Opinion 2012–36: Green Party of Connecticut
Draft Advisory Opinion 2012–37: Yamaha Motor Corporation, U.S.A.
Proposed Final Audit Report on Minnesota Democratic-Farmer-Labor Party (A09–08)
Audit Division Recommendation Memorandum on McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc.
Notice of Proposed Rulemaking: Limited Liability Partnerships
Management and Administrative Matters

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2012–29309 Filed 11–30–12; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 19, 2012.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Paul Jerome Mitchell,* Columbia, South Carolina; to acquire voting shares of SCCB Financial Corporation, and thereby indirectly acquire voting shares of South Carolina Community Bank, both in Columbia, South Carolina.

Board of Governors of the Federal Reserve System, November 29, 2012.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2012–29200 Filed 12–3–12; 8:45 am]

BILLING CODE 6210–01–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 December 28, 2012.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *First Northwest Bancorp,* Port Angeles, Washington; to become a bank holding company upon the conversion of First Federal Savings and Loan Association of Port Angeles, Port Angeles, Washington, from a mutual to stock savings bank.

Board of Governors of the Federal Reserve System, November 29, 2012.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2012–29201 Filed 12–3–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Senior Executive Service Performance Review Board Membership

The Agency for Healthcare Research and Quality (AHRQ) announces the appointment of members to the AHRQ Senior Executive Service (SES) Performance Review Board (PRB). This action is being taken in accordance with 5 U.S.C. 4314(c)(4), which requires notice of appointment of members to performance review boards to be published in the **Federal Register**.

Members of the PRB are appointed in a manner that will ensure consistency, stability and objectivity in the SES performance appraisals. The function of the PRB is to make recommendations to the Director, AHRQ, relating to the performance of senior executives in the Agency.

The following persons will serve on the AHRQ SES Performance Review Board:

Irene Fraser
Stephen B. Cohen
William Munier
David Meyers
Michael Fitzmaurice
Phyllis Zucker
Mark Handelman
Jean Slutsky

For further information about the AHRQ Performance Review Board, contact Ms. Alison Reinheimer, Office of Performance, Accountability, Resources, and Technology, Agency for Healthcare Research and Quality, 540 Gaither Road, Suite 4010, Rockville, Maryland 20850.

Dated: November 26, 2012.

Carolyn M. Clancy,

Director, AHRQ.

[FR Doc. 2012–29033 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–0840]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Formative Research and Tool Development—(OMB # 0920–0840, Exp. 1/31/2013)—Revision—National Center for HIV/AIDS, Viral Hepatitis, STD, TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention request approval for a revision and a 3 year approval for the previously approved Formative Research and Tool Development. This information collection request has been revised to include one additional type of formative research information collection activity, additional detail regarding the previously approved categories of formative research, and instrument testing for data collection activities used to inform many aspects of surveillance, communications, health promotion, and research project development for NCHHSTP's 4 priority diseases (HIV/AIDS, sexually transmitted diseases/infections (STD/STI), viral hepatitis, and tuberculosis elimination. Formative research is the basis for developing effective strategies including communication channels, for influencing behavior change. It helps researchers identify and understand the characteristics—interests, behaviors and needs—of target populations that influence their decisions and actions.

Formative research is integral in developing programs as well as improving existing and ongoing programs. Formative research also looks at the community in which a public health intervention is being or will be implemented and helps the project staff understand the interests, attributes and needs of different populations and persons in that community. Formative research is research that occurs before a program is designed and implemented, or while a program is being conducted.

Formative research is an integral part of developing programs or adapting programs that deal with the complexity of behaviors, social context, cultural identities, and health care that underlie the epidemiology of HIV/AIDS, viral hepatitis, STDs, and TB in the U.S.

CDC conducts formative research to develop public-sensitive communication messages and user friendly tools prior to developing or recommending interventions, or care. Sometimes these studies are entirely behavioral but most often they are cycles of interviews and focus groups designed to inform the development of a product.

Products from these formative research studies will be used for prevention of HIV/AIDS, Sexually Transmitted Infections (STI), viral Hepatitis, and Tuberculosis. Findings from these studies may also be presented as evidence to disease-specific National Advisory Committees, to support revisions to recommended prevention and intervention methods, as well as new recommendations.

Much of CDC's health communication takes place within campaigns that have fairly lengthy planning periods—timeframes that accommodate the standard Federal process for approving data collections. Short term qualitative interviewing and cognitive research techniques have previously proven invaluable in the development of scientifically valid and population-appropriate methods, interventions, and instruments.

This request includes studies investigating the utility and acceptability of proposed sampling and recruitment methods, intervention contents and delivery, questionnaire domains, individual questions, and interactions with project staff or electronic data collection equipment. These activities will also provide information about how respondents answer questions and ways in which question response bias and error can be reduced.

This request also includes collection of information from public health programs to assess needs related to initiation of a new program activity or expansion or changes in scope or implementation of existing program activities to adapt them to current needs. The information collected will be used to advise programs and provide capacity-building assistance tailored to identified needs.

Overall, these development activities are intended to provide information that will increase the success of the surveillance or research projects through increasing response rates and decreasing response error, thereby decreasing future data collection burden to the public. The studies that will be covered under this request will include one or more of the following investigational modalities: (1) structured and qualitative interviewing for surveillance, research, interventions and material development, (2) cognitive interviewing for development of specific data collection instruments, (3) methodological research (4) usability testing of technology-based instruments and materials, (5) field testing of new methodologies and materials, (6) investigation of mental models for health decision-making, to inform health communication messages, and (7) organizational needs assessment to support development of capacity. Respondents who will participate in individual and group interviews (qualitative, cognitive, and computer assisted development activities) are selected purposively from those who respond to recruitment advertisements.

In addition to utilizing advertisements for recruitment, respondents who will participate in research on survey methods may be selected purposively or systematically from within an ongoing surveillance or research project. Participation of respondents is voluntary. The total estimated burden is 55820 hours.

There is no cost to participants other than their time.

Type of respondent	Form name	No. of respondents	Number of responses per respondent	Average hours per response
General public and health care providers	Screener	97440	1	10/60
General public and health care providers	Consent Forms	48720	1	5/60
General public and health care providers	Individual interview	7920	1	1
General public and health care providers	Group interview	4800	1	2
General public and health care providers	Survey of Individual	36000	1	30/60

Dated: November 26, 2012.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29183 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day-13–0843]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Field Evaluation of Prototype Kneel-assist Devices in Low-seam Mining (0920–0843, Expiration 1/31/2013)—Extension—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH, under Public Law 91–596, Sections 20 and 22 (Section 20–22, Occupational Safety and Health Act of 1970) has the responsibility to conduct research relating to innovative methods, techniques, and approaches dealing with occupational safety and health problems.

According to the Mining Safety and Health Administration (MSHA) injury database, 227 knee injuries were reported in underground coal mining in 2007. With data from the National Institute for Occupational Safety and Health (NIOSH), it can be estimated that the financial burden of knee injuries was nearly three million dollars in 2007.

Typically, mine workers utilize kneepads to better distribute the pressures at the knee. The effectiveness of these kneepads was only recently investigated in a study by NIOSH that has not yet been published. The results of this study demonstrated that kneepads do decrease the maximum stress applied to the knee albeit not drastically. Additionally, the average pressure across the knee remains similar to the case where subjects wore no kneepads at all. Thus, the injury data and the results of this study suggest the need for the improved design of kneel-assist devices such as kneepads. NIOSH is currently undertaking the task of designing more effective kneel-assist devices such as a kneepad and a padded support worn at the ankle where mine workers can comfortably rest their body weight.

These devices must also be field tested to verify they do not result in body discomfort or inadvertent accidents. It is also important to determine how usable and durable these devices are in the harsh mining environment. In order to quantitatively demonstrate that these prototype devices are superior to their predecessors, mine workers using these prototypes must be interviewed. Their feedback will identify any necessary changes to the design of the devices such that NIOSH can ensure the prototypes will be well-accepted by the mining community.

To collect this type of information, a field study must be conducted where kneel-assist devices currently used in the mining industry (i.e. kneepads) are compared to the new prototype designs. The study suggested here would take approximately 13 months.

Phase I of this study will evaluate the prototype kneel-assist device by mine workers after being used for one month. Iterative changes will be made to the design based on the feedback obtained during Phase I. Data will be collected via interviews with individual mine workers and through a focus group where all mine workers come together to express their opinions about the devices. If the prototype kneel-assist devices do not appear to be successful, the data collected will be used to adequately redesign them and the above described process will begin again. If the prototype kneel-assist devices appear to be successful, Phase II of the study will commence.

Once Phase II of study is ready to commence, cooperating mines will be identified. Every month, the section foreman at the cooperating mines will be asked to supply some information regarding the current mine environment.

Initially, the mine workers will be given a control kneel-assist device. Currently, mine workers only utilize kneepads as a kneel-assist device. Therefore, only a control kneepad will be provided. They will then be asked some basic demographics information such as their age and time in the mining industry. Additional data will then be collected at 1, 3, and 6 months after the study commences. The mine workers will be asked to provide their feedback regarding factors such as body part discomfort, usability, durability, and ease of movement with respect to the control kneepad. After evaluating the control kneepad, mine workers will then be given the prototype kneel-assist device that was finalized in Phase I of the study. The same questions that were asked about the control kneepad will again be asked at 1, 3, and 6 months after usage begins of the prototype. Thus, Phase II of the study will last 12 months.

There will be no cost to the respondents other than their time. The total burden is 216.

ESTIMATED ANNUALIZED BURDEN HOURS

	Respondents	Form name	No. of respondents	No. of responses per respondent	Average burden per response (in hours)
Phase I	Section Foreman	Phase I Section Foreman Form.	3	1	30/60
	Mine Workers	Phase I Baseline Form	27	1	20/60
	Mine Workers	Phase I 1month form	27	1	30/60
	Mine Workers	Phase I Focus Group Questions.	27	1	1
Phase II	Section Foreman	Phase II Section Foreman Form.	6	12	10/60
	Mine Workers	Phase II Baseline Form	54	1	20/60
	Mine Workers	Phase II 1, 3, and 6 months forms.	54	6	25/60

Dated: November 26, 2012.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29182 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day-13–0848]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Ron Otten, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Written comments should be received within 60 days of this notice.

Proposed Project

Laboratory Medicine Best Practices Project (LMBP), OMB Control Number 0920–0848, Expiration 5/31/2013—EXTENSION—Office of Surveillance, Epidemiology and Laboratory Services (OSELS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC is seeking approval from the Office of Management and Budget (OMB) to collect information from healthcare organizations in order to conduct systemic evidence reviews of laboratory practice effectiveness. The purpose of information collection is to include completed unpublished quality improvement studies/assessments carried out by healthcare organizations (laboratories, hospitals, clinics) in systematic reviews of practice effectiveness. CDC has been sponsoring the Laboratory Medicine Best Practices initiative to develop new systematic evidence reviews methods for making evidence-based recommendations in laboratory medicine. This initiative supports the CDC's mission of improving laboratory practices. The focus of the Initiative is on pre- and post-analytic laboratory medicine practices that are effective at improving health care quality. While evidence based approaches for decision-making have become standard in healthcare, this has been limited in laboratory medicine. No single-evidence-based model for recommending practices in laboratory medicine exists, although the number of laboratories operating in the United States and the volume of laboratory tests available certainly warrant such a model. The Laboratory Medicine Best Practices Initiative began in October 2006, when CDC convened the Laboratory Medicine Best Practices Workgroup (Workgroup), a multidisciplinary panel of experts in several fields including laboratory medicine, clinical medicine, health services research, and health care performance measurement. The Workgroup has been supported by staff at CDC and the Battelle Memorial Institute under contract to CDC. To date, the Laboratory Medicine Best Practices (LMBP) project work has been completed over three phases. During Phase 1 (October 2006–September 2007)of the project, CDC staff developed systematic review methods for conducting evidence reviews using published literature, and completed a proof-of-concept test. Results of an extensive search and review of published literature using the methods for the topic of patient specimen identification indicated that an insufficient quality and number of studies were available for completing systematic evidence reviews of laboratory medicine practice effectiveness for multiple practices, and hence for making evidence-based recommendations. These results were considered likely to be generalizable to most potential topic areas of interest. A finding from Phase 1 work was that laboratories would be unlikely to publish quality improvement projects or studies demonstrating practice effectiveness in the peer reviewed literature, but that they routinely

conducted quality improvement projects and had relevant data for completion of evidence reviews. Phase 2 (September 2007–November 2008) and Phase 3 (December 2008–September 2009), involved further methods development and pilot tests to obtain, review, and evaluate published and unpublished evidence for practices associated with the topics of patient specimen identification, communicating critical value test results, and blood culture contamination. Exploratory work by CDC supports the existence of relevant unpublished studies or completed quality improvement projects related to laboratory medicine practices from healthcare organizations. The objective for successive LMBP evidence reviews of practice effectiveness is to supplement the published evidence with unpublished evidence to fill in gaps in the literature. Healthcare organizations and facilities (laboratory, hospital, clinic) will have the opportunity to voluntarily enroll in an LMBP registrant network and submit readily available unpublished studies; quality improvement projects, evaluations, assessments, and other analyses relying on unlinked, anonymous data using the LMBP Submission Form. LMBP registrants will also be able to submit unpublished studies/data for evidence reviews on an annual basis using this form. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	No. of respondents	No. of responses per respondent	Average burden per response (in hrs)	Total burden (in hours) *
Healthcare Organizations	150	1	40/60	100
Total				100

Dated: November 26, 2012.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29176 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day-13–0849]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Ron Otten, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and 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 information technology. Written comments should be received within 60 days of this notice.

Proposed Project

School Dismissal Monitoring System (OMB Control No. 0920–0849 Exp. 5/31/2013)—Revision—National Center Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In the spring of 2009, the beginning of H1N1 influenza pandemic, illness among school-aged students (K–12) in many states and cities resulted in at least 1,351 school dismissals due to rapidly increasing absenteeism among students or staff. These dismissals impacted at least 824,966 students and 53,217 teachers. During that time, the U.S. Department of Education (ED) and the Centers for Disease Control and Prevention (CDC) received numerous daily requests about the overall number of school dismissals nationwide and the number of students and teachers impacted by the school dismissals. CDC and ED recognized the importance of having a mechanism in place to collect this information and gauge the impact of school dismissals during the pandemic. Although an informal process was put in place in conjunction with ED to track school closures, there was no formal monitoring system established. Consequently, CDC and ED launched the School Dismissal Monitoring System to track reports of school closures during public health emergencies and generate accurate, real-time, national summary data daily on the number of closed schools and the number of students and teachers impacted by the dismissals. The system, initially approved under OMB Control No. 0920–0008, Emergency Epidemic Investigations, facilitated CDC's and ED's efforts to track implementation of CDC pandemic guidance, characterized factors associated with differences in morbidity and mortality due to pandemic influenza in the schools and surrounding communities, and described the characteristics of the schools experiencing outbreaks as well as control measures undertaken by those schools. In the fall of 2009, CDC's School Dismissal Monitoring System detected 1,947 school dismissals impacting approximately 623,616 students and 40,521 teachers nationwide. These data were used widely throughout the U.S. Government for situational awareness and specifically at CDC to assess the impact of CDC guidance and community mitigation efforts in response to the 2009 H1N1 influenza pandemic.

The purpose of this monitoring system is to generate accurate, real-time, national summary data daily on the number of school dismissals and the number of students and teachers impacted by the dismissals due to public health emergencies. This collection request includes dismissals initiated for infectious disease outbreaks or weather related events when school dismissals are recommended by federal, state or local public health authorities.

Respondents for this data collection are individuals representing schools, school districts, and public health agencies. CDC has determined that the information to be collected is necessary to study the impact of a public health emergency as it relates to community mitigation activities. The information has been used to help understand how CDC guidance on school dismissals has been implemented at the state and local levels nationwide and to help determine how this guidance might be more helpful in the future. Specifically, data collection will be utilized to:

1. Determine the scope and extent of school dismissals in the United States during public health emergencies:

a. Prospectively monitor data to identify schools and school districts that have high dismissal rates due to infectious diseases, or that implement pre-emptive school dismissals due to other public health emergencies due to other reasons when recommended by public health officials.

b. Retrospectively review data collected to describe impact school dismissals had on students and teachers

2. Describe the characteristics of schools and school districts with high dismissal rates due to infectious diseases

Respondents are required to identify their respective institutions by providing non-sensitive information, to include the name and zip code of schools and school districts and their dates of closure, as well as reason for the dismissal (due to illness rates among students and staff or pre-emptive to slow the spread of infection). The respondents have the option of providing their position titles, phone number of the institution they represent, and email address. The estimates for burden hours are derived from the 627 total number of reported closures during the fall in 2009. We have multiplied that number by four as an estimate for a calendar year. Respondents are providing this information as public health and education officials and representatives of their agencies and organizations and not as private citizens. The data collection does not involve personally identifiable information and should have no impact on an individual's privacy. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	No. of respondents	No. of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
School, school district, or public health authorities.	School Dismissal Monitoring Form ..	2500	1	5/60	208
Total	.....	.....	.....	.....	208

Dated: November 26, 2012.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29175 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–13–0852]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Ron Otten, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Written comments should be received within 60 days of this notice.

Proposed Project

Prevalence Survey of Healthcare-Associated Infections (HAIs) and Antimicrobial Use in U.S. Acute Care Hospitals—Extension (0920–0852 expiration 5/31/13)—National Center for Emerging and Zoonotic Infectious Diseases, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Preventing healthcare-associated infections (HAIs) is a CDC priority. An essential step in reducing the occurrence of HAIs is to estimate accurately the burden of these infections in U.S. hospitals, and to describe the types of HAIs and causative organisms. The scope and magnitude of HAIs in the United States were last directly estimated in the 1970s in which comprehensive data were collected from a sample of 338 hospitals; 5% of hospitalized patients acquired an infection not present at the time of admission. Because of the substantial resources necessary to conduct hospital-wide surveillance in an ongoing manner, most of the more than 4,500 hospitals now reporting to the CDC's current HAI surveillance system, the National Healthcare Safety Network (NHSN 0920–0666 expiration 1/31/15), focus instead on device-associated and procedure-associated infections in selected patient locations, and do not report data on all types of HAIs occurring hospital-wide. Periodic assessments of the magnitude and types of HAIs occurring in all patient populations within acute care hospitals are needed to inform decisions by local and national policy makers and by hospital infection control personnel regarding appropriate targets and strategies for HAI prevention.

In 2008–2009 in the previous project period, CDC developed a pilot protocol for a HAI point prevalence survey,

conducted over a 1-day period at each of nine acute care hospitals in one U.S. city. This pilot phase was followed in 2010 by a phase 2, limited roll-out HAI and antimicrobial use prevalence survey, conducted during July and August in 22 hospitals across 10 Emerging Infections Program sites (in California, Colorado, Connecticut, Georgia, Maryland, Minnesota, New Mexico, New York, Oregon, and Tennessee). Experience gained in the phase 1 and phase 2 surveys was used to conduct a full-scale, phase 3 survey in 2011, involving 183 hospitals in the 10 EIP sites. Over 11,000 patients were surveyed, and analysis of HAI and antimicrobial use data is ongoing at this time.

An extension of the prevalence survey's existing OMB approval is sought, to allow a repeat HAI and antimicrobial use prevalence survey to be performed in 2014. A repeat survey will allow further refinement of survey methodology and assessment of changes over time in prevalence, HAI distribution, and pathogen distribution. It will also allow for a re-assessment of the burden of antimicrobial use, at a time when antimicrobial stewardship is an area of active engagement in many acute care hospitals. The 2014 survey will be performed in a sample of up to 500 acute care hospitals, drawn from the acute care hospital populations in each of the 10 EIP sites (and including participation from many hospitals that participated in prior phases of the survey). Infection prevention personnel in participating hospitals and EIP site personnel will collect demographic and clinical data from the medical records of a sample of eligible patients in their hospitals on a single day in 2014, to identify CDC-defined HAIs. The surveys will provide data for CDC to make estimates of the prevalence of HAIs across this sample of U.S. hospitals as well as the distribution of infection types and causative organisms. These data can be used to work toward reducing and eliminating healthcare-associated infections—a Department of Health and Human Services (DHHS) Healthy People 2020 objective (*http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=17*). This survey project also supports the CDC Winnable Battle goal of improving national surveillance for healthcare-associated infections (*http://www.cdc.gov/winnablebattles/Goals.html*).

This survey assumes one respondent per hospital, a median of 75 patients per hospital, and average data collection time of 15 minutes per patient. There are no costs to respondents other than their time. The estimated annualized burden is 9,375 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form name	No. of respondents	Number of responses per respondent	Average burden per response in hours	Total burden (in hours)
Infection Prevention Personnel in Participating Hospitals.	Data Collection Form	500	75	15/60	9,375
Total					9,375

Dated: November 27, 2012.

Ron Otten,

Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29173 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day-13–13DB]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Kimberly S. Lane, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Written comments should be received within 60 days of this notice.

Proposed Project

Emerging Infections Program—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Emerging Infections Programs (EIPs) are population-based centers of excellence established through a network of state health departments collaborating with academic institutions; local health departments; public health and clinical laboratories; infection control professionals; and healthcare providers. EIPs assist in local, state, and national efforts to prevent, control, and monitor the public health impact of infectious diseases. Various parts of the EIP have received separate Office of Management and Budget (OMB) clearances (Active Bacterial Core Surveillance [ABCs]—OMB number 0920–0802 and All Age Influenza Hospitalization Surveillance—OMB number 0920–0852); however this request seeks to have these core EIP activities under one clearance.

Activities of the EIPs fall into the following general categories: (1) Active surveillance; (2) applied public health epidemiologic and laboratory activities; (3) implementation and evaluation of pilot prevention/intervention projects; and (4) flexible response to public health emergencies. Activities of the

EIPs are designed to: (1) Address issues that the EIP network is particularly suited to investigate; (2) maintain sufficient flexibility for emergency response and new problems as they arise; (3) develop and evaluate public health interventions to inform public health policy and treatment guidelines; (4) incorporate training as a key function; and (5) prioritize projects that lead directly to the prevention of disease. Proposed respondents will include state health departments who may collaborate with one or more of the following: academic institutions, local health departments, public health and clinical laboratories, infection control professionals, and healthcare providers. Frequency of reporting will be determined as cases arise. The total estimated burden is 12,153 hours. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS *

Type of respondent	Form name	No. of respondents	No. of responses per respondent	Avg. burden per response (in hours)	Total burden (in hours)
State Health Department	ABCs Case Report Form	10	809	20/60	2697
State Health Department	Invasive Methicillin-resistant *Staphylococcus aureus* ABCs Case Report Form.	10	609	20/60	2030
State Health Department	ABCs Invasive Pneumococcal Disease in Children Case Report Form.	10	41	10/60	68
State Health Department	Neonatal Infection Expanded Tracking Form.	10	37	20/60	123
State Health Department	ABCs Legionellosis Case Report Form.	10	100	20/60	333
State Health Department	Campylobacter	10	637	20/60	2123
State Health Department	Cryptosporidium	10	130	10/60	217
State Health Department	Cyclospora	10	3	10/60	5
State Health Department	Listeria monocytogenes	10	13	20/60	43
State Health Department	Salmonella	10	827	20/60	2757
State Health Department	Shiga toxin producing E. coli	10	90	20/60	300
State Health Department	Shigella	10	178	10/60	297
State Health Department	Vibrio	10	20	10/60	33
State Health Department	Yersinia	10	16	10/60	27
State Health Department	Hemolytic Uremic Syndrome	10	10	60/60	100
State Health Department	All Age Influenza Hospitalization Surveillance Project Case Report Form.	10	400	15/60	1000
Total					12,153

Dated: November 27, 2012.

Ron A. Otten,

Director Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29172 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day-13–0017]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Ron Otten, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Written comments should be received within 60 days of this notice.

Proposed Project

Application for Training (0920–0017, Expiration 03/31/2013)—Revision—Scientific Education and Professional Development Program Office (SEPDPO), Office of Surveillance, Epidemiology, and Laboratory Services (OSELS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC offers public health training activities to professionals worldwide. Employees of hospitals, universities, medical centers, laboratories, State and Federal agencies, and State and local health departments apply for training to learn up-to-date public health practices. CDC's training activities include laboratory training, classroom study, online training, and distance learning. CDC uses two training application forms, the Training and Continuing Education Online New Participant Registration Form and the National Laboratory Training Network Registration Form, to collect information necessary to manage and conduct training pertinent to the agency's mission.

CDC requests OMB approval to continue to collect information through

these forms to (1) grant public health professionals the continuing education (CE) they need to maintain professional licenses and certifications, (2) create a transcript or summary of training at the participant's request, (3) generate management reports, and (4) maintain training statistics; and a revision that will allow CDC to comply with new continuing education accreditation organization requirements for collection of additional profession-specific data.

CDC is accredited by six different continuing education (CE) organizations to award CE: (1) The International Association for Continuing Education and Training (IACET) to provide Continuing Education Units (CEUs), (2) the Accreditation Council for Continuing Medical Education (ACCME) to provide Continuing Medical Education credits (CME), (3) the American Nurses Credentialing Center (ANNC) to provide Continuing Nurse Education credits (CNE), (4) the National Commission for Health Education Credentialing (NCHEC) to award CHES credit, (5) the Accreditation Council for Pharmacy Education (ACPE) to provide continuing pharmacy credit, and (6) the American Association of Veterinary State Boards to award Registry of Approved Continuing Education (RACE) credit. The accrediting organizations require a method of tracking participants who complete an educational activity and demographic data allows CDC to do so. Also, several of the organizations require a permanent record that includes the participant's name, address, and phone number, to facilitate retrieval of historical information about when a participant completed a course or several courses during a time period. This information provides the basis for a transcript or for determining whether a person is enrolled in more than one course. CDC uses the email address to verify the participant's electronic request for transcripts, verify course certificates, and send confirmation that a participant is registered for a course.

Tracking course attendance and meeting accrediting organizations' standards for reporting, require uniform standardized training application forms. The standardized data these forms request for laboratory training, classroom study, online training, and distance learning are not requested elsewhere. In other words, these forms do not duplicate requests for information from participants. Data are collected only once per course or once per new registration. The annual burden table has been updated to reflect an increase in distance learning to 6,792 burden hours; that is an average burden of 5 minutes per respondent. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	No. of respondents	No. of responses per respondent	Avg. burden per response (in hrs)	Total burden (in hrs)
Health Professionals	Training and Continuing Education Online New Participant Registration Form (36.5).	75,000	1	5/60	6,250
Laboratorians	National Laboratory Training Network Registration Form (32.1).	6,500	1	5/60	542
Total					6,792

Dated: November 26, 2012.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–29174 Filed 12–3–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10418]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection:* Revision of a currently approved collection; *Title of Information Collection:* Annual MLR and Rebate Calculation Report and MLR Rebate Notices; *Use:* Under Section 2718 of the Affordable Care Act and implementing regulation at 45 CFR part 158, a health insurance issuer (issuer) offering group or individual health insurance coverage must submit a report to the Secretary concerning the amount the issuer spends each year on claims, quality improvement expenses, non-claims costs, federal and state taxes and licensing and regulatory fees, and the amount of earned premium. An issuer must provide an annual rebate if the amount it spends on certain costs compared to its premium revenue (excluding federal and states taxes and licensing and regulatory fees) does not meet a certain ratio, referred to as the medical loss ratio (MLR). An interim final rule (IFR) implementing the MLR was published on December 1, 2010 (75 FR 74865) and modified by technical corrections on December 30, 2010 (75 FR 82277), which added part 158 to Title 45 of the Code of Federal Regulations. The IFR was effective January 1, 2011. A final rule regarding selected provisions of the IFR was published on December 7, 2011 (76 FR 76574, CMS–9998–FC) and an interim final rule regarding an issue not included in issuers' reporting obligations (disbursement of rebates by non-federal governmental plans) was also published December 7, 2011 (76 FR 76596, CMS–9998–IFC2) Both rules published on December 7, 2011 and

were effective January 1, 2012. Each issuer is required to submit annually MLR data, including information about any rebates it must provide, on a form prescribed by CMS, for each state in which the issuer conducts business. Each issuer is also required to provide a rebate notice to each policyholder that is owed a rebate and each subscriber of policyholders that are owed a rebate for any given MLR reporting year. Additionally, each issuer is required to maintain for a period of seven years all documents, records and other evidence that support the data included in each issuer's annual report to the Secretary.

Based upon HHS' experience in the MLR data collection and evaluation process, HHS is updating its annual burden hour estimates to reflect the actual numbers of submissions, rebates and rebate notices. In addition, the notice requirement for issuers that do not owe rebates applied only to the 2011 reporting year, and does not apply to 2012 and subsequent MLR reporting years.

We have simplified the format of the reporting form and the method by which issuers submit their data. For the 2012 MLR reporting year, when submitting data to CMS, issuers will have the option to use either a Microsoft Excel (.xls) or a Comma Separated Value (.csv) file format. This will allow issuers flexibility and reduce the burden in submitting the MLR report. The new method will no longer include pre-calculated fields which will reduce the burden as well as the possibility of error.

The 2012 MLR Reporting Form and instructions also reflect changes for the 2012 reporting year and beyond that are set forth in the December 2011 Final Rule as to whether certain already reported expenditures such as ICD–10 conversion costs are taken into account in calculating an issuer's MLR.

HHS has created and published a host of electronic training tools to assist issuers with the preparation and submission of MLR data forms and Rebate calculations. Consequently the agency is reducing its current burden hours from 354,570 to 311,302. *Form Number:* CMS–10418 (OCN: 0938–1164); *Frequency:* Annual submission for each respondent; *Affected Public:* Private Sector, Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 502; *Number of Responses:* 3,085; *Total Annual Hours:* 311,302. (For policy questions regarding this collection, contact Carol Jimenez at (301) 492–4457. For all other issues, call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by February 4, 2013:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard,

Baltimore, Maryland 21244–1850.

Dated: November 29, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–29243 Filed 12–3–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0081]

Guidance on Investigational New Drug Applications for Positron Emission Tomography Drugs; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled ''Investigational New Drug Applications for Positron Emission Tomography (PET) Drugs.'' The guidance is intended to assist manufacturers of PET drugs in submitting investigational new drug applications (INDs).

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kyong (Kaye) Kang, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2352, Silver Spring, MD 20993–0002, 301–796–2050.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance entitled ''Investigational New Drug Applications for Positron Emission Tomography (PET) Drugs.'' The guidance summarizes the IND process for PET drugs, makes recommendations for how to submit an IND, provides advice on expanded access options for investigational PET drugs, and describes the process for requesting permission to charge for an investigational PET drug.

A draft guidance of the same title was announced in the **Federal Register** on February 14, 2012 (77 FR 8262), and Docket No. FDA–2012–D–0081 was open for comments until May 14, 2012. We received comments from industry and professional societies. We have carefully considered, and where appropriate, we have made corrections, added information, or clarified the information in this guidance in response to the comments or on our own initiative.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on the submission of INDs for PET drugs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov.* It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). INDs and requests to charge for a drug under an IND are submitted to FDA under part 312 (21 CFR part 312). New drug applications and abbreviated new drug applications are submitted to FDA under §§ 314.50 and 314.94 (21 CFR 314.50 and 314.94). The collections of information in part 312 and in §§ 314.50 and 314.94 have been approved under OMB control numbers 0910–0014 and 0910–0001.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: November 28, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29163 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0080]

Guidance on Food and Drug Administration Oversight of Positron Emission Tomography Drug Products—Questions and Answers; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled ''FDA Oversight of PET Drug Products—Questions and Answers.'' This guidance provides questions and answers that address nearly all aspects of the FDA approval and surveillance processes, including application submission, review, compliance with good manufacturing practices, inspections, registration and listing, and user fees.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to this guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Elizabeth Giaquinto, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6164, Silver Spring, MD 20993–0002, 301–796–3416.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance entitled ''FDA Oversight of PET Drug Products—Questions and Answers.'' In 1997, Congress passed the Food and Drug Administration Modernization Act (the Modernization Act) (Public Law 105–115). Section 121 of the Modernization Act directed FDA to establish appropriate approval procedures and current good manufacturing practices (CGMP) for PET drugs. The procedures were finalized and an implementation timeline was instituted on December 10, 2009, when FDA published regulations that described the minimum CGMP standards that each PET drug manufacturer is to follow during the production of a PET drug (see part 212 (21 CFR part 212)).[1] Under the requirements of section 121 of the Modernization Act, within 2 years following that publication date, a new drug application (NDA) or abbreviated new drug application (ANDA) must be submitted for any PET drug marketed for clinical use in the United States.

Recognizing that many PET drug producers are unfamiliar with the drug approval process, FDA issued several guidance documents specific to PET drug producers[2] and held a public meeting in March 2011 to assist applicants in preparing NDAs and ANDAs for the three most commonly used PET drugs. Numerous questions have been raised since that public meeting on all aspects of FDA oversight of PET drugs. This guidance is being issued to respond to the questions that have been submitted to date, and it will be revised periodically to respond to additional questions that have been submitted and are expected to be submitted in the future.

A draft guidance of the same title was announced in the **Federal Register** on February 27, 2012 (77 FR 11553), and Docket No. FDA 2012–D–0080 was open for public comment until May 29, 2012. We received one set of comments from industry. We have carefully considered the comments, and where appropriate, we have made corrections, added information, or clarified the information in this guidance in response to the comments or on our own initiative. In addition, we have added six new questions and answers (see questions 63, 64, 65, 66, 88, and 89).

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on the FDA oversight of PET drugs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov.* It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m.

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[1] The regulation, CGMP guidance, and supportive information, including historical documents, are available at *http://www.fda.gov/Drugs/DevelopmentApprovalProcess/Manufacturing/ucm085783.htm.*

[2] We update guidances periodically. To make sure you have the most recent version of a guidance, check FDA's Drugs guidance Web page at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 314 were approved under OMB control numbers 0910–0001 and 0910–0338; the collections of information in 21 CFR part 312 were approved under OMB control number 0910–0014; the collections of information in part 212 were approved under OMB control number 0910–0667; the collections of information in 21 CFR parts 210 and 211 were approved under 0910–0139; and the collections of information in 21 CFR part 207 were approved under OMB control number 0910–0045. The guidance also refers to collections of information associated with submitting Form FDA 3397 (Prescription Drug User Fee Cover Sheet), approved under OMB control number 0910–0297.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: November 28, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29157 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–1040]

Antiseptic Patient Preoperative Skin Preparation Products; Public Hearing; Request for Comments; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public hearing; request for comments; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a document that appeared in the **Federal Register** of November 21, 2012 (77 FR 69863). The document announced a public hearing entitled ''Antiseptic Patient Preoperative Skin Preparation Products.'' The document was published with an incorrect email address. This document corrects that error. Due to this error, FDA is extending the *Requests for Oral Presentations* registration date from November 27, 2012, to December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Lee Lemley, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave. Silver Spring, MD 20903, 301–796–3441, Fax: 301–847–8753, email: *CDER-AntisepticPreOpPublicMeeting@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of November 21, 2012, in FR Doc. 2012–28357, on page 69863, the following corrections are made:

1. On page 69863, in the second column, under *Contact Person,* the email address ''*AntisepticPreOpPublicMeeting@fda.hhs.gov*'' is corrected to read ''*CDER-AntisepticPreOpPublicMeeting@fda.hhs.gov*''.

2. On page 69863, in the third column, under *Requests for Oral Presentations,* the date ''November 27, 2012'' is changed to read ''December 7, 2012.

Dated: November 28, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29166 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for Nonvoting Industry Representatives and Request for Nominations for Nonvoting Industry Representatives on the Device Good Manufacturing Practice Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organization interested in participating in the selection of nonvoting industry representatives to serve on the Device Good Manufacturing Practice Advisory Committee (DGMPAC) in the Center for Devices and Radiological Health notify FDA in writing. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current vacancies effective with this notice.

DATES: Any industry organizations interested in participating in the selection of an appropriate nonvoting members to represent industry interests must send a letter stating that interest to FDA by January 3, 2013, for the vacancies listed in this notice. Concurrently, nomination materials for prospective candidates should be sent to FDA by January 3, 2013.

ADDRESSES: All letters of interest and nominations should be submitted in writing to Margaret J. Ames (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Margaret J. Ames, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5234, Silver Spring, MD 20993, 301–796–5960, *margaret.ames@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Section 520 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 360j), as amended, provides that the DGMPAC shall be composed of two representatives of interests of the device manufacturing industry. The Agency is requesting nominations for nonvoting industry representatives on the DGMPAC.

I. Function of DGMPAC

Review proposed regulations issuance regarding good manufacturing practices governing the methods used in, and the facilities and controls used for manufacture, packaging, storage, installation, and servicing of devices, and make recommendations regarding the feasibility and reasonableness of those proposed regulations. The committee also reviews and makes recommendations on proposed guidelines developed to assist the medical device industry in meeting the good manufacturing practice requirements, and provides advice with regard to any petition submitted by a manufacturer for an exemption or variance from good manufacturing practice regulations.

II. Qualifications

Persons nominated for the DGMPAC should possess appropriate qualifications to understand and contribute to the committee's work as described in the committee's function.

III. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations, and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for a particular committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within the 60 days, the Commissioner of Food and Drugs will select the nonvoting member to represent industry interests.

IV. Application Procedure

Individuals may self nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Contact information, a current curriculum vitae, and the name of the committee of interest should be sent to the FDA contact person (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees, and therefore encourages nominations of appropriately qualified candidates from these groups. Specifically, in this document, nominations for nonvoting representatives of industry interests are encouraged from device manufacturing industry.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14 relating to advisory committees.

Dated: November 28, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29165 Filed 12–3–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Substance Abuse Prevention and Treatment Block Grant Synar Report Format, FFY 2014–2016—(OMB No. 0930–0222)—Revision

Section 1926 of the Public Health Service Act [42 U.S.C. 300x-26] stipulates that funding Substance Abuse Prevention and Treatment Block Grant (SABG) agreements for alcohol and drug abuse programs for fiscal year 1994 and subsequent fiscal years require states to have in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18. This section further requires that states conduct annual, random, unannounced inspections to ensure compliance with the law; that the state submit annually a report describing the results of the inspections, the activities carried out by the state to enforce the required law, the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 18, and the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought.

Before making an award to a State under the SABG, the Secretary must make a determination that the state has maintained compliance with these requirements. If a determination is made that the state is not in compliance, penalties shall be applied. Penalties ranged from 10 percent of the Block Grant in applicable year 1 (FFY 1997 SABG Applications) to 40 percent in applicable year 4 (FFY 2000 SABG Applications) and subsequent years. Respondents include the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

Regulations that implement this legislation are at 45 CFR 96.130, are approved by OMB under control number 0930–0163, and require that each state submit an annual Synar report to the Secretary describing their progress in complying with section 1926 of the PHS Act. The Synar report, due December 31 following the fiscal year for which the state is reporting, describes the results of the inspections and the activities carried out by the state to enforce the required law; the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 18; and the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought. SAMHSA's Center for Substance Abuse Prevention will request OMB approval of revisions to the current report format associated with Section 1926 (42 U.S.C. 300x-26). The report format is not changing significantly. Any changes in either formatting or content are being made to simplify the reporting process for the states and to clarify the information as the states report it; both outcomes will facilitate consistent, credible, and efficient monitoring of Synar compliance across the states. All of the information required in the new report format is already being collected by the states. Specific changes are listed below:

Clarification Changes

To decrease the need for supplemental questions and reporting,

additional instruction has been included in 4 portions of the report.

In Section I (Compliance Progress), the following clarification changes are being made with respect to the Annual Synar Report:

Question 1c: Changes to State law— This question, which was formerly Question 1d, asks about changes to state youth access to tobacco laws and has been edited to include an option for changes to state law concerning vending machines. The former Question 1c, which contained detailed information about types of changes to vending machine laws has been eliminated due to the fact that the Family Smoking Prevention and Tobacco Control Act, which gives the Food and Drug Administration (FDA) the authority to regulate tobacco products, banned vending machines in youth accessible locations as of June 2010, making it unlikely that states that have not done so already will enact similar state laws. However, there are three U.S. jurisdictions not subject to federal law that may still enact vending machine restrictions and can report this information in the new Question 1c.

Questions 5a, 5b, and 5d: Enforcement Agencies, Evidence of Enforcement and Frequency of Enforcement—These questions have been clarified so it is clear that they refer to enforcement of state youth access laws, and not federal youth access laws.

In Section II (Intended Use), the following clarification change is being made:

Question 3—State Challenges: This question includes a new response option (''Issues regarding the age or gender balance of youth inspectors'') since this is a common challenge reported by states.

In Appendix B (Synar Survey Sampling Methodology), the following clarification is being made:

Question 4—Vending machine inclusion in Synar Survey – This question, which asks if vending machines are included in the Synar survey and the reasons for their elimination if they are not included, includes a new response option (''State has a contract with the FDA and is actively enforcing the vending machine requirements of the Family Smoking Prevention and Tobacco Control Act''). This new option is included because federal law bans vending machines in youth accessible locations and states that are contracted with the FDA to enforce this provision are not required to include vending machines in their Synar surveys.

In Appendix C (Synar Survey Inspection Protocol), the following change is being made:

Question 1—Synar Survey Protocol— This question, which asks about aspects of the state's Synar survey protocol (including whether buys are consummated or unconsummated, whether youth inspectors carry identification, whether adult inspectors enter the outlet with the youth, and whether youth inspectors are compensated), has been edited to remove the option for ''Not specified in protocol'' since all states are required to submit Synar protocols that include these items. Additionally, a requirement for states to provide a narrative explanation has been included for those states who choose the response option ''Permitted under specified circumstances.''

Content Changes

The content of the Synar Report has changed little. The content changes that have been made address the need to (1) clarify the intent of information requested via the addition of clarifying questions, (2) reduce the need for Government Project Officers to ask additional questions to supplement the originally submitted Report. These additions and changes are essential to SAMHSA's ability to adequately assess state and jurisdictional compliance with the Synar regulation.

In Section I (Compliance Progress), the following changes are being made with respect to the Annual Synar Report:

Questions 4d–g—Coordination With Agency That Receives the FDA State Enforcement Contract— These close-ended questions ask the state to list the agency that is under contract to the FDA to enforce federal youth access laws, to describe the relationship between the state's Synar program and this agency, and to identify if the state uses data from the FDA enforcement inspections for the Synar survey. They have been added to replace the previously open-ended Question 5g, which required a narrative response. These close-ended questions will focus state responses.

In Appendix B (Synar Survey Sampling Methodology), the following changes are being made:

Questions 9a–b—Synar Survey Estimation System Sample Size (SSES) Calculator— These questions, which ask if the state used the SSES sample size calculator and if so, if they used the state or stratum level calculator, will eliminate the need for Government Project Officers to ask these clarifying questions during the review process. This revision also eliminates the need for those states who use the SSES sample size calculator to manually list the sample size formulas.

Question 10b—Stratum Level Information— This question, which asks states who used the stratum level calculator to provide the stratum level information, eliminates the need for Government Project Officers to ask this clarifying question during the review process.

In Appendix C (Synar Survey Inspection Protocol), the following change is being made:

Questions 4a–b—Type of Tobacco Products— These questions, which ask the state to define the type of tobacco products requested during Synar inspections and to describe the protocol for tobacco type selection, have been added to Appendix C. They have been added to provide additional information about state Synar protocols, which is frequently requested by partner agencies and can also be used to target technical assistance.

There are no changes to Forms 1–5 or Appendix D.

ANNUAL REPORTING BURDEN

45 CFR Citation	Number of respondents [1]	Responses per respondents	Total number of responses	Hours per response	Total hour burden
Annual Report (Section 1—States and Territories) 96.130(e)(1–3)	59	1	59	15	885
State Plan (Section II—States and Territories) 96.130(e)(4,5)96.130(g)	59	1	59	3	177
Total	59				1,062

[1] Red Lake Indian Tribe is not subject to tobacco requirements.

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 *OR* email a copy to *Summer.King@samhsa.hhs.gov.* Written comments must be received before 60 days after the date of the publication in the **Federal Register**.

Summer King,

Statistician.

[FR Doc. 2012–29199 Filed 12–3–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2012–0003; Internal Agency Docket No. FEMA–B–1273]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Title 44, Part 65 of the Code of Federal Regulations (44 CFR part 65). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will become effective on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Deputy Associate Administrator for Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information Exchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
California: Ventura	City of Moorpark (12–09–0985P).	The Honorable Janice Parvin, Mayor, City of Moorpark, 799 Moorpark Avenue, Moorpark, CA 93021.	18 High Street, Moorpark, CA 93021	*http://www.r9map.org/Docs/12-09-0985P-060712-102IAC.pdf.*	July 18, 2012	060712
Idaho:						
Ada	City of Boise (11–10–1081P).	The Honorable David H. Biester, Mayor, City of Boise, 150 North Capitol Boulevard, Boise, ID 83702.	150 North Capitol Boulevard, Boise, ID 83702.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	June 15, 2012	160002
Ada	Unincorporated areas of Ada County (11–10–1081P).	The Honorable Rick Yzaguirre, Chairman, Ada County Board of Commissioners, 200 West Front Street, 3rd floor, Boise, ID 83702.	200 West Front Street, 3rd Floor, Boise, ID 83702.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	June 15, 2012	160001
Blaine	City of Hailey (12–10–0384P).	The Honorable Fritz Haemmerle, Mayor, City of Hailey, 115 Main Street South, Suite H, Hailey, ID 83333.	115 Main Street South, Suite H, Hailey, ID 83333.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	July 5, 2012	160022
Illinois:						
Effingham	City of Effingham (11–05–5866P).	The Honorable Merv Gillenwater, Mayor, City of Effingham, 201 East Jefferson Avenue, Effingham, IL 62401.	Effingham City Hall, 201 East Jefferson Avenue, Effingham, IL 62401.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 24, 2012	170229
Kendall	City of Sandwich (12–05–0175P).	The Honorable Tom Thomas, Mayor, City of Sandwich, 144 East Railroad Street, Sandwich, IL 60548.	144 East Railroad Street, Sandwich, IL 60548.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 13, 2012	170188
Kendall	Unincorporated areas of Kendall County (12–05–0175).	The Honorable John Purcell, Chairman, Kendall County Board, 111 West Fox Street, Yorkville, IL 60560.	Kendall County Zoning and Planning Commission, 111 West Fox Street, Yorkville, IL 60560.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 13, 2012	170341
McLean	City of Bloomington (11–05–3513P).	The Honorable Stephen F. Stockton, Mayor, City of Bloomington, Bloomington City Hall, 109 East Olive Street, Bloomington, IL 61701.	Bloomington Engineering Department, 109 East Olive Street, Bloomington, IL 61701.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 13, 2012	170490
McLean	Unincorporated areas of McLean County (11–05–3513P).	The Honorable Matt Sorenson, Chairman, McLean County Board, 115 East Washington Street, Room 401, Bloomington, IL 61701.	McLean County Building and Zoning Department, 115 East Washington Street, Room M102, Bloomington, IL 61701.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 13, 2012	170931
Tazewell	City of Washington (11–05–7882P).	The Honorable Gary W. Manier, Mayor, City of Washington, 301 Walnut Street, Washington, IL 61571.	301 Walnut Street, Washington, IL 61571	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 12, 2012	170655
Will	Unincorporated areas of Will County (11–05–6606P).	The Honorable Lawrence M. Walsh, Will County Executive, 302 North Chicago Street, Joliet, IL 60432.	58 East Clinton Street, Suite 500, Joliet, IL 60432.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 8, 2012	170695
Will	Village of Plainfield (11–05–6606P).	The Honorable Michael P. Collins, President, Village of Plainfield, 24401 West Lockport Street, Plainfield, IL 60544.	24401 West Lockport Street, Plainfield, IL 60544.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 8, 2012	170771
Will	Village of Romeoville (11–05–0953P).	The Honorable John Noak, Mayor, Village of Romeoville, Romeoville Village Hall, 1050 West Romeo Road, Romeoville, IL 60446.	Romeoville Village Hall, 1050 West Romeo Road, Romeoville, IL 60446.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 20, 2012	170711

Iowa: Black Hawk	City of Cedar Falls (11–07–1543P).	The Honorable Jon Crews, Mayor, City of Cedar Falls, 220 Clay Street, Cedar Falls, IA 50613.	220 Clay Street, Cedar Falls, IA 50613	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	June 8, 2012	190017
Kansas:						
McPherson	City of McPherson (12–07–0044P).	The Honorable Thomas A. Brown, Mayor, City of McPherson, 400 East Kansas Avenue, McPherson, KS 67460.	400 East Kansas Avenue, McPherson, KS 67460.	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	June 27, 2012	200217
Sedgwick	City of Wichita (11–07–2738P).	The Honorable Carl Brewer, Mayor, City of Wichita, 455 North Main Street, Wichita, KS 67202.	455 North Main Street, Wichita, KS 67202	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	June 19, 2012	200328
Sedgwick	Unincorporated areas of Sedgwick County (11–07–2738P).	The Honorable Tim R. Norton, Chairman, Sedgwick County Board of Commissioners, 525 North Main Street, Suite 320, Wichita, KS 67203.	1144 South Seneca Street, Wichita, KS 67213.	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	June 19, 2012	200321
Maine: Lincoln	Town of Southport (11–01–1247P).	The Honorable Gerald Gamage, Town of Southport Selectman, 361 Hendricks Hill Road, Southport, ME 04576.	361 Hendricks Hill Road, Southport, ME 04576.	*http://www.starr-team.com/starr/LOMR/Pages/RegionI.aspx.*	June 8, 2012	230221
Minnesota: Rice	City of Faribault (12–05–1808P).	The Honorable John Jasinski, Mayor, City of Faribault, 208 1st Avenue Northwest, Fairbault, MN 55021.	208 1st Avenue, Northwest, Faribault, MN 55021.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 6, 2012	270404
Missouri:						
Jackson	City of Independence (11–07–2613P).	The Honorable Don B. Remial, Mayor, City of Independence, 111 East Maple Avenue, Independence, MO 64050.	111 East Maple, Independence, MO 64050	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	July 13, 2012	290172
St. Charles	City of Chesterfield (11–07–3427P).	The Honorable Bruce Geiger, Mayor, City of Chesterfield, 690 Chesterfield Parkway West, Chesterfield, MO 63017.	690 Chesterfield Parkway West, Chesterfield, MO 63017.	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	July 6, 2012	290896
St. Charles	Unincorporated areas of St. Charles County (11–07–3427P).	The Honorable Steve Ehlmann, St. Charles County Executive, 100 North 3rd Street, St. Charles, MO 63301.	300 North 2nd Street, St. Charles, MO 63301.	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	July 6, 2012	290315
St. Louis	Unincorporated areas of St. Louis County (11–07–2794P).	The Honorable Charlie A. Dooley, St. Louis County Executive, St. Louis County Government Center, 41 South Central Avenue, Clayton, MO 63105.	41 South Central Avenue, Clayton, MO 63105.	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	July 17, 2012	290327
Ohio:						
Clinton	Village of Sabina (12–05–0889P).	The Honorable Dean Carnahan, Mayor, Village of Sabina, 99 North Howard Street, Sabina, OH 45169.	99 North Howard Street, Sabina, OH 45169.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 3, 2012	390627
Cuyahoga	City of Beachwood (12–05–2285P).	The Honorable Merle S. Gorden, Mayor, City of Beachwood, 25325 Fairmont Boulevard, Beachwood, OH 44122.	25325 Fairmont Boulevard, Beachwood, OH 44122.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 29, 2012	390094
Washington: District of Columbia.	District of Columbia (12–03–0808P).	The Honorable Vincent C. Gray, Mayor, District of Columbia, John A. Wilson Building, 1350 Pennsylvania Avenue Northwest, Washington, DC 20004.	1200 1st Street Northeast, 5th Floor, Washington, DC 20002.	*https://www.rampp-team.com/lomrs.htm*	July 20, 2012	110001
Wisconsin:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Racine	City of Burlington (11–05–2911P).	The Honorable Robert Miller, Mayor, City of Burlington, 300 North Pine Street, Burlington, WI 53105.	300 North Pine Street, Burlington, WI 53105.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 8, 2012	550348
Racine	Unincorporated areas of Racine County (11–05–2911P).	The Honorable James A. Ladwig, Racine County Executive, 730 Wisconsin Avenue, Racine, WI 53403.	14200 Washington Avenue, Sturtevant, WI 53177.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 8, 2012	550347
Rock	City of Evansville (12–05–1647P).	The Honorable Sandy Decker, Mayor, City of Evansville, 31 South Madison Street, Evansville, WI 53536.	31 South Madison Street, Evansville, WI 53536.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 11, 2012	550366
Rock	Unincorporated areas of Rock County (12–05–1647P).	The Honorable J. Russell Podzilni, Chair, Rock County Board of Supervisors, 51 South Main Street, Janesville, WI 53545.	51 South Main Street, Janesville, WI 53545	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	July 11, 2012	550363
Walworth	City of Lake Geneva (11–05–4839P).	The Honorable Jim Connors, Mayor, City of Lake Geneva, 626 Geneva Street, Lake Geneva, WI 53147.	626 Geneva Street, Lake Geneva, WI 53147.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 4, 2012	550466
Walworth	Unincorporated areas of Walworth County (11–05–4839P).	The Honorable David Bretl, Walworth County Administrator, 100 West Walworth Street, Elkhorn, WI 53121.	100 West Walworth Street, Elkhorn, WI 53121.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 4, 2012	550462
Washington	Unincorporated areas of Washington County (11–05–6560P).	The Herbert J. Tennies, Chair, Washington County Board, 432 East Washington Street, Suite 3029, West Bend, WI 53095.	333 East Washington Street, Suite 2300, West Bend, WI 53095.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 8, 2012	550471

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: November 14, 2012.

James A. Walke,

Acting Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–29256 Filed 12–3–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3354–EM; Docket ID FEMA–2012–0002]

New Jersey; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of New Jersey (FEMA–3354–EM), dated October 28, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 8, 2012.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29192 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3353–EM; Docket ID FEMA–2012–0002]

Connecticut; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Connecticut (FEMA–3353–EM), dated October 28, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 8, 2012.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29206 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3349–EM; Docket ID FEMA–2012–0002]

Maryland; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Maryland (FEMA–3349–EM), dated October 28, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 8, 2012.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29208 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3359–EM; Docket ID FEMA–2012–0002]

Virginia; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the Commonwealth of Virginia (FEMA–3359–EM), dated October 29, 2012, and related determinations.

DATES: *Effective Date:* November 1, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency

Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 1, 2012.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29220 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3358–EM; Docket ID FEMA–2012–0002]

West Virginia; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of West Virginia (FEMA–3358–EM), dated October 29, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 8, 2012.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29210 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3351–EM; Docket ID FEMA–2012–0002]

New York; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of New York (FEMA–3351–EM), dated October 28, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 8, 2012.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29261 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4085–DR; Docket ID FEMA–2012–0002]

New York; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New York (FEMA–4085–DR), dated October 30, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective November 8, 2012.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29259 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4087–DR; Docket ID FEMA–2012–0002]

Connecticut; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Connecticut (FEMA–4087–DR), dated October 30, 2012, and related determinations.

DATES: *Effective Date:* November 23, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Connecticut is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 30, 2012.

Fairfield, Middlesex, New Haven, and New London Counties and the Mashantucket Pequot Tribal Nation and Mohegan Tribal Nation located within New London County for Public Assistance [Categories C–G] (already designated for Public Assistance [Categories A and B], including direct federal assistance).

Litchfield, Tolland, and Windham Counties for Public Assistance, including direct federal assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29190 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4087–DR; Docket ID FEMA–2012–0002]

Connecticut; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Connecticut (FEMA–4087–DR), dated October 30, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective November 8, 2012.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29207 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4086–DR; Docket ID FEMA–2012–0002]

New Jersey; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Jersey (FEMA–4086–DR), dated October 30, 2012, and related determinations.

DATES: *Effective Date:* November 8, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective November 8, 2012.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29191 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4091–DR; Docket ID FEMA–2012–0002]

Maryland; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Maryland (FEMA–4091–DR), dated November 20, 2012, and related determinations.

DATES: *Effective Date:* November 20, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency

Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated November 20, 2012, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Maryland resulting from Hurricane Sandy during the period of October 26 to November 4, 2012, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Maryland.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael J. Lapinski, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Maryland have been designated as adversely affected by this major disaster:

Allegany, Calvert, Caroline, Charles, Dorchester, Frederick, Garrett, Harford, Howard, Kent, Queen Anne's, Somerset, St. Mary's, Talbot, Washington, Wicomico, and Worcester Counties and the Independent City of Baltimore for Public Assistance.

All counties and the Independent City of Baltimore within the State of Maryland are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–29194 Filed 12–3–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[LLWO100000, L18200000.XX0000]

Oil, Gas, and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, NM

AGENCY: Department of the Interior.

ACTION: Notice of Secretary's Order 3324.

SUMMARY: Secretary's Order 3324 revises and supersedes the Order of the Secretary of the Interior, dated October 28, 1986 (51 FR 39425), and corrected on August 26, 1987 (52 FR 32171), and provides procedures and guidelines for more orderly co-development of oil and gas and potash deposits owned by the United States within the Designated Potash Area through safe, concurrent operations.

DATES: *Effective Date:* December 3, 2012.

FOR FURTHER INFORMATION CONTACT: Tony Herrell; telephone 505–954–2222; 301 Dinosaur Trail, Santa Fe, New Mexico 87508; email: *therrell@blm.gov.*

SUPPLEMENTARY INFORMATION: Secretary's Order 3324 reads as follows:

Order No. 3324

Sec. 1 Purpose and Effect. This Order revises and supersedes the Order of the Secretary of the Interior, dated October 28, 1986 (51 FR 39425), and corrected on August 26, 1987 (52 FR 32171), and provides procedures and guidelines for more orderly co-development of oil and gas and potash deposits owned by the United States within the Designated Potash Area through safe, concurrent operations.

Sec. 2 Authority. This Order is issued in accordance with the authority vested in the Secretary of the Interior in the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 *et seq.*); the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351–359); the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701 *et seq.*), and regulations and onshore orders implementing these statutes.

Sec. 3 Order Revised and Superseded. The Order of the Secretary of the Interior dated October 28, 1986 (51 FR 39425), and corrected on August 26, 1987 (52 FR 32171), is hereby superseded by this revised Order. The following provisions will apply to concurrent operations in prospecting for, developing, and producing oil and gas and potash deposits owned by the United States within the Designated Potash Area.

Sec. 4 Definitions.

a. *Authorized Officer.* Any employee of the Bureau of Land Management (BLM) authorized to perform duties described in 43 CFR parts 3000, 3100, and 3500, as delegated in the BLM Manual.

b. *Barren Area.* An area established by the BLM within the Designated Potash Area for which sufficient data is available to establish a lack of potash mineralization in sufficient thickness and quality to be mineable under existing technology and economics.

c. *Buffer Zone.* Areas established by the BLM within the Designated Potash Area:

(1) Extending outward a certain distance from the perimeter of existing underground open mine workings within which oil or gas operations are generally not allowed due to a BLM determination that oil or gas drilling could constitute a hazard to or interfere with orderly potash mining operations, or

(2) Extending outward a certain distance from operating oil or gas well(s) or established Drilling Islands within which potash operations are generally not allowed due to a BLM determination that potash mining or exploration operations could constitute a hazard to or interfere with orderly oil or gas operations.

d. *Co-development.* The concurrent development of oil and gas and potash resources within the Designated Potash Area. Co-development is a cooperative effort between industries under the guidelines of this order, as regulated by the BLM, to support production of potash and oil and gas from the lands within the Designated Potash Area.

e. *Designated Potash Area.* The land area described in Section 8 of this Order.

f. *Development Area.* An area established by the BLM within the Designated Potash Area in consideration of appropriate oil and gas technology such that wells can be drilled from a Drilling Island capable of effectively extracting oil and gas resources while

managing the impact on potash resources. Each Development Area will typically have only one Drilling Island, subject to narrow exceptions based on specific facts and circumstances. All new oil and gas wells that penetrate the potash formations within a Development Area will be drilled from the Drilling Island(s) associated with that Development Area. The boundaries of each Development Area will be determined in conformity with Section 6.e.(2).

g. *Drilling Island.* An area established by the BLM, usually associated with and within a Development Area, from which all new drilling of vertical, directional, or horizontal wells that newly penetrate the potash formations can be performed in order to support the development of oil and gas resources. The size and shape of a Drilling Island defines the area where wellbore penetrations of the potash formations will be allowed; this area is to be as small as practical to allow effective oil and gas development while managing impacts on potash.

h. *Indicated Resources.* Potash resources from which tonnage, grade, and mineral content are computed partly from specific measurements and samples, and partly from projection of geologic evidence. Indicated Resources are estimated at a lower level of confidence than Measured Reserves.

i. *Inferred Resources.* Potash resources which are probable, considering reasonably correlated data from lithologic descriptions and well logs, but for which tonnage and grade cannot be computed due to the absence of specific data.

j. *Joint Industry Technical Committee.* A committee established by, and subject to the management and control of, the potash mining industry and the oil and gas industry whose role is to study how concurrent development of potash and oil and gas can be safely performed in proximity to each other. While the committee may provide input to the BLM on such matters as indicated herein or otherwise at its discretion, it will not be subject to the BLM's management or control.

k. *Measured Reserves (also known as ''Potash Enclave'')*. Areas within the Designated Potash Area where potash is known to exist in sufficient thickness and quality to be mineable under existing technology and economics.

l. *Potash.* Potassium and associated minerals as specified in the Act of February 27, 1927 (30 U.S.C. 281–287).

m. *Unknown Area.* An area within the Designated Potash Area where there is an absence of data for the BLM to classify the mineralization as Measured Reserves, Indicated Resources, Inferred Resources, or Barren Area.

Sec. 5 Status of Lands. This Order will not affect the current status of lands with respect to their being withdrawn from or open to entry or leasing.

Sec. 6 General Provisions.

a. *Issuance of Oil and Gas Leases.* The Department of the Interior reaffirms its policy that the lease stipulations contained in the Order of the Secretary of the Interior dated October 28, 1986, and corrected on August 26, 1987 (52 FR 32171), are necessary to protect the rights of the oil and gas and potash lessees and operators. Therefore, each successful applicant for a noncompetitive oil and gas lease, and any party awarded a competitive lease, for lands included in the Designated Potash Area, is required, as a condition to the issuance of such lease, to execute a stipulation to the lease as follows:

(1) Drilling for oil and gas shall be permitted only in the event that the lessee establishes to the satisfaction of the Authorized Officer, BLM, that such drilling will not interfere with the mining and recovery of potash deposits, or the interest of the United States will best be served by permitting such drilling.

(2) No wells shall be drilled for oil or gas at a location which, in the opinion of the Authorized Officer, would result in undue waste of potash deposits or constitute a hazard to or unduly interfere with mining operations being conducted for the extraction of potash deposits.

(3) When the Authorized Officer determines that unitization is necessary for orderly oil and gas development and proper protection of potash deposits, no well shall be drilled for oil or gas except pursuant to a unit plan approved by the Authorized Officer.

(4) The drilling or the abandonment of any well on said lease shall be done in accordance with applicable oil and gas operating regulations (43 CFR 3160), including such requirements as the Authorized Officer may prescribe as necessary to prevent the infiltration of oil, gas, or water into formations containing potash deposits or into mines or workings being utilized in the extraction of such deposits. In addition, the Authorized Officer will include a lease provision which states that drilling for and production of oil and gas will be subject to the terms of this Order, any subsequent revisions, and the orders of the Authorized Officer thereunder.

b. *Reinstatement or Renewal of Oil and Gas Leases.* As a condition to the granting of any discretionary reinstatement or renewal of any existing lease that includes lands in the Designated Potash Area, the BLM will impose stipulations identical to those specified in Section 6.a.

c. *Potash Leases.*

(1) All potash permits, licenses, and leases hereafter issued or existing potash leases hereafter readjusted for Federal lands within the Designated Potash Area, must be subject to a requirement, either to be included in the lease, license, or permit or imposed as a stipulation, that no mining or exploration operations may be conducted that, in the opinion of the Authorized Officer, will constitute a hazard to oil or gas production, or that will unreasonably interfere with orderly development and production under any oil and gas lease issued for the same lands.

(2) BLM will continue to include applicable due diligence stipulations in all potash leases issued or readjusted after the date of this Order.

(3) Before being allowed to participate in a competitive lease sale, all bidders must certify in writing that they have an identifiable, substantial, and genuine interest in developing the potash resources and that they intend to develop the potash resources in accordance with the applicable diligence stipulations.

(4) In addition, the Authorized Officer will include a lease provision providing that potash mining operations will be subject to the terms of this Order, any subsequent revisions, and the orders of the Authorized Officer thereunder.

d. *Delineation of Resource Areas.* Each potash lessee must file annually by March 1, with the Authorized Officer, data and a map(s) on which has been delineated the following information with respect to the Federal, state, and private potash leases which the lessee then holds; and lands on which exploration activities have been conducted.

(1) Those areas where active mining operations are currently in progress in one or more ore zones;

(2) Those areas where operations have been completed in one or more ore zones;

(3) Those areas that are not presently being mined which are considered to contain Measured Reserves in one or more ore zones;

(4) Those areas that are not presently being mined which are considered to contain Indicated Resources in one or more ore zones;

(5) Those areas that are not presently being mined which are considered to contain Inferred Resources in one or more ore zones;

(6) Those areas that are considered to be Barren Areas;

(7) Those areas that are Unknown Areas; and

(8) Those areas that are planned to be mined as per a three-year mine plan.

(9) The Authorized Officer will annually review the information submitted under this requirement and make any revisions to the boundaries of Measured Reserves, Indicated Resources, Inferred Resources, Barren Areas, and Unknown Areas. Upon verification, the Authorized Officer will commit the initial findings to a map(s) of suitable scale and will thereafter revise that map(s) as necessary to reflect the latest available information.

e. *Oil and Gas Drilling.*

(1) Drilling within the Designated Potash Area. It is the intent of the Department of the Interior to administer oil and gas operations throughout the Designated Potash Area in a manner which promotes safe, orderly co-development of oil and gas and potash resources. It is the policy of the Department of the Interior to deny approval of most applications for permits to drill oil and gas wells from surface locations within the Designated Potash Area. Three exceptions to this policy will be permitted if the drilling will occur under the following conditions from:

(a) A Drilling Island associated with a Development Area established under this Order or a Drilling Island established under a prior Order;

(b) A Barren Area and the Authorized Officer determines that such operations will not adversely affect active or planned potash mining operations in the immediate vicinity of the proposed drill-site; or

(c) A Drilling Island, not covered by (a) above, or single well site established under this Order by the approval and in the sole discretion of the Authorized Officer, provided that such site was jointly recommended to the Authorized Officer by the oil and gas lessee(s) and the nearest potash lessee(s).

(2) Development Areas.

(a) When processing an application for permit to drill (APD) an oil or gas well in the Designated Potash Area that complies with regulatory requirements, the Authorized Officer will determine whether to establish a Development Area in connection with the application, and if so, will determine the boundaries of the Development Area and the location within the Development Area of one or more Drilling Islands from which drilling will be permitted. The BLM may also designate a Development Area outside of the APD process based on information in its possession, and may modify the boundaries of a Development Area. Existing wells may be included within the boundaries of a Development Area. A Development Area may include Federal oil and gas leases and other Federal and non-Federal lands.

(b) After designating or modifying a Development Area, the BLM will issue a Notice to Lessees, consistent with its authorities under 43 CFR subpart 3105 and part 3180, informing lessees that future drilling on lands under an oil and gas lease within that Development Area will:

(i) Occur, under most circumstances, from a Barren Area or a Drilling Island within the Development Area; and

(ii) Be managed under a unit or communitization agreement, generally by a single operator, consistent with BLM regulations and this Order. Unit and communitization agreements will be negotiated among lessees. The BLM will consider whether a specific plan of development is necessary or advisable for a particular Drilling Island.

(c) The Authorized Officer reserves the right to approve an operator or successor operator of a Development Area and/or a Drilling Island, if applicable, to ensure that the operator has the resources to operate and extract the oil and gas resources consistent with the requirements of this Order and all applicable laws and regulations, and has provided financial assurance in the amount required by the Authorized Officer.

(d) The Authorized Officer will determine the appropriate designation of a Development Area in terms of location, shape, and size. In most cases, a single Drilling Island will be established for each Development Area. In establishing the location, shape, and size of a Development Area and an associated Drilling Island, the Authorized Officer will consider:

(i) The appropriate location, shape, and size of a Development Area and associated Drilling Island to allow effective extraction of oil and gas resources while managing the impact on potash resources;

(ii) The application of available oil and gas drilling and production technology in the Permian Basin;

(iii) The applicable geology of the Designated Potash Area and optimal locations to minimize loss of potash ore while considering co-development of both resources;

(iv) Any long term exploration and/or mining plans provided by the potash industry;

(v) Whether a Barren Area may be the most appropriate area for a Drilling Island;

(vi) The requirements of this Order; and

(vii) Any other relevant factors.

(e) As the Authorized Officer establishes a Development Area, the Authorized Officer will more strictly apply the factors listed in Section 6.e.(2)(d), especially the appropriate application of the available oil and gas drilling and production technology in the Permian Basin, when closer to current traditional (non-solution) potash mining operations. Greater flexibility in the application of the factors listed in Section 6.e.(2)(d) will be applied further from current and near-term traditional (non-solution) potash mining operations. No Drilling Islands will be established within one mile of any area where approved potash mining operations will be conducted within 3 years consistent with the 3-year mine plan referenced above (Section 6.d.(8)) without the consent of the affected potash lessee(s).

(f) The Authorized Officer may establish a Development Area associated with a well or wells drilled from a Barren Area as appropriate and necessary.

(g) As part of the consideration for establishing Development Areas and Drilling Islands, the BLM will consider input from the potash lessees and the oil and gas lessees or mineral right owners who would be potentially subject to a unitization agreement supporting the Development Area, provided that the input is given timely.

(3) Buffer Zones. Buffer Zones of ¼ mile for oil wells and ½ mile for gas wells are hereby established. These Buffer Zones will stay in effect until such time as revised distances are adopted by the BLM Director or other BLM official, as delegated. However, the Authorized Officer may adjust the Buffer Zones in an individual case, when the facts and circumstances demonstrate that such adjustment would enhance conservation and would not compromise safety. The Director will base revised Buffer Zones on science, engineering, and new technology and will consider comments and reports from the Joint Industry Technical Committee and other interested parties in adopting any revisions.

(4) Unitization and Communitization. To more properly conserve the potash and oil and gas resources in the Designated Potash Area and to adequately protect the rights of all parties in interest, including the United States, it is the policy of the Department of the Interior that all Federal oil and gas leases within a Development Area should be unitized or subject to an

approved communitization agreement unless there is a compelling reason for another operating system. The Authorized Officer will make full use of his/her authorities wherever necessary or advisable to require unitization and/or communitization pursuant to the regulations in 43 CFR subparts 3105 and 3180. The Authorized Officer will use his/her discretion to the fullest extent possible to assure that any communitization agreement and any unit plan of operations hereafter approved or prescribed within the Designated Potash Area will adhere to the provisions of this Order. The Authorized Officer will work with Federal lessees, and with the State of New Mexico as provided below, to include non-Federal mineral rights owners in unit or communitization agreements to the extent possible.

(5) Coordination with the State of New Mexico.

(a) If the effective operation of any Development Area requires that the New Mexico Oil Conservation Division (NMOCD) revise the state's mandatory well spacing requirements, the BLM will participate as needed in such a process. The BLM may adopt the NMOCD spacing requirements and require lessees to enter into communitization agreements based on those requirements.

(b) The BLM will cooperate with the NMOCD in the implementation of that agency's rules and regulations.

(c) In taking any action under Section 6.e. of this Order, the Authorized Officer will take into consideration the applicable rules and regulations of the NMOCD.

(6) Approvals of Exploration on Existing Potash Leases and Potash Exploration Licenses.

(a) Exploration for potash on lands leased for potash is permitted only with approval by the BLM, in consultation and coordination with the potash lessee, of an exploration plan in accordance with 43 CFR subpart 3592 and subject to the terms and conditions of the potash lease.

(b) An oil and gas or potash operator may apply for an exploration license to drill core holes necessary to define the absence or existence and extent of mineable potash reserves in areas within the Designated Potash Area. Exploration licenses allow the exploration of known, unleased mineral deposits to obtain geologic, environmental, and other pertinent data concerning the deposit. See 43 CFR subpart 3506. These licenses can be obtained from the Carlsbad Field Office, BLM. Costs for such exploration may be shared consistent with the provisions of 43 CFR 3506.14, if applicable.

(c) Should an oil and gas or potash operator desire to attempt to gather sufficient data for the BLM to establish a Barren Area in any part of the Designated Potash Area not defined as Barren, provisions and protocols are included in this Order for the operator to review relevant data in the area to design a core acquisition program (see Section 6.e.(8)(b) and (c) of this Order) and to obtain access to the land to acquire core data (see Section 6.e.(6)(b)). The BLM will develop and employ, as appropriate, data management protocols to protect the appropriate use of the data in its records. The BLM will use such newly acquired data to determine the resulting potash ore quality and make any changes to potash reserves and resources maps indicated by the new data.

(7) Notice to Affected Parties. An applicant for an Application for Permit to Drill (APD), or a proponent of a plan of development for a unit or communitization area or a proposal for a Development Area or a Drilling Island, will provide notice of the application, plan, or proposal to the potash lessees and potash operators in the Designated Potash Area and to the owners of the oil and gas rights and surface owners affected by such application, plan, or proposal. A list of current potash lessees and potash operators will be available and maintained by the Carlsbad Field Office, BLM. The BLM will assist to the extent possible in identifying the oil and gas and surface owners affected by the application, plan, or proposal. This notice should be prior to or concurrent with the submission of the application, plan, or proposal to the BLM. The BLM will not authorize any action prior to this notice.

(8) Access to Maps and Surveys.

(a) Well records and survey plats that an oil and gas lessee is required to file pursuant to applicable operating regulations (43 CFR subpart 3160) will be available for inspection at the Carlsbad Field Office, BLM, by any party holding a potash permit or lease on the lands on which the well is situated insofar as such records are pertinent to the mining and protection of potash deposits.

(b) Maps of mine workings and surface installations and records of core analyses that a potash lessee is required to file pursuant to applicable operating regulations (43 CFR 3590) will be available for inspection at the Carlsbad Field Office, BLM. These records are available for viewing by any party holding an oil and gas lease on the same lands insofar as such records are pertinent to the development and protection of oil and gas deposits.

(c) In order for an oil and gas or potash operator to establish and design a core acquisition program for the purposes of proving a Barren Area, those records of core analyses in the area of the planned program that are necessary to design that program should be provided in a timely fashion by the BLM to the operator of the planned program to the extent allowed by law, subject to data management protocols as referenced in Section 6.e.(6)(c), and consistent with 43 CFR part 2 and Sections 3503.41–.43. The BLM will use all data available to it when delineating Barren Areas.

(d) Maps of potash reserves and resources prepared under the provisions of Section 6.d. will be available for inspection in the Carlsbad Field Office, BLM. Digital copies of these maps will be available by mail or at these offices by May 1 of each year. Maps of established Development Areas will be updated as new Development Areas are established. Maps of Development Areas will be provided in a timely fashion by the BLM upon request.

Sec. 7 Regulatory and Administrative Matters.

a. This Order applies to the exercise of all existing leases in the Designated Potash Area in conformity with lease stipulations and Federal law.

b. Except to the extent otherwise provided by this Order, the regulations contained in 43 CFR part 3100 and subparts 3160 and 3180 (governing the leasing and development of oil and gas) and 43 CFR part 3500 and subpart 3590 (governing the leasing and development of potash deposits), remain applicable to the lands covered by this Order.

c. In implementing this Order, the BLM is authorized to exercise its discretion through any and all appropriate means, including rulemaking, notices to lessees, and orders of the Authorized Officer.

d. The BLM will obtain and use the best science available when administering this Order consistent with Departmental Manual chapters 305 DM 2 and 305 DM 3. The BLM will comply with the requirements of Secretary's Order 3305, Ensuring Scientific Integrity within the Department of the Interior, dated, September 29, 2010. The BLM has previously used Sandia National Laboratories to provide unbiased technical assistance in administering the Designated Potash Area and may continue to do so, if the BLM, consistent with all applicable laws, so chooses.

e. The BLM will develop guidelines consistent with this Order for establishing Development Areas and

Drilling Islands. In developing such guidelines, the BLM may consider comments and reports from the Joint Industry Technical Committee and other interested parties.

f. The BLM will develop appropriate time-frame guidelines and requirements, as appropriate, to enable timely actions pursuant to this Order.

Sec. 8 The Designated Potash Area Legal Description.

New Mexico Principal Meridian

T. 22 S., R. 28 E.,
Secs. 25 and 36.
T. 23 S., R. 28 E.,
Sec. 1.
T. 19 S., R. 29 E.,
Secs. 1 and 2;
Secs 11 to 15, inclusive;
Secs. 22 to 27, inclusive;
Secs. 35 and 36.
T. 20 S., R. 29 E.,
Secs. 1 and 2;
Secs. 11 to 15, inclusive;
Secs. 22 to 27, inclusive;
Secs. 34 to 36, inclusive.
T. 21 S., R. 29 E.,
Secs. 1 to 5, inclusive;
Secs. 10 to 15, inclusive;
Secs. 22 to 27, inclusive;
Secs. 34 to 36, inclusive.
T. 22 S., R. 29 E.,
Secs. 1 to 5, inclusive;
Secs. 8 to 17, inclusive;
Secs. 19 to 36, inclusive.
T. 23 S., R. 29 E.,
Secs. 1 to 17, inclusive;
Secs. 21 to 28, inclusive;
Secs. 33 to 36, inclusive.
T. 24 S., R. 29 E.,
Secs. 1 to 4, inclusive.
T. 18 S., R. 30 E.,
Secs. 8 to 17, inclusive;
Secs. 20 to 29, inclusive;
Secs. 32 to 36, inclusive.
T. 19 S., R. 30 E.
T. 20 S., R. 30 E.
T. 21 S., R. 30 E.
T. 22 S., R. 30 E.
T. 23 S., R. 30 E.
T. 24 S., R. 30 E.,
Secs. 1 to 18, inclusive.
T. 19 S., R. 31 E.,
Secs. 7 and 18;
Secs. 31 to 36, inclusive.
T. 20 S., R. 31 E.
T. 21 S., R. 31 E.
T. 22 S., R. 31 E.
T. 23 S., R. 31 E.
T. 24 S., R. 31 E.,
Secs. 1 to 18, inclusive;
Secs. 35 and 36.
T. 25 S., R. 31 E.,
Secs. 1 and 2.
T. 19 S., R. 32 E.,
Secs. 25 to 28, inclusive;
Secs. 31 to 36, inclusive.
T. 20 S., R. 32 E.
T. 21 S., R. 32 E.
T. 22 S., R. 32 E.,
Secs. 1 to 12, inclusive.
T. 19 S., R. 33 E.,
Secs. 21 to 36, inclusive.
T. 20 S., R. 33 E.
T. 21 S., R. 33 E.
T. 22 S., R. 33 E.,
Secs. 1 to 12, inclusive.
T. 19 S., R. 34 E.,
Secs. 19 and 20;
Secs. 29 to 32, inclusive.
T. 20 S., R. 34 E.,
Secs. 3 to 10, inclusive;
Secs. 15 to 36, inclusive.
T. 21 S., R. 34 E.,
Secs. 5 to 8, inclusive;
Secs. 17 to 20, inclusive;
Secs. 29 to 32, inclusive.
T. 22 S., R. 34 E.,
Sec. 6.

The area described, including public and non-public lands, aggregates 497,002.03 acres, more or less.

Sec. 9 Administrative Provisions. The Director, BLM, is authorized to delegate responsibilities herein as is determined appropriate. This Order will remain in effect until superseded, replaced, or incorporated into the Departmental Manual.

Ken Salazar,

Secretary of the Interior.

[FR Doc. 2012–29393 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2012–N276;FXES1113 0800000–123–FF08E00000]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: Comments on these permit applications must be received on or before January 3, 2013.

ADDRESSES: Written data or comments should be submitted to the Endangered Species Program Manager, U.S. Fish and Wildlife Service, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist; see **ADDRESSES** (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 et seq.). We seek review and comment from local, State, and Federal agencies and the public on the following permit requests.

Applicant

Permit No. TE–78622A

Applicant: William J. Mautz, Hilo, Hawaii

The applicant requests a permit to take (capture, handle, mark, salvage, and release) the island night lizard (*Xantusia riversiana*) in conjunction with surveys, population monitoring, and research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–78621A

Applicant: Danielle L. Temple, Three Rivers, California

The applicant requests a permit to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–053336

Applicant: John E. Vollmar, Berkley, California

The applicant requests an amendment to a permit to take (to restore and enhance habitat) for the California tiger salamander (Santa Barbara County DPS) (*Ambystoma californiense*) in conjunction with habitat enhancement and restoration activities in Santa Barbara County, California, for the purpose of enhancing the species' survival.

Permit No. TE–776608

Applicant: Monk and Associates, Inc., Walnut Creek, California

The applicant requests an amendment to a permit to take (survey, capture, handle, and release) the giant kangaroo

rat (*Dipodomys ingens*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–798003

Applicant: North State Resources, Redding, California

The applicant requests a permit renewal to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*); take (harass by survey) the southwestern willow flycatcher (*Empidonax traillii extimus*); and take (capture, handle, and release) the California tiger salamander (Sonoma County Distinct Population Segment) (*Ambystoma californiense*) and California tiger salamander (Santa Barbara County DPS) (*Ambystoma californiense*) in conjunction with survey activities throughout the range of each species in California and Nevada for the purpose of enhancing the species' survival.

Permit No. TE–88331A

Applicant: Ryan S. Winkleman, Rancho Santa Margarita, California

The applicant requests a permit to take (survey, capture, handle, and release) the arroyo toad (=arroyo southwestern) (*Anaxyrus californicus* (*Bufo microscaphus c.*)) in conjunction with survey and annual monitoring activities in Los Angeles, San Bernardino, and Riverside Counties, California, for the purpose of enhancing the species' survival.

Permit No. TE–089980

Applicant: Jeff M. Hagar, Richmond, California

The applicant requests a permit renewal to take (survey, capture, handle, and release) the tidewater goby (*Eucyclogobius newberryi*) in conjunction with surveys and scientific studies in San Diego, Orange, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, San Mateo, San Francisco, Marin, and Sonoma Counties, California, for the purpose of enhancing the species' survival.

Permit No. TE–092469

Applicant: Ingrid I. Eich, Fullerton, California

The applicant requests a permit renewal to take (capture, collect, and collect vouchers) the Riverside fairy shrimp (*Streptocephalus woottoni*) and San Diego fairy shrimp (*Branchinecta sandiegonensis*), and requests an amendment to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), and vernal pool tadpole shrimp (*Lepidurus packardi*), in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–795935

Applicant: Gibson & Skordal, LLC, Sacramento, California

The applicant requests a permit renewal to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–053379

Applicant: Christine L. Tischer, Orange, California

The applicant requests a permit renewal to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) and take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–213314

Applicant: Morro Coast Audubon Society, Morro Bay, California

The applicant requests an amendment to a permit to take (locate, capture, handle, measure, release, and relocate) the Morro shoulderband snail (*Helminthoglypta walkeriana*) in conjunction with surveys, monitoring, and habitat restoration activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–180579

Applicant: Dwayne N. Oberhoff, Los Osos, California

The applicant requests a permit renewal to take (locate, capture, handle, and release) the Morro shoulderband snail (*Helminthoglypta walkeriana*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–89964A

Applicant: Debra S. Barringer, Ventura, California

The applicant requests a permit to take (survey, locate, and monitor nests) the California least tern (*Sternula antillarum browni*) in conjunction with survey and population monitoring activities in Ventura, Orange, San Diego, San Luis Obispo, and Santa Barbara Counties, California, for the purpose of enhancing the species' survival.

Permit No. TE–90000A

Applicant: Ryan M. Brown, Chico, California

The applicant requests a permit to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–195306

Applicant: Sierra View Landscape Incorporated, Rocklin, California

The applicant requests a permit renewal to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–89998A

Applicant: Matthew L. Amalong, Fountain Valley, California

The applicant requests a permit to take (survey, locate and monitor nests) the California least tern (*Sternula antillarum browni*) in conjunction with survey and population monitoring activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–89496A

Applicant: Nathan W. Mudry, Fullerton, California

The applicant requests a permit to take (survey, locate and monitor nests) the California least tern (*Sternula antillarum browni*) in conjunction with survey and population monitoring activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–227263

Applicant: Emilie A. Strauss, San Rafael, California

The applicant requests an amendment to a permit to take (harass by survey) the California clapper rail (*Rallus longirostris obsoletus*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE–90002A

Applicant: Todd J. Wong, Elk Grove, California

The applicant requests a permit to take (capture, collect, and collect vouchers) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE–179036

Applicant: Cullen A. Wilkerson, Richmond, California

The applicant requests a permit renewal to take (harass by survey, capture, handle, mark, and release) the San Francisco garter snake (*Thamnophis sirtalis tetrataenia*) in conjunction with survey and research activities throughout the range of the species in California, and take (harass by survey, capture, handle, and release) the California tiger salamander (central DPS) (*Ambystoma californiense*) and the California red-legged frog (*Rana draytonii*) (*R. aurora d.*) in conjunction with survey and research activities in Contra Costa, San Mateo, Alameda, San Joaquin, Solano, Yolo, Napa, Butte, and Santa Clara Counties, California, for the purpose of enhancing the species' survival.

Public Comments

We invite public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

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.

Mary Grim.

Acting Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2012–29178 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–MB–2012–N253; 91100–3740–GRNT 7C]

Meeting Announcement: North American Wetlands Conservation Council

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The North American Wetlands Conservation Council (Council) will meet to select North American Wetlands Conservation Act (NAWCA) grant proposals for recommendation to the Migratory Bird Conservation Commission (Commission). This meeting is open to the public, and interested persons may present oral or written statements.

DATES: *Council:* Meeting is December 4, 2012, 8:30 a.m. through 4:30 p.m. If you are interested in presenting information at this public meeting, contact the Council Coordinator no later than November 26, 2012.

ADDRESSES: The Council meeting will be held at the National Fish and Wildlife Foundation, 1133 15th Street Suite 1100, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Cynthia Perry, Council Coordinator, by phone at (703) 358–2432; by email at *dbhc@fws.gov;* or by U.S. mail at U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Mail Stop MBSP 4075, Arlington, VA 22203.

SUPPLEMENTARY INFORMATION:

Background

In accordance with NAWCA (Pub. L. 101–233, 103 Stat. 1968, December 13, 1989, as amended), the State-private-Federal Council meets to consider wetland acquisition, restoration, enhancement, and management projects for recommendation to, and final funding approval by, the Commission. Project proposal due dates, application instructions, and eligibility requirements are available on the NAWCA Web site at *http://www.fws.gov/birdhabitat/Grants/NAWCA/Standard/US/Overview.shtm.*

Proposals require a minimum of 50 percent non-Federal matching funds. If you are interested in presenting information at this public meeting, contact the Council Coordinator no later than the date under **DATES**.

Meeting

The Council will consider U.S. standard grant proposals at the meeting announced in **DATES**. The Commission will consider the Council's recommendations at its meeting tentatively scheduled for March 13, 2013.

Public Input

If you wish to:

Attend the Council meeting, you must contact the Council Coordinator (see **FOR FURTHER INFORMATION CONTACT**) no later than November 26, 2012.

Submit written information or questions before the Council meeting for consideration during the meeting November 26, 2012.

Give an oral presentation during the Council meeting November 26, 2012.

Submitting Written Information or Questions

Interested members of the public may submit relevant information or questions for the Council to consider during the public meeting. If you wish to submit a written statement, so that the information may be made available to the Council for their consideration prior to this meeting, you must contact the Council Coordinator by the date

above. Written statements must be supplied to the Council Coordinator in both of the following formats: One hard copy with original signature, and one electronic copy via email (acceptable file formats are Adobe Acrobat PDF, MS Word, MS PowerPoint, or rich text file).

Giving an Oral Presentation

Individuals or groups requesting to make an oral presentation at the Council meeting will be limited to 2 minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact the Council Coordinator by the date above, in writing (preferably via email; see **FOR FURTHER INFORMATION CONTACT**), to be placed on the public speaker list for either of these meetings. Nonregistered public speakers will not be considered during the Council meeting. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, are invited to submit written statements to the Council within 30 days following the meeting.

Meeting Minutes

Summary minutes of the Council and meeting will be maintained by the Council Coordinator at the address under **FOR FURTHER INFORMATION CONTACT**. Council meeting minutes will be posted at *http://www.fws.gov/birdhabitat/Grants/NAWCA/CouncilAct.shtm#CouncilMeet* within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

Dated: November 26, 2012.

Jerome Ford,

Assistant Director, Migratory Birds.

[FR Doc. 2012–29254 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX13BA02EEW0200]

Agency Information Collection Activities: Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of an extension of currently approved information Collection, 1028–0103.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is inviting comments on an information collection request (ICR) that we have sent to the Office of Management and Budget (OMB) for review and approval. The ICR concerns the paperwork requirements for the *USA National Phenology Network—The Nature's Notebook Plant and Animal Observing Program.* As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this ICR. This collection is scheduled to expire on January 31, 2013.

DATES: Submit written comments by January 3, 2013.

ADDRESSES: Please submit comments on this information collection directly to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via email: (*OIRA_SUBMISSION@omb.eop.gov*); or by fax (202) 395–5806; and identify your submission with #1028–0103. Please also submit a copy of your comments to Information Collection Clearance Officer, U.S. Geological Survey, 807 National Center, Reston, VA 20192 (mail); or *smbaloch@usgs.gov* (email). Please Reference Information Collection 1028–0103 in the subject line.

FOR FURTHER INFORMATION CONTACT: Jake F. Weltzin, Ecologist, U.S. Geological Survey, *jweltzin@usgs.gov,* (520) 626–3821.

SUPPLEMENTARY INFORMATION:

Title: USA National Phenology Network—The *Nature's Notebook* Plant and Animal Observing Program.

OMB Control Number: 1028–0103.

Type of Request: Notice of an extension of a currently approved information collection.

Respondent Obligation: Voluntary.

Abstract: The USA–NPN is a program sponsored by the USGS that uses standardized forms for tracking plant and animal activity as part of a project called *Nature's Notebook.* The *Nature's Notebook* forms are used to record phenology (e.g., timing of leafing or flowering of plants and reproduction or migration of animals) as part of a nationwide effort to understand and predict how plants and animals respond to environmental variation and changes in weather and climate. Contemporary data collected through *Nature's Notebook* are quality-checked, described and made publicly available; data are used to inform decision-making in a variety of contexts, including agriculture, drought monitoring, and wildfire risk assessment. Phenological information is also critical for the management of wildlife, invasive species, and agricultural pests, and for understanding and managing risks to human health and welfare, including allergies, asthma, and vector-borne diseases. Participants may contribute phenology information to *Nature's Notebook* through a browser-based web application or via mobile applications for iPhone and Android operating systems, meeting GPEA requirements. The web application interface consists of several components: user registration, a searchable list of 877 plant and animal species which can be observed; a ''profile'' for each species that contains information about the species including its description and the appropriate monitoring protocols; a series of interfaces for registering as an observer, registering a site, registering plants and animals at a site, generating datasheets to take to the field, and a data entry page that mimics the datasheets.

Frequency of Collection: On occasion. During the Spring and Fall seasons when phenology is changing quickly, we recommend respondents make observations twice per week.

Estimated Number and Description of Respondents: In addition to those users already registered, we expect an additional 1,027 users will register each year. These respondents are members of the public, registered with *Nature's Notebook.*

Estimated Annual Responses: 501,130.

Estimated Annual burden hours: 17,032.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We estimate the non-hour cost burden to be $3.34 per respondent. This cost applies to new observers and includes material used to mark sites or plants during the first observation. Marking helps to ensure reporting consistency for future observations.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Comments: To comply with the public consultation process, on August 10, 2012, we published a **Federal Register** notice (77 FR 47867) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day public comment period, which ended October 9, 2012. In response to our **Federal Register** Notice, we received one

comment, which consisted of a general invective about the U.S. Government and did not pertain to this information collection. We again invite comments concerning this information collection on: (1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility; (2) the accuracy of our estimate of the burden for this collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents. Please note that the comments submitted in response to this notice are a matter of public record. 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 OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: November 26, 2012.

William Lellis,

Deputy Associate Director, Ecosystems Mission Area.

[FR Doc. 2012–29151 Filed 12–3–12; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT921000–12–L13200000–EL0000–P; MTM 103852]

Notice of Invitation—Coal Exploration License Application MTM 103852, MT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are hereby invited to participate with Ambre Energy on a pro rata cost sharing basis in a program for the exploration of coal deposits owned by the United States of America in lands located in Big Horn County, Montana, encompassing 9,474.45 acres.

DATES: Any party seeking to participate in this exploration program must send written notice to both the Bureau of Land Management (BLM) and Ambre Energy as provided in the **ADDRESSES** section below no later than January 3, 2013 or 10 calendar days after the last publication of this Notice in the *Sheridan Press* newspaper, whichever is later. This Notice will be published once a week for 2 consecutive weeks in the *Sheridan Press,* Sheridan, Wyoming. Such written notice must refer to serial number MTM 103852.

ADDRESSES: The proposed exploration license and plan are available for review from 9 a.m. to 4 p.m., Monday through Friday, in the public room at the BLM Montana State Office, 5001 Southgate Drive, Billings, Montana.

A written notice to participate in the exploration licenses should be sent to the State Director, BLM Montana State Office, 5001 Southgate Drive, Billings, MT 59101 and Ambre Energy, 170 South Main Street, Suite 700, Salt Lake City, UT 84101.

FOR FURTHER INFORMATION CONTACT: Robert Giovanini by telephone at 406–896–5084 or by email at *rgiovani@blm.gov;* or Connie Schaff by telephone at 406–896–5060 or by email at *cschaff@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The exploration activities will be performed pursuant to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 201(b), and to the regulations at 43 CFR part 3410. The purpose of the exploration program is to gain additional geologic knowledge of the coal underlying the exploration area for the purpose of assessing the coal resources. The exploration program is fully described and will be conducted pursuant to an exploration license and plan approved by the BLM. The exploration plan may be modified to accommodate the legitimate exploration needs of persons seeking to participate.

The lands to be explored for coal deposits in exploration license MTM 103852 are described as follows:

Principal Meridian, Montana

T. 8 S., R. 40 E.,
- Sec.27, W½SW¼ and SW¼SE¼SW¼;
- Sec.28, S½N½ and S½;
- Sec.29, S½;
- Sec.32, SW¼;
- Sec.34, W½NW¼NE¼, N½NE¼NW¼, and SE¼NE¼NW¼.

T. 9 S., R. 39 E.,
- Sec.12, SW¼SW¼;
- Sec.13, lots 1 thru 4, inclusive, W½E½, and W½;
- Sec.24, lots 1 thru 4, inclusive, W½E½, and W½;
- Sec.25, lots 1 thru 4, inclusive, W½E½, and W½.

T. 9 S., R. 40 E.,
- Sec.2, lots 1 and 2, S½NE¼, SE¼NW¼, E½SW¼, and SE¼;
- Sec.4, lot 4, and SW¼NW¼;
- Sec.5, lots 1 thru 4, inclusive, S½N½, SW¼, N½SE¼, and SW¼SE¼;
- Sec.7, SE¼SE¼;
- Sec.8, NW¼NE¼, NW¼SW¼NE¼, NW¼, NW¼NE¼SW¼, NW¼SW¼, and NW¼SW¼SW¼;
- Sec.11, N½NE¼, and NE¼NW¼;
- Sec.17, W½SW¼;
- Sec.18, lots 1 thru 4, inclusive, E½ and E½W½;
- Sec.19, lots 1 thru 3, inclusive, E½ and E½W½;
- Sec.20, W½SW¼NE¼, W½, S½NE¼SE¼, NW¼SE¼, and S½SE¼;
- Sec.23, E½, E½NW¼, SW¼NW¼, and SW¼;
- Sec.24, All;
- Sec.25, N½ and SW¼;
- Sec.26, All;
- Sec.29, NE¼, N½SW¼, SW¼SW¼, and N½SE¼;
- Sec.30, lots 2 thru 4, inclusive, E½SW¼, and SE¼.

Containing 9,474.45 acres.

The Federal coal within the lands described for exploration license MTM 103852 is currently unleased for development of Federal coal reserves.

Phillip C. Perlewitz,

Chief, Branch of Solid Minerals.

[FR Doc. 2012–29224 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO100000, L18200000.XX0000]

Notice of Availability of the BLM's Responses to Public Comments and of the BLM's Environmental Assessment on the Proposed Order of the Secretary on Oil, Gas, and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: Under the authority of the Mineral Leasing Act, as amended, on December 3, 2012 the Secretary of the Interior issued Order 3324 (2012 Secretary's Order) to address oil, gas, and potash leasing and development within the Designated Potash Area in Eddy and Lea counties in New Mexico. The 2012 Secretary's Order supersedes a previous Order issued in 1986 and corrected in 1987 that addresses these issues. In developing the 2012 Secretary's Order, a draft Order was released for a public comment period that began on July 13, 2012 and ended

on August 31, 2012, 77 FR 41442. This Notice announces the availability of the Bureau of Land Management's (BLM) responses to the comments that were received during the comment period and the availability of the Environmental Assessment that was prepared by the BLM in developing the 2012 Secretary's Order.

DATES: Secretary's Order 3324 was published in the **Federal Register** on December 4, 2012.

ADDRESSES: The comments that were received, the comment responses, and the Environmental Assessment are available for review at the following Web site: *http://www.blm.gov/nm/st/en/info/potash.html.*

FOR FURTHER INFORMATION CONTACT: Tony Herrell; telephone 505–954–2222; 301 Dinosaur Trail, Santa Fe, New Mexico 87508; email: *therrell@blm.gov.*

SUPPLEMENTARY INFORMATION:

Background

An area near the town of Carlsbad in southeastern New Mexico contains large deposits of potash, oil, and gas. Oil and gas have been produced from this area since the early twentieth century. In 1925, potash (potassium-bearing salts primarily used for fertilizer) was discovered in this area and has been mined since 1930.

The Secretary issued the first Potash Order in 1939 (4 FR 1012, February 25, 1939). That Order withdrew approximately 43,000 acres of public land from oil and gas leasing to protect potash deposits. In 1951, the Secretary revoked the 1939 Order and issued a new Order authorizing concurrent development of oil and gas and potash reserves within an area comprising 298,345 acres under reciprocal lease stipulations to ensure that the development of either mineral would not interfere with development of the other (16 FR 10669, October 18, 1951). The Order was amended in 1965 (30 FR 6692, May 15, 1965), 1975 (40 FR 51486, November 5, 1975), and 1986 (51 FR 39425, October 28, 1986). A correction to the 1986 Order was issued in 1987 (52 FR 32171, August 26, 1987). The potash area designated by the corrected 1986 Order comprises approximately 497,000 acres, and the 2012 Secretary's Order, published on December 4, 2012, does not alter the boundaries of the area.

The potash deposits in this area occur from 800 feet to over 2,000 feet beneath the surface and are mined by both conventional and solution mining methods; conventional methods require miners to be underground. The oil and gas in the area is found in formations below the potash-bearing formations, so oil and gas wells must extend through potash formations. If potash mining were to breach a well casing, or if a well casing near a potash mine failed for other reasons, gas could migrate into the mine workings, thus endangering the miners. Additionally, the potential for such a breach could raise the costs of potash mining due to the need to utilize enhanced ventilation techniques and specialized equipment needed to mine in a gas-filled environment. Given these safety risks, it has been a challenge to produce potash and oil and gas at the same time in the same area. This challenge has led to a long history of conflict between the potash and the oil and gas industries.

This conflict has resulted in a great deal of litigation regarding decisions made by the BLM on a variety of potash or oil and gas development applications. Nevertheless, leading members of the two industries have initiated efforts to work together over the past 2 years. A number of productive meetings and discussions have occurred among many of the parties involved in these previous disputes. Additionally, there have been significant advances in the technology of oil and gas drilling that could be used to reduce the conflict between such drilling and the extraction of potash. Further, the economic outlook for both the oil and gas industry and the potash industry has recently improved. The BLM has also worked with Sandia National Laboratories to investigate well-logging technology, gas migration in the potash formations, and standards to use for estimating the mineability of potash and potash cutoff grades. These circumstances led to review of the 1986 Secretary's Order.

The 2012 Secretary's Order

The 2012 Secretary's Order differs from the 1986 Order as described below.

The 2012 Secretary's Order authorizes the BLM to establish ''Development Areas'' where oil and gas wells can be drilled from one or more ''Drilling Islands.'' The Drilling Island concept was first introduced in the 1975 Secretary's Order. In most cases, a single Drilling Island will be established for each Development Area, but if circumstances dictate, the BLM may establish additional Drilling Islands. Drilling Islands will be situated in such a manner that extended reach horizontal wells could access oil and gas within the associated Development Area. Unless there is a compelling reason for not operating under a unitization or communitization agreement, the 2012 Secretary's Order envisions that the oil and gas leases in a Development Area will be unitized under the regulations found at 43 CFR subpart 3180 and developed by a unit operator, or operated under a communitization agreement as authorized under 43 CFR subpart 3105. These oil and gas reservoir management tools should lead to more orderly development of the oil and gas resources in the Development Area and minimize impacts to surface resources due to a reduction in the number of drill pads and associated roads, power lines, and other ancillary facilities. Moreover, the resulting reduction in the number and spacing of oil and gas drilling locations where wells penetrate the potash formation is expected to minimize impacts to potash resources and enhance the safety of underground potash miners.

The BLM envisions that a substantial portion of the Designated Potash Area will eventually be divided into Development Areas designed to minimize the impacts to potash mining while allowing for the development of oil and gas resources. The BLM expects that the oil and gas in Development Areas will largely be developed with extended-reach horizontal wells using the most current technology, consistent with applicable laws and regulations.

The 2012 Secretary's Order retains several important features of the 1986 Order, including the boundaries of the Designated Potash Area established in the 1986 Order, as corrected in 1987. The Secretary's Order also retains language of the 1986 Order for stipulations for oil and gas leases and potash leases issued, reinstated, renewed, or readjusted in the Designated Potash Area.

The formatting is modified to be consistent with the Department of the Interior's (Department) style requirements for Secretary's Orders. These requirements were changed in 1992 and are recorded in Section 012 DM 1 of the Departmental Manual.

Comments on the Draft Order

The BLM received 28 comment letters during the comment period, including 41 distinct comments. These comments and the BLM's responses to them are available for review at the following Web site: *http://www.blm.gov/nm/st/en/info/potash.html.*

Environmental Assessment

Pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* and BLM's implementing regulations, the BLM prepared an Environmental Assessment (EA) in conjunction with the development of the 2012 Secretary's Order. Based on the EA, a Finding of No Significant Impact (FONSI) was made.

The EA/FONSI is available for review at the following Web site: *http://www.blm.gov/nm/st/en/info/potash.html.*

Authority: 40 CFR 1506.6, 43 CFR 3164.1, 43 CFR 3590.2.

Mike Pool,

Bureau of Land Management.

[FR Doc. 2012–29389 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCA9300000;L14300000;EU0000;CAS 074589]

Notice of Intent To Prepare an Amendment to the Redding Resource Management Plan and an Associated Environmental Assessment, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM), Redding Field Office, Redding, California, intends to prepare an amendment to the 1993 Redding Resource Management Plan (RMP) with an associated Environmental Assessment (EA) to analyze the sale of the reversionary interest held by the United States (U.S.) in 5 acres of land previously conveyed out of Federal ownership and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public scoping process for the RMP amendment with associated EA. Comments on issues may be submitted in writing until January 3, 2013. In order to be included in the analysis, all comments must be received prior to the close of the 30-day scoping period. We will provide additional opportunities for public participation as appropriate.

ADDRESSES: You may submit comments on issues and planning criteria related to the Redding RMP amendment and associated EA by any of the following methods:

- *Email: iemry@blm.gov.*
- *Fax:* 530–224–2172.
- *Mail:* Jennifer Mata, BLM Redding Field Manager, 355 Hemsted Drive, Redding, CA 96002.

Documents pertinent to this proposal may be examined at the Redding Field Office, 355 Hemsted Drive, Redding, CA 96002.

FOR FURTHER INFORMATION CONTACT: Ms. Ilene Emry, Realty Specialist, BLM Redding Field Office, telephone 530–224–2122; address 355 Hemsted Drive, Redding California 96002; email *iemry@blm.gov.* You may also request to have your name added to our mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM Redding Field Office, Redding, California is providing notice that it intends to prepare an RMP amendment with an associated EA for the 1993 Redding RMP; announces the beginning of the scoping process; and seeks public input on issues and planning criteria. The planning area is located in Butte County, California, and encompasses the reversionary interest held by the U.S. in 5 acres of land previously conveyed out of Federal ownership. The BLM has received a request from the Forbestown Lodge No. 50, Free and Accepted Masons, to purchase the reversionary held by the U.S., in the following described land:

Mount Diablo Meridian

T. 19 N., R. 6 E.,
Sec. 10, lot 27.

The area described aggregates 5.00 acres, more or less, in Butte County, California.

The land described above was conveyed in 1971 to the Forbestown Lodge No. 50, Free and Accepted Masons, a California non-profit association, under the authority of the Recreation and Public Purposes Act of June 14, 1926 (R&PP), for use as a public recreation site and meeting hall for the Lodge and public. The land is surrounded by private land, and is not contiguous to any other public land. When public land is conveyed under the authority of the R&PP, the U.S. retains a reversionary interest in the land which could result in title to the land reverting to the U.S. if the land is not used for the purposes for which it was conveyed or if the land is sold or transferred without the BLM's approval. The BLM is responsible for monitoring these reversionary interests in perpetuity to ensure the lands are used for the purposes for which they were conveyed. The reversionary interest in the land described above was not specifically identified for sale in the 1993 Redding RMP, as amended, and a plan amendment is required to process a direct sale. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and will guide the planning process. The BLM anticipates that the EA will consider both a plan amendment and the subsequent sale of the land and has identified local land uses and input from local governments as the primary preliminary issue of concern. The BLM anticipates that the EA will include, at a minimum, input from the disciplines of land use planning, biology and archaeology. This plan amendment will be limited to an analysis of whether the reversionary interest in the land described above meets the criteria for sale under Section 203 of the FLPMA, which are the planning criteria for this amendment.

You may submit comments on issues and planning criteria in writing to the BLM using one of the methods listed in the ''**ADDRESSES**'' section above. To be most helpful, you should submit comments by the close of the 30-day scoping period.

The BLM will use the NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470(f)) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such resources in the context of both the NEPA and Section 106 of the NHPA.

The BLM will consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request, or be requested by the BLM, to participate in the development of the environmental analysis as a cooperating agency.

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.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2

Cynthia Staszak,

Associate Deputy State Director Resources, California.

[FR Doc. 2012–29227 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVC02000 LF2200000.DD0000.LFSPGVF60000; 12–08807; MO#4500041562; TAS: 14X1125]

Notice of Temporary Restriction of Vehicle Use and Temporary Closure to Tree Cutting and Wood Harvesting on Public Land in Douglas County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM), as authorized under the provisions of the Federal Land Policy and Management Act of 1976 and pursuant to BLM regulations, is temporarily restricting travel by motorized vehicles to existing posted roads and two-track trails and issuing a temporary closure to wood harvesting and/or tree cutting on public land within the Topaz Ranch Estates (TRE) and Preacher fires burn areas. These areas are located south of Gardnerville, Nevada, in the Pine Nut Mountains east of U.S. Highway 395 in Douglas County, Nevada.

DATES: *Effective Dates:* The temporary restriction and closure of the described public use will be in effect from December 4, 2012 to December 4, 2014.

FOR FURTHER INFORMATION CONTACT: Ryan Elliott, fire planner, 775–885–6167, email: *r1elliot@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A temporary restriction of cross-country vehicle travel and a temporary closure to tree cutting and wood collecting on areas burned by the TRE and Preacher fires in May and June 2012 are necessary to promote successful rehabilitation of the burn areas. The burn areas are located on public land on the west side of the Pine Nut Mountains. The affected public lands are described as follows:

Mount Diablo Meridian

TRE Fire

T. 10 N., R 22 E.,
Sec. 1, lots 2, 3, and 4;
Sec. 2, lots 1, 2, 3, and 4, SW¼NE¼, S½NW¼, N½SW¼, NW¼SE¼;
Sec. 3, lots 1 and 2, S½NE¼, S½.

T. 11 N., R. 22 E.,
Sec. 24, SE¼SW¼, S½SE¼;
Sec. 25;
Sec. 26, NE¼NE¼, S½NE¼, S½NW¼, S½;
Sec. 27, S½SW¼, NE¼SE¼, S½SE¼;
Sec. 33, E½, E½NW¼, E½SW¼;
Sec. 34, N½, NW¼SW¼, SE¼SW¼, SE¼;
Sec. 35;
Sec. 36.

T. 10 N., R. 23 E.,
Sec. 6, lots 2, 3, 4, and 5, SW¼NE¼, SE¼NW¼.

T. 11 N., R. 23 E.,
Sec. 19, lots 3 and 4, SW¼NE¼, SE¼NW¼, E½SW¼, W½SE¼, SE¼SE¼;
Sec. 20, S½SW¼;
Sec. 28, W½NW¼, W½SW¼;
Sec. 29;
Sec. 30, lots 1, 2, 3, and 4, E½, E½NW¼, E½SW¼;
Sec. 31, lots 1, 2, 3, and 4, NE¼, E½NW¼, E½SW¼;
Sec. 32, N½, N½SW¼, N½SE¼;
Sec. 33, NW¼, N½SW¼.

The area described contains 8,070.4 acres, more or less in Douglas County, Nevada.

Preacher Fire

T. 12 N., R 21 E.,
Sec. 24, S½SW¼;
Sec. 25, NW¼;
Sec. 26, N½NE¼, SW¼NE¼, NE¼NW¼, S½NW¼, SW¼, SW¼SE¼;
Sec. 35, NW¼NW¼.

The area described contains 720 acres, more or less in Douglas County, Nevada.

This temporary restriction and temporary closure order will be posted at the Carson City District Office, 5665 Morgan Mill Road, Carson City, Nevada and at primary access points on BLM land into the burn areas. Maps of the closure areas are also available at the Carson City District Office.

On July 24, 2012, the BLM signed a Decision Record for the TRE and Preacher Fires, Emergency Action, Temporary Closures Environmental Assessment (EA) to implement these restrictions and closure. The EA analyzed these actions and is available to the public on the District Web site at *http://www.blm.gov/nv/st/en/fo/carson_city_field/blm_information/nepa/nepa_archives.html.* Temporarily restricting vehicle use to posted roads and two-track track trails and temporarily closing the areas to wood collecting and cutting will improve post-fire recovery and rehabilitation of the TRE and Preacher fires burn areas. To meet the goals for post-fire rehabilitation, restrictions and closures need to be in effect for at least two growing seasons, ensuring sufficient regrowth of perennial plants and adequate stabilization of soils.

Motorized vehicle use within the burn areas will be restricted to existing posted roads and two-track trails. The BLM will post roads and two-track trails open to use during this period. This restriction applies to all motorized vehicles, excluding:

(1) Any emergency or law enforcement vehicle while being used for emergency or administrative purposes; and

(2) Any vehicle whose use is expressly authorized in writing by the manager, Sierra Front Field Office.

Closing the areas to wood harvesting and/or tree cutting is necessary because the BLM uses the burned trees to create erosion breaks. This restriction applies to all persons excluding:

(1) BLM personnel; and

(2) Any person who is expressly authorized in writing by the manager, Sierra Front Field Office.

If satisfactory rehabilitation is achieved prior to December 4, 2014, the temporary restriction and temporary closure will be lifted. If the rehabilitation has not met the established benchmarks for success in the TRE and Preacher fires rehabilitation, the BLM will consider reissuing a temporary order.

Penalties: Any person who fails to comply with the restriction order is subject to arrest and, upon conviction, may be fined not more than $1,000 and/or imprisonment for not more than 12 months.

Authority: 43 CFR 8364.1.

Christopher J. McAlear,

District Manager, Carson City District Office.

[FR Doc. 2012–29222 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CONC–11525; 2410–OYC]

Notice of Continuation of Visitor Services

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: Pursuant to the terms of existing concession contracts, public notice is hereby given that the National Park Service intends to request a continuation of visitor services for the periods specified below.

DATES: *Effective Date:* January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street NW., 11th Floor, Washington, DC, 20005; telephone (202) 513–7156.

SUPPLEMENTARY INFORMATION: The contracts listed below have been extended to the maximum allowable under 36 CFR 51.23. Under the provisions of current concession contracts and pending the completion of the public solicitation of a prospectus for a new concession contract, the National Park Service authorizes continuation of visitor services for a period not-to-exceed 1 year under the terms and conditions of the current contract as amended. The continuation of operations does not affect any rights with respect to selection for award of a new concession contract.

NACC001–89	Golf Course Specialists, Inc	National Capital Park—Central.
NACC003–86	Guest Services, Inc	National Capital Park—Central.
GATE003–98	Marinas of the Future, Inc	Gateway National Recreation Area.
LAKE001–73	Rex G. Maughan & Ruth G. Maughan	Lake Mead National Recreation Area.
LAKE002–82	Lake Mead RV Village, LLC	Lake Mead National Recreation Area.
LAKE005–97	Rex G. Maughan	Lake Mead National Recreation Area.
LAKE006–74	Las Vegas Boat Harbor, Inc	Lake Mead National Recreation Area.
LAKE009–88	Temple Bar Marina, LLC	Lake Mead National Recreation Area.
CACH001–84	White Dove, Inc. dba Thunderbird Lodge	Canyon de Chelly National Monument.
GLAC002–81	Glacier Park, Inc	Glacier National Park.
GLCA002–88	ARAMARK	Glen Canyon National Recreation Area.
GLCA003–69	ARAMARK	Glen Canyon National Recreation Area.
GRTE004–98	Louise M. and Harold M. Bertschy dba Triangle X Ranch.	Grand Teton National Park.
MEVE001–82	ARAMARK Mesa Verde Company, Inc	Mesa Verde National Park.
PEFO001–85	Xanterra Parks & Resorts, LLC	Petrified Forest National Park.
OZAR012–88	Akers Ferry Canoe Rental, Inc	Ozark National Scenic Riverways.
BLRI001–93	Southern Highland Handicraft Guild	Blue Ridge Parkway.
BLRI002–83	Northwest Trading Post, Inc	Blue Ridge Parkway.
CAHA001–98	Avon-Thornton Limited Partnership	Cape Hatteras National Seashore.
CAHA004–98	Oregon Inlet Fishing Center, Inc	Cape Hatteras National Seashore.
MACA002–82	Forever NPC Resorts, LLC	Mammoth Cave National Park.
VIIS001–71	CBI Acquisitions, Inc	Virgin Islands National Park.

Under the provisions of current concession contracts and pending the completion of the public solicitation of a prospectus for a new concession contract, the National Park Service authorizes continuation of visitor services for the contract below for a period not-to-exceed 2 years under the terms and conditions of the current contract as amended. The continuation of operations does not affect any rights with respect to selection for award of a new concession contract.

INDE001–94	Concepts by Staib, Ltd	Independence National Historical Park.

Dated: October 26, 2012.

Lena McDowall,

Associate Director, Business Services.

[FR Doc. 2012–29185 Filed 12–3–12; 8:45 am]

BILLING CODE 4312–53–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–PWRO–11822; PPWODIRED0]

Designation of Potential Wilderness as Wilderness, Point Reyes National Seashore

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: This notice informs the public that all uses in Point Reyes National Seashore that are prohibited by the Wilderness Act (Pub. L. 88–577) have ceased and certain Federal lands that were previously designated as potential wilderness are, upon publication of this notice, designated as wilderness.

DATES: The designation is effective December 4, 2012.

SUPPLEMENTARY INFORMATION: Public Law 94–567, approved October 20, 1976, designated 25,370 acres in Point Reyes National Seashore as wilderness and further identified 8,003 acres as potential wilderness additions in maps entitled ''Wilderness Plan, Point Reyes National Seashore'', numbered 612–90,000–B and dated September 1976. The maps showing the wilderness area and potential wilderness additions are on file at the headquarters of Point Reyes National Seashore, Point Reyes Station, CA 94956. Although Section 1 of Public Law 94–567 identified the number of acres of wilderness and potential wilderness, the maps filed with the committee as required under Section 2 of the legislation confirms that the actual acreage of the lands and waters was 24,200 acres of wilderness and 8,530 acres of potential wilderness.

Section 3 of Public Law 94–567 provided a process whereby potential wilderness additions within the Point Reyes National Seashore would convert to designated wilderness upon publication in the **Federal Register** of a notice that all uses of the land prohibited by the Wilderness Act (Pub. L. 88–577) have ceased. On November 18, 1999, a notice was published in the **Federal Register** that 1,752 acres of potential wilderness had converted to designated wilderness as a result of the cessation of prohibited uses. 64 FR 63057.

Public Law 94–567 identified much of Drakes Estero as potential wilderness, and not as designated wilderness, due to the presence of a commercial shellfish operation in the estero. The authorizations for the commercial shellfish business operating in Drakes Estero expire on November 30, 2012.

Accordingly, all uses prohibited under the Wilderness Act within Drakes Estero have ceased as of 11:59 p.m. on November 30, 2012. Drakes Estero is entirely in federal ownership. Pursuant to Section 3 of Public Law 94–567, publication of this notice hereby effects the change in status of 1,363 acres of Drakes Estero, more or less, from potential wilderness to designated wilderness. A map showing this change is on file at the headquarters of Point Reyes National Seashore, Point Reyes Station, CA 94956.

With publication of this notice, the total designated wilderness within Point Reyes National Seashore encompasses 27,315 acres, more or less. The potential wilderness remaining within the national seashore consists of 5,415 acres, more or less. The remaining potential wilderness will remain as such until publication of a notice that uses conflicting with the provisions of the Wilderness Act have ceased.

Note that the total wilderness acreage cited in the November 18, 1999, notice was based on the acreage reported in Section 1 of Public Law 94–567. The total wilderness acreage cited in this notice is based on the maps filed with the committee under Section 2 of Public Law 94–567 and the May 1978 survey of the Point Reyes Wilderness. The National Park Service believes that the acreage calculation based on the maps and survey is more accurate than the acreage reported in Section 1 of the Act.

Note further that in Public Law 99–68, approved on July 1985, Congress designated that the wilderness area of Point Reyes National Seashore was to be known as the ''Phillip Burton Wilderness.'' Drakes Estero is hereby added to the Phillip Burton Wilderness.

Dated: November 30, 2012.

Jonathan B. Jarvis,

Director, National Park Service.

[FR Doc. 2012–29381 Filed 12–3–12; 8:45 am]

BILLING CODE 4312–FF–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CONC–11526; 2410–OYC]

Notice of Extension of Concession Contracts

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to extend the following expiring concession contracts for a period of up to 1 (one) year, or until such time as a new contract is executed, whichever occurs sooner.

DATES: *Effective Date:* January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street NW., 11th Floor, Washington, DC 20005; telephone (202) 513–7156.

SUPPLEMENTARY INFORMATION: All of the listed concession authorizations will expire by their terms on or before December 31, 2012. Pursuant to 36 CFR 51.23, the National Park Service has determined that the proposed short-term extensions are necessary in order to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption.

KATM001–08	Katmailand, Inc	Katmai National Park & Preserve.
ACAD001–03	Acadia Corporation	Acadia National Park.
NACE003–06	Buzzard Point Boatyard Corporation	National Capital Parks—East.
CACO003–02	Town of Truro	Cape Cod National Seashore.
COLO001–02	Yorktowne Shoppe, Ltd	Colonial National Historical Park.
COLO006–03	Debi A. Helseth	Colonial National Historical Park.
GATE001–02	Jamaica Bay Riding Academy, Inc	Gateway National Recreation Area.
GATE017–03	Jen Marina Development, LLC	Gateway National Recreation Area.
SEKI006–96	Asilomar Management Company, LLC	Sequoia & Kings Canyon National Parks.
BRCA001–03	Bryce Canyon Natural History Association	Bryce Canyon National Park.
CANY008–03	Canyonlands Natural History Association	Canyonlands National Park.
GRCA001–02	Xanterra Parks & Resorts, LLC	Grand Canyon National Park.
GRCA003–97	D.N.C. Parks and Resorts at Grand Canyon, Inc.	Grand Canyon National Park.
GRTE012–03	The Mountain Guides	Grand Teton National Park.
IMFA001–03	Western National Parks Association	
JODR003–04	ARAMARK Togwotee, LLC	John D. Rockefeller, Jr., Memorial Parkway.
JODR013–04	Rocky Mountain Snowmobile Tours	John D. Rockefeller, Jr., Memorial Parkway.
JODR015–04	Two Bears, Inc	John D. Rockefeller, Jr., Memorial Parkway.
ROMO004–03	Silver Peaks Enterprises, Inc	Rocky Mountain National Park.
ROMO007–03	Homestead Firewood	Rocky Mountain National Park.
YELL300–04	Yellowstone Expeditions	Yellowstone National Park.
YELL301–04	Loomis Recreational, Inc	Yellowstone National Park.
YELL302–04	See Yellowstone Tours, Inc	Yellowstone National Park.
YELL303–04	Yellowstone Winter Guides, Inc	Yellowstone National Park.
YELL304–04	Triangle C Ranch, LLC	Yellowstone National Park.
YELL305–04	Loomis Recreational, Inc	Yellowstone National Park.
YELL306–04	Buffalo Bus Touring Company	Yellowstone National Park.
YELL307–04	Buffalo Bus Touring Company	Yellowstone National Park.
YELL308–04	Buffalo Bus Touring Company	Yellowstone National Park.
YELL402–04	Backcountry Adventure, Inc	Yellowstone National Park.
ZION001–03	Bryce-Zion Trail Rides, Inc	Zion National Park.
OZAR015–04	Kim Smith	Ozark National Scenic Riverways.
JEFF001–05	Compass Group, NA	Jefferson National Expansion Memorial.

Dated: October 26, 2012.

Lena McDowall,

Associate Director, Business Services.

[FR Doc. 2012–29186 Filed 12–3–12; 8:45 am]

BILLING CODE 4312–53–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–11719; 2200–3200–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before November 3, 2012. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 19, 2012. 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.

Dated: November 14, 2012.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

ARKANSAS

Garland County

Whittington Park Historic District, Whittington Ave. & Sabie St. between Water & Woodfin Sts., Hot Springs, 12001055

GEORGIA

Dooly County

Vienna High and Industrial School, 216 9th St., Vienna, 12001056

INDIANA

Floyd County

Beard-Kerr Farm, 502 Georgetown-Lanesville Rd., Georgetown, 12001057

Johnson County

Franklin Senior High School, (Indiana's Public Common and High Schools MPS) 550 E. Jefferson St., Franklin, 12001058

La Porte County

Ames Family Homestead, 5332 & 5336 W. 150 N., La Porte, 12001062

Lake County

Roosevelt, Theodore, High School, (Indiana's Public Common and High Schools MPS) 730 W. 26th St., Gary, 12001059

Roselawn—Forest Heights Historic District, (Historic Residential Suburbs in the United States, 1830–1960 MPS) Roughly bounded by Lawndale, 172nd Pl., Hohman & State Line Aves., Hammond, 12001060

Sablotny, Barney, House, 501 W. 47th St., Gary, 12001061

Marion County

Emerson Avenue Addition Historic District, (Historic Residential Suburbs in the United States, 1830–1960 MPS) Roughly bounded by E. Michigan & E. St Clair Sts., N. Emerson Ave. & Ellenberger Park, Indianapolis, 12001063

Kassebaum Building, 6319, 6323, 6325, 6327, 6331 Guilford Ave. & 915 E. Westfield Blvd., Indianapolis, 12001064

Tippecanoe County

Morehouse, Levi and Lucy, Farm, 5038 Morehouse Rd., West Lafayette, 12001065

MAINE

Kennebec County

Waterville Main Street Historic District, Roughly Main & Common Sts., Waterville, 12001066

Penobscot County

Colonial Apartments, 51–53 High St., Bangor, 12001067

Piscataquis County

American Woolen Company Foxcroft Mill, E. Main St., Dover-Foxcroft, 12001068

Washington County

Calais Observatory, Meridian Park, North St., Calais, 12001069

Sewell Memorial Congregational Church, 558 US 1, Robbinston, 12001070

MICHIGAN

Charlevoix County

Boyne City Central Historic District, Water, Pearl, Lake, Ray & Main Sts., Boyne City, 12001071

MISSOURI

St. Louis Independent city

Forest Park Southeast Historic District (Boundary Increase IV), Portions of Boyle, Chouteau, Kentucky, Norfolk, Swan, Talmadge, Tower Grove, Vandeventer & Vista, St. Louis (Independent City), 12001072

NEBRASKA

Cass County

Kupke, Christian, Farmstead, 32618 Church Rd., Murdock, 12001073

Douglas County

Traver Brothers Row Houses, (Attached Dwellings of Omaha, Nebraska from 1880–1962 MPS) 2601–2607 Jones St. & 651–672 S. 26th Ave., Omaha, 12001074

Richardson County

Miles Ranch, 63795 638 Ave., Dawson, 12001075

PUERTO RICO

Lajas Municipality

Rivera, Luis Munoz, School, (Early Twentieth Century Schools in Puerto Rico TR) 65 Infanteria St., Lajas, 12001076

Las Marias Municipality

de Hostos, Eugenio Maria, School, (Early Twentieth Century Schools in Puerto Rico TR) Matias Brugman Ave., Las Marias, 12001077

Naranjito Municipality

Escuela Guillermo Esteves, (Early Twentieth Century Schools in Puerto Rico TR) Jct. of Georgetti & Achiote Sts., Naranjito, 12001078

A request for removal has been made for the following resource:

NEBRASKA

Otoe County

Little Nemaha River Bridge, Co. Rd. over the Little Nemaha R., 3 mi. NW of Syracuse., Syracuse, 92000723

[FR Doc. 2012–29168 Filed 12–3–12; 8:45 am]

BILLING CODE 4312–51–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a meeting of the Advisory Committee on Actuarial Examinations (portions of which will be open to the public) in Washington, DC, on January 10–11, 2013.

DATES: Thursday, January 10, 2013, from 9:00 a.m. to 5:00 p.m., and Friday, January 11, 2013, from 8:30 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be held at the Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Patrick W. McDonough, Executive

Director of the Joint Board for the Enrollment of Actuaries, 202–622–8225.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet at the Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, on Thursday, January 10, 2013, from 9:00 a.m. to 5:00 p.m., and Friday, January 11, 2013, from 8:30 a.m. to 5:00 p.m.

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2012 Pension (EA–2A) Joint Board Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2013 Basic (EA–1) Examination and the May 2013 Pension (EA–2L) Examination will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the portions of the meeting dealing with the discussion of questions that may appear on the Joint Board's examinations and the review of the November 2012 Pension (EA–2A) Joint Board Examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1:00 p.m. on January 11, 2013, and will continue for as long as necessary to complete the discussion, but not beyond 3:00 p.m. Time permitting, after the close of this discussion by Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should notify the Executive Director in writing prior to the meeting in order to aid in scheduling the time available and should submit the written text, or at a minimum, an outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. All persons planning to attend the public session should notify the Executive Director in writing to obtain building entry. Notifications of intent to make an oral statement or to attend must be faxed, no later than January 4, 2013, to 202–622–8300, Attn: Executive Director. Any interested person also may file a written statement for consideration by the Joint Board and the Committee by sending it to: Internal Revenue Service; Attn: Patrick W. McDonough, Executive Director; Joint Board for the Enrollment of Actuaries SE:RPO; Room 7550; 1111 Constitution Avenue NW.; Washington, DC 20224–0002.

Dated: November 29, 2012.

Patrick W. McDonough,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2012–29270 Filed 12–3–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

[OMB Number 1103–0098]

Agency Information Collection Activities: Revision of a Previously Approved Collection, With Change; Comments Requested COPS Application Package

ACTION: 30-Day notice.

The Department of Justice (DOJ) Office of Community Oriented Policing Services (COPS) 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. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 189, page 59665 on September 28, 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 January 3, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Danielle Ouellette, Department of Justice Office of Community Oriented Policing Services, 145 N Street NE., Washington, DC 20530.

Written comments and suggestions from the public 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 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a previously approved collection, with change.

(2) *Title of the Form/Collection:* COPS Application Package.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Law enforcement agencies and other public and private entities that apply for COPS Office grants or cooperative agreements will be asked complete the COPS Application Package. The COPS Application Package includes all of the necessary forms and instructions that an applicant needs to review and complete to apply for COPS grant funding. The package is used as a standard template for all COPS programs.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 3000 respondents annually will complete the form within 11 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 33,000 total annual burden hours associated with this collection.

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., Room 3W–1407B, Washington, DC 20530.

Dated: November 27, 2012.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012–29209 Filed 12–3–12; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

[OMB Number 1103–0100]

Agency Information Collection Activities: Extension of a Previously Approved Information Collection; Comments Requested Monitoring Information Collections

ACTION: 30-Day Notice.

The Department of Justice (DOJ) Office of Community Oriented Policing Services (COPS) 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 extension of a previously approved information collection is published to obtain comments from the public and affected agencies. This information collection was previously published in the **Federal Register** Volume 77, Number 189, page 59664 on September 28, 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 January 3, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Danielle Ouellette, Department of Justice Office of Community Oriented Policing Services, 145 N Street NE., Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the 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 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a previously approved collection

(2) *Title of the Form/Collection:* Monitoring Information Collections

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice Office of Community Oriented Policing Services

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Law enforcement agencies and other public and private entities that apply for COPS Office grants or cooperative agreements will be asked complete the COPS Application Package. The COPS Application Package includes all of the necessary forms and instructions that an applicant needs to review and complete to apply for COPS grant funding. The package is used as a standard template for all COPS programs.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 150 respondents annually will complete the collections: At 3 hours per respondent.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 450 total annual burden hours associated with this collection.

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., Room 3W–1407B, Washington, DC 20530.

Dated: November 27, 2012.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012–29212 Filed 12–3–12; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Sematech, Inc. d/b/a International Sematech

Notice is hereby given that, on October 19, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Sematech, Inc. d/b/a International Sematech (''SEMATECH'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Dai Nippon Printing Co., Ltd., Tokyo, JAPAN, has withdrawn as a party to this venture.

In addition, Pall Corporation, Port Washington, NY, has been added as a party to the International SEMATECH Manufacturing Initiative, Inc. (''ISMI'').

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and SEMATECH intends to file additional written notifications disclosing all changes in membership.

On April 22, 1988, SEMATECH filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on May 19, 1988 (53 FR 17987).

The last notification was filed with the Department on June 29, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 2012 (77 FR 43615).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–29273 Filed 12–3–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—SGIP 2.0, Inc.

Notice is hereby given that, on October 17, 2012, pursuant to Section 6(a) of the National Cooperative

Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), SGIP 2.0, Inc. (''SGIP 2.0'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the name and principal place of business of the standards development organization is SGIP 2.0, Inc., c/o Gesmer Updegrove LLP, Boston, MA. The nature and scope of SGIP 2.0's standards development activities are: SGIP 2.0 is organized exclusively for charitable, religious, educational, literary, and scientific purposes, within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or the corresponding provision of any subsequent federal tax law), and the regulations currently or hereafter promulgated thereunder. In furtherance of such purposes, SGIP 2.0 is organized and will be operated primarily to continue the work of the unincorporated SmartGrid Interoperability Panel, by supporting the National Institute of Standards and Technology in fulfilling its responsibilities pursuant to the *Energy Independence and Security Act of 2007,* including but not limited to by (a) providing technical guidance and coordination to help facilitate standards development for smart grid interoperability; (b) identifying and specifying testing and certification requirements, including provision of the underlying rationale to assess achievement of interoperability using smart grid standards; (c) informing and educating smart grid industry stakeholders regarding smart grid interoperability and related benefits; (d) liaising with similar organizations in other countries to help establish global smart grid interoperability alignment; and (e) undertaking such other activities as may from time to time be appropriate to further the purposes and achieve the goals set forth above.

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–29266 Filed 12–3–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—3D PDF Consortium, Inc.

Notice is hereby given that, on November 8, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* (''the Act''), 3D Consortium, Inc. (''3D PDF'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Boeing Shared Services Group, Seattle, WA, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and 3D PDF intends to file additional written notifications disclosing all changes in membership.

On March 27, 2012, 3D PDF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on April 20, 2012 (77 FR 23754).

The last notification was filed with the Department on August 20, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 14, 2012 (77 FR 56861).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–29269 Filed 12–3–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0006]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Application for Individual Manufacturing Quota for a Basic Class of Controlled Substance and for Ephedrine, Pseudoephedrine, and Phenylpropanolamine

ACTION: 60-Day Notice.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), 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. Comments are encouraged and will be accepted until February 4, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy Gallagher, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

Written comments and suggestions from the public 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 functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies 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 Information Collection 1117–0006

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Individual Manufacturing Quota for a Basic Class of Controlled Substance and for Ephedrine, Pseudoephedrine, and Phenylpropanolamine (DEA Form 189).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the*

collection: Form Number: DEA Form 189, Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: 21 U.S.C. 826 and 21 CFR 1303.22 and 1315.22 require that any person who is registered to manufacture any basic class of controlled substances listed in Schedule I or II and who desires to manufacture a quantity of such class, or who desires to manufacture using the List I chemicals ephedrine, pseudoephedrine, or phenylpropanolamine, must apply on DEA Form 189 for a manufacturing quota for such quantity of such class or List I chemical.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that each form takes 0.5 hours (30 minutes) to complete. In total, 33 firms submit 641 responses, with each response taking 0.5 hours (30 minutes) to complete. This results in a total public burden of 320.5 hours annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* In total, 33 firms submit 641 responses, with each response taking 0.5 hours (30 minutes) to complete. This results in a total public burden of 320.5 hours annually.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Suite 3W–1407B, Washington, DC 20530.

Dated: November 27, 2012.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–29213 Filed 12–3–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0008]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Application for Procurement Quota for Controlled Substances and Ephedrine, Pseudoephedrine, and Phenylpropanolamine DEA Form 250

ACTION: 60-Day Notice.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), 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. Comments are encouraged and will be accepted until February 4, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy Gallagher, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

Written comments and suggestions from the public 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 functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies 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 Information Collection 1117–0008

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Procurement Quota for Controlled Substances and Ephedrine, Pseudoephedrine, and Phenylpropanolamine (DEA Form 250).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: DEA Form 250, Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: 21 U.S.C. 826 and 21 CFR 1303.12 and 1315.32 require that U.S. companies who desire to use any basic class of controlled substances listed in Schedule I or II or the List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine for purposes of manufacturing during the next calendar year shall apply on DEA Form 250 for procurement quota for such class or List I chemical.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that each form takes ½ hour to complete. DEA estimates that 419 individual respondents will respond to this form. DEA estimates that 2,716 responses are received annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total public burden for this collection is 1,358 hours annually.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: November 27, 2012.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–29214 Filed 12–3–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting and Hearing Notice No. 10–12]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings as follows:

Wednesday, December 12, 2012: 9:00 a.m.—Oral hearings on Objection to Commission's Proposed Decisions in Claim No. LIB–II–164; 10:30 a.m.—Claim Nos. LIB–II–113/LIB–II–117;

11:00 a.m.—Issuance of Proposed Decision in claims against Libya;

2:00 p.m.—Oral hearings on Objection to Commission's Proposed Decisions in Claim No.—LIB–II–159; 3:00 p.m.—LIB–II–058.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Judith H. Lock, Executive Officer, Foreign Claims Settlement Commission, 600 E Street NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

Jeremy R. LaFrancois,

Chief Administrative Counsel.

[FR Doc. 2012–29364 Filed 11–30–12; 4:15 pm]

BILLING CODE 4410–BA–P

DEPARTMENT OF LABOR

Office of the Secretary

Tribal Consultation Policy

AGENCY: Office of the Secretary, Labor.

ACTION: Final policy; Response to comments on proposed policy.

SUMMARY: The Department of Labor (DOL) is issuing its final Tribal Consultation Policy. The Tribal Consultation Policy (hereinafter referred to as the ''policy'') establishes standards for improved consultation with federally-recognized Indian Tribes to the extent that no conflict exists with applicable federal laws or regulations. The policy applies to any Department action that affects federally-recognized Indian tribes and requires that the Department's government-to-government consultation involve appropriate Tribal and Departmental Officials. In addition to setting forth the final policy, this document also responds to comments on the proposed policy, which was published in the **Federal Register** on April 18, 2012 (77 FR 23283).

DATES: This Final Policy is effective December 4, 2012

FOR FURTHER INFORMATION CONTACT: For information on the Department of Labor's Tribal Consultation Policy, contact Jeremy Bishop, Special Assistant to the Secretary, Office of Public Engagement, U.S. Department of Labor, Room C–2313, 200 Constitution Ave. NW., Washington, DC 20210. Telephone: (202) 693–6452 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone via TTY by calling the toll-free Federal Information Relay service at 1–800–877–8339. Email: *bishop.jeremy@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion of Comments on the Proposed Draft Tribal Consultation Policy

In response to the proposed Tribal Consultation Policy, the Department received comments from a broad spectrum of interested parties, including Indian tribes, Alaska Native Corporations, and tribal advocacy groups that raise a variety of concerns with specific provisions of the proposed policy. After reviewing these comments thoughtfully and systemically, the Department has modified several provisions and retained others as originally proposed.

Provisions of the policy that received comments are discussed in detail below; provisions that were not commented on have been adopted as originally proposed. The original comments can also be viewed online in their entirety at: *http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=25;po=0;D=DOL-2012-0002.*

A. Section I—Background and Purpose; B. Referenced Authorities

A commenter suggested adding the Consolidated Appropriations Act of 2005 (Pub. L. 108–447) to the list of authorities on which the policy is based. Section 518 of Title V of Division H requires OMB and all federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order 13175, Consultation and Coordination With Indian Tribal Governments. This provision amends the Consolidated Appropriations Act of 2004 (Public Law 108–199), which only required that the Office of Management and Budget (OMB) participate in such consultations with Alaska Native Corporations.

The Department has incorporated this change.

B. Section II—Guiding Principles; A. Government-to-Government Relationship and Tribal Self-Determination

One commenter recommended editing this section to specify that while the relationship between the federal government and Alaska Native corporations is different than the government-to-government relationship with federally-recognized tribes, the policy should recognize the Department's obligations to consult with Alaska Native corporations pursuant to the Consolidated Appropriations Act for Fiscal Year 2005 (Pub. L. 108–447).

The Department does not believe it is necessary to make this suggested change. The definition of ''Indian Tribe'' in section X, which specifically includes Alaska Native Corporations, makes clear that such organizations are entitled to the same treatment under the policy as other federally-recognized tribes.

C. Section III—Policy Statement; B. Implementation Responsibilities of DOL Operating Agencies

A commenter suggested changing the phrase ''legally permissible'' to ''not legally prohibited'' to allow Indian tribes greater discretion in developing their own policies and standards, so long as such actions are not legally prohibited. The commenter believes the revised standard would give further weight to Indian tribes' self-determination, and would be easier to implement and enforce than ''permissible'' as a basis for the Department's decisionmaking.

The Department believes the suggested change is unnecessary. The phrase ''legally permissible'' is consistent with the text throughout this section and sufficiently conveys the discretion to be afforded Indian tribes in developing their own policies and standards regarding the administration of DOL programs by Indian tribes.

D. Section IV—Regulations

A commenter recommended deleting the term ''tribal officials'' in section V to clarify that comments are normally provided by the Indian tribes, not individual tribal officials.

The Department does not believe such a change is appropriate. The definition of ''Tribal Officials'' in Section X specifically recognizes that tribal officials have the authority to represent and act on behalf of their respective Indian tribes.

E. Section V—Unfunded Mandates

One commenter suggested deleting the term ''tribal governments'' in paragraphs (1) and (2) of this section because it is not defined in the policy. The commenter notes the proposed change would alleviate potential confusion caused by applying some Tribal Consultation Policy provisions to the undefined ''tribal governments,'' while applying other provisions to the defined term ''Indian Tribes.''

Moreover, while the term ''Tribal Officials'' is defined in Section X, the commenter suggested deleting this term in paragraph (2) to make clear that the policy is referring to the same entities throughout, and that the Unfunded Mandates section does not have a

different effect from other sections based on the use of different terminology.

The Department agrees with this suggestion and has made the appropriate changes in the text of this section.

It was also suggested that the Department include, with its summary of affected Indian tribes' concerns with certain proposed regulations in subparagraph (2)(b), an explanation of how such concerns were addressed through changes to the proposed regulations.

The Department does not believe a revision is needed. The Department already addresses the impact of its proposed regulations on Indian tribes consistent with applicable federal law.

F. Section VI—Flexibility and Waivers

A commenter recommended deleting the term ''tribal government(s)'' in section VI and replacing it with the term ''Indian tribes.'' The commenter notes the proposed change would alleviate potential confusion caused by applying some Tribal Consultation Policy provisions to the undefined ''tribal governments,'' while applying other provisions to the defined term ''Indian Tribes.''

The Department agrees with these changes and they are reflected in the text of this section.

A commenter also recommended the Department revise its standards for granting Indian tribes certain waivers of statutory or regulatory requirements, so that such waivers will be granted provided they are ''not inconsistent'' with applicable federal policy objectives.

The Department accepts this change from ''consistent'' to ''not inconsistent''.

The commenter further requested that the Department provide a legal basis for any refusal to grant a requested wavier to an Indian tribe by amending the text to read as follows:

The agency will provide the applicant with timely written notice of the decision, and, if the application for a waiver is not granted, the reasons for such denial including a citation to the legal authority which prevented DOL from granting the waiver.

The Department routinely cites its legal bases for declining to request a waiver, but notes there may also be instances where important agency policy and programmatic concerns preclude granting a waiver of a statutory or regulatory requirement. Thus, the Department has accordingly revised the provision as reflected in the text of this section.

Another commenter suggested the Department provide specific timeframes for issuing decisions about whether to grant a waiver of a statutory or regulatory requirement. The commenter also questioned whether the Department would deem a waiver request to be approved if the Department failed to respond by the applicable deadline. Lastly, the commenter questioned whether there is an appeals process for the denial of a waiver request.

The Department notes the decision on whether to grant a waiver is fact-specific and varies depending on the circumstances of each particular application. In addition, the procedures for reviewing a waiver application are often prescribed by statute (e.g., the Workforce Investment Act of 1998 (Pub. L. 105–220, as amended; 29 U.S.C. 2801 et seq.)). Thus, in order to maintain the necessary flexibility to meet these requirements, the Department declines to make further changes to this section.

G. VII—Consultation Process Guidelines

A commenter requested the Department revise, from 60 days to 90 days, the notice provided to Indian tribes in paragraph (1) of this section before the Department moves forward with a policy or action it determines will have tribal implications, whether for an individual tribe, regionally, or nationally. The commenter states such an extension would allow for more meaningful participation.

The Department believes the 60-day notice requirement provides sufficient opportunity for consultation with affected Indian tribes. The Department notes this provision is greater than the 30-day notice and comment period required when an agency issues a Notice of Proposed Rulemaking under the Administrative Procedure Act (see 5 U.S.C. 553(d)).

The commenter also requested that the Department delete the provision in paragraph (1) that an Indian tribe requesting a consultation should distribute any DOL-provided information to its members. Among other things, the commenter asserts that compliance with this provision would ''be unworkable because of the significant costs involved for postage, copying, labor, etc.''

The Department notes this provision is not a mandatory requirement, but has amended the provision to offer Indian tribes greater flexibility in supplying DOL-provided materials to its members prior to the consultation.

Another commenter suggested revising, from ''no unique impacts on Indian tribes'' to ''no tribal implications'', the Department's threshold in paragraph (1) for determining whether DOL agencies may follow the existing **Federal Register** notice and comment process when providing public notice about rulemaking proceedings of general applicability.

The Department is concerned that requiring a consultation prior to the initiation of every proposed rulemaking that may only have a minor or tangential impact on a particular Indian tribe would impose an unrealistic burden on DOL agencies and may, in fact, hinder the overall effectiveness of the policy. Thus, the Department has revised the determining threshold to ''no particularized impact on Indian tribes'' to emphasize that consultation prior to the initiation of a rulemaking proceeding should be reserved for proposed rules that would have a particular or distinct impact on Indian tribes.

A commenter requested that enforcement issues, such as ''enforcement policy'' and ''planning'', be added as permissible subjects for consultation under the Department's Tribal Consultation Policy in paragraph (2).

Discussions with Indian tribes regarding the framing and shaping of the Department's enforcement policies are not appropriate subjects for consultation under this policy. In particular, the Department's component agencies need to retain sufficient autonomy, discretion, and confidentiality in order to develop successful enforcement strategies within prescribed statutory frameworks. Allowing certain stakeholders increased influence over the development of strategies, enforcement policies and initiatives would frustrate agencies' efforts to ensure necessary worker protections, benefits, and rights. The Department, therefore, declines to make the recommended changes.

A commenter also requested that ''grants management issues'' be included as a permissible subject for consultation in paragraph (2), since these issues may represent an Indian tribe's greatest area of interest or concern when dealing with the Department of Labor.

Although general discussions regarding the grant programs and contracting are permissible subjects for consultation under the policy, the scope of the Department's interactions with grantees and prospective grantees about specific grantee selection and monitoring processes are routinely set forth in each grant solicitation application. For these reasons, the Department declines to make further changes to this paragraph.

A commenter recommended that Indian tribes be involved in matters of interest to them before the Initial Planning and Scoping stage outlined in paragraph (3). The commenter believes that Indian tribes should be directly involved in development and planning, and not merely as respondents to a plan developed by the Department of Labor.

The Initial Planning and Scoping stage is specifically designed to allow the Department and Indian tribes to jointly frame the scope of consultation following the Department's notification to affected tribes that a proposed policy or action will have tribal implications. It is through this consultation process that a proposed policy or action may be subject to amendment based on the valuable input received from affected Indian tribes. A requirement that DOL consult with affected Indian tribes before a proposed policy or action is even formulated would not serve to further the goals of the Tribal Consultation Policy. For these reasons, the Department declines to require consultation prior to the Initial Planning and Scoping stage.

A commenter objected to the requirement in paragraph (7) that a written communication on the correspondence of the highest elected or appointed tribal official will be considered by the Department as the official position of the tribe on the subject at issue. The commenter notes that Indian tribes operate differently and do not all follow the same procedures for vetting their views. Thus, to preserve tribes' sovereignty and self-determination, the commenter suggests allowing Indian tribes to use their own process for submitting comments on issues of concern.

The Department agrees, and has amended the provision to convey that an Indian tribe's views can also be submitted by an appropriate third party designee.

A commenter recommended that the suggested timeframes for the consultation process outlined in paragraph (8) be mandatory, rather than permissive, so that all interested parties know with certainty when such actions will take place. The commenter would also extend the timeframe in subsections (a) and (b) from 30 to 60 days, and extend the timeframe in subsection (c) from 60 to 90 days.

The Department recognizes that each tribal consultation is unique and will depend on the nature and complexity of the issues to be discussed. There may be times, for example, when these timeframes must be compressed to respond to an emergency situation or to meet a critical deadline, or expanded to address novel or highly complex matters. Thus, the Department has retained the permissive nature of the established time frames, but revised the text in subsections (a), (b), and (c) by replacing the word ''should'' with ''shall normally''.

One commenter suggested adding a requirement in paragraph (9) that the Department provide, at the conclusion of a consultation, a specific explanation for why any tribal input was not adopted. The commenter believes this would make the consultation process more transparent and ensure that tribes' recommendations receive full and fair consideration by the Department.

The Department notes the requirement to provide a ''specific explanation'' for why a particular recommendation was not adopted may be difficult to articulate in some instances, and an extended debate over the required degree of specificity may unnecessarily detract from the overarching purpose of the policy to improve coordination between the Department and affected Indian tribes. Thus, the Department has accordingly revised the provision as reflected in the text of this paragraph.

A commenter suggested in paragraph (11) that DOL agencies' use of existing statutory advisory committees be a mandatory, rather than permissive, part of their consultation responsibilities under the policy.

The Department recognizes the valuable role advisory committees often play in meaningful consultation. The Department notes, however, that some Indian tribes may have concerns about being forced to utilize an advisory committee structure as part of the consultation process. The Department has, therefore, declined to make this suggested change.

A commenter recommended deleting the term ''tribal governments'' from paragraph (12), Submission of Comments by Other AI/AN Organizations, to alleviate potential confusion caused by applying some Tribal Consultation Policy provisions to the undefined ''tribal governments'', while applying other provisions to the defined term ''Indian Tribes''.

The Department agrees with this suggestion and has changed the text of the section accordingly.

Another commenter stated that aside from paragraph (12), the policy does not provide meaningful participation for Alaska Native Corporations as required by the Consolidated Appropriations Act for Fiscal Year 2005 (Public Law 108–447).

The Department believes the definition of ''Indian Tribes'' in section X, which specifically includes Alaska Native Corporations, makes clear that such organizations are entitled to the same treatment under the policy as other federally-recognized tribes.

H. VIII —Performance and Accountability

One commenter recommended under paragraph (1) of this section that the policy specify that DOL agencies be required to maintain records of tribal concerns that were not addressed, as well as those that were, and that such records also be made available to Indian tribes.

The Department believes these changes are unnecessary, since it already reports this information to the public on an annual basis, and continually provides relevant follow-up information on the DOL Web site at: *http://www.dol.gov*.

A commenter also suggested that under paragraph (2), the Department develop and utilize appropriate evaluation measures, with input from affected Indian tribes, in assessing its efforts to determine whether the overall policy is effective over time.

The Department believes that all Indian tribes should have an opportunity to express their views on how to best measure the effectiveness of the Tribal Consultation Policy, not just those tribes who may be directly impacted by the policy in the near-term. Thus, the Department has accordingly revised this provision.

I. IX—Designated Officials and Points of Contact; B. Point of Contact for Each DOL Operating Agency

A commenter identified a possible typographical error that would require the Department to appoint an ''alternate tribal official'', instead of providing the Department the authority to appoint one of its own staff as the alternate official.

The Department agrees and has deleted the word ''tribal''.

The commenter further noted this subsection also contains reference to ''agency tribal officials''. The commenter suggests revising the text so to make clear the subsection does not refer to actual tribal officials.

The Department agrees and has revised the provision accordingly.

Lastly, this commenter suggested changing ''should'' to ''shall'' in the final sentence of this subsection to clarify that responsibility for tribal matters is not a civil rights matter, and, therefore, does not belong within the Department's Civil Rights Center.

The Department has changed ''should'' to ''shall'' in this sentence, but believes that it is important to retain

final discretion as to whether these responsibilities should ever be placed with the Civil Rights Center.

J. Section X—Definitions

The Department received input that the policy is inadequate because, among other things, it limits the Department's responsibility to consulting only with Indian tribes.

One commenter noted there are several instances in the policy where the word ''Indian'' does not appear before the word ''tribe''. Since the term ''Indian tribe'' specifically encompasses Alaska Native Corporations, the commenter suggests using the term consistently throughout to make clear that Alaska Native Corporations will receive the same treatment under the Tribal Consultation Policy as other federally-recognized tribes.

The Department has addressed this concern throughout the policy, as appropriate, and specifically notes that Alaska Native Corporations are entitled to the same treatment as other federally-recognized tribes under this Tribal Consultation Policy.

A commenter also objected to inclusion of ''Native Hawaiians'' within the definition of ''American Indian and Alaska Native (AI/AN)''. The commenter believes ''Native Hawaiian'' is considered a racial or ethnic classification rather than a tribal classification, and that use of the term is thus prohibited.

The Department disagrees with this view. The analogous treatment of Native Hawaiians and federally-recognized Indian tribes is explicitly recognized in numerous federal statutes. For example, section 166 of the Workforce Investment Act of 1998 (Public Law 105–220, as amended), which provides specific employment and training programs for Indian, Alaska Native, and Native Hawaiian individuals, gives the same meaning to ''Native Hawaiians'' as the term is defined in section 7207 of the Native Hawaiian Education Act (Pub. L. 107–110, as amended):

(1) Native Hawaiian: The term ''Native Hawaiian'' means any individual who is

(A) A citizen of the United States; and

(B) A descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii, as evidenced by—

(i) Genealogical records;

(ii) Kapuna (elders) or Kamaaina (long-term community residents) verification; or

(iii) Certified birth records.

In addition, section 7202(12)(B) of the Native Hawaiian Education Act states, ''Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.''

The commenter cites *Rice v. Cayetano,* 528 U.S. 495 (2000) in support of the assertion that ''Native Hawaiian'' is a suspect racial classification rather than a tribal classification. In *Rice,* the Supreme Court held that Hawaii's voting scheme for the statewide election of trustees for the Office of Hawaiian Affairs, which restricted voter eligibility to certain defined classes of Hawaiian citizens (including Native Hawaiians), violated the Fifteenth Amendment. However, the Court reached its decision without ever addressing whether Congress (or by extension the Executive branch) may treat Native Hawaiians in the same manner as federally-recognized tribes. In fact, the Court expressly declined to review this issue.

Further, while Native Hawaiians are included in the definition of ''American Indian and Alaska Native (AI/AN)'', the Tribal Consultation policy does not provide any additional consultation rights to Native Hawaiian individuals, communities, or organizations. For these reasons, the Department declines to delete the reference to ''Native Hawaiians'' from the term ''American Indian and Alaska Native (AI/AN)'' as defined in the policy.

Another commenter noted that federally-recognized Indian tribes have formed consortiums and multi-tribal organizations which operate DOL programs and serve more than one tribe. The commenter notes, ''[e]ach of these groups speaks on behalf of the tribes they serve on DOL issues, unless a tribe has decided to participate in any particular issue or has reserved that power to itself.'' To accurately include these consortium groups' participation in the Tribal Consultation Policy, the commenter suggests adding another category, ''Tribal Organization'', which would have the same impact on DOL policy as individual tribes, to be defined as follows:

Tribal Organization: For purposes of this Tribal Consultation Policy, ''tribal organization'' means an American Indian or Alaska Native intertribal organization, consortium, or other similar organization whose membership includes at least one federally-recognized Indian Tribe.

As part of this change, the commenter suggests adding the term ''tribal organization'' throughout the text of the Tribal Consultation Policy wherever there is a reference to ''Indian tribes''. The commenter also suggests revising the definition of an ''AI/AN Organization'' so that there is a clear distinction between that term and the commenter's proposed definition of ''Tribal Organization''.

The Department does not believe that the additional definition of ''Tribal Organization'' is necessary. The Department recognizes that Indian tribes may delegate or appoint a third party to represent their interests, provided such notice is submitted to the Department in writing prior to the start of any consultation with the Department, similar to consultations conducted pursuant to the Federal Advisory Committee Act (Pub. L. 92–463). The Department has added a corresponding sentence to the definition of ''Indian tribe''.

Lastly, one commenter suggested deleting the word ''government'' from the definition of the term ''Tribal Committee, Task Force, or Work Group'', to ensure consistency with other defined terms. The commenter notes the term ''Tribal Government Officials'' is undefined in the Tribal Consultation Policy, and may cause confusion as to who is specifically permitted to participate in such task forces, committees, and work groups.

The Department agrees and has deleted the word ''government'' from this definition.

II. Final Tribal Consultation Policy

U.S. Department of Labor

Tribal Consultation Policy

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- A. Executive Order 13175 and the Department of Labor's Relationship With Indian Tribes
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Appendix A—Executive Order 13175

I. Background and Purpose

A. Executive Order 13175 and DOL's Relationship With Indian Tribes

The United States has a unique legal and political relationship with Indian tribal governments, established through

and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

The Department of Labor (DOL) has collaborated extensively with American Indians and Alaska Natives (AI/AN) for many years in advancing its mission of fostering job opportunities, improving working conditions, and assuring work-related benefits and rights of workers and retirees in the United States. In recent years, senior DOL officials have conducted many site visits in Indian Country and regularly engage with Indian tribes and their representatives, including the National Congress of American Indians. The Department's collaboration with Indian tribes encompasses a broad range of DOL matters affecting tribes, including joint efforts to improve tribal program management, rulemaking, regulations, policies, waivers and flexibility, grant programs, contracting opportunities, and regulatory guidance.

The Department's Employment and Training Administration (ETA), for example, awards grants to Indian and Native American entities for programs that have become a key part of improving tribal economic self-sufficiency by ensuring that tribal workers have the skills to build and operate new infrastructure and facilities at the tribal community level and facilitate the creation of new business opportunities in Indian Country. ETA's Division of Indian and Native American Programs (DINAP) administers employment and training services grants to tribal communities in ways that are consistent with the traditional cultural values and beliefs of the people they are designed to serve, including youth and at-risk populations facing employment barriers. DINAP works closely with the Native American Employment and Training Council (NAETC), a federal advisory committee comprised of representatives of Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations appointed by the Secretary of Labor. The NAETC provides advice to the Secretary regarding the overall operation and administration of tribal programs authorized under section 166 of the Workforce Investment Act (Pub. L. 105–220, as amended), as well as the implementation of other DOL tribal programs and services.

The Department's Women's Bureau (WB) has an ongoing relationship with the United Indians of All Tribes Foundation and works with its Procurement Technical Assistance Center to provide information to Indian women small business owners concerning workforce development trends and DOL contract opportunities. The WB is also part of a network of Indian women organizations that collaborate on finding ways to end domestic violence and abuse.

The Department's Office of Federal Contract Compliance Programs (OFCCP) works in concert with the Council for Tribal Employment Rights to increase the employment of AI/ANs by federal contractors and subcontractors through linkages, referrals, training, regular communication, and sharing of information and resources pursuant to federal contractors' obligations.

The Department's Occupational Safety and Health Administration (OSHA) works with Indian tribes by providing compliance assistance and including the tribes in relevant OSHA outreach and awareness campaigns addressing worker safety and health. OSHA is making its contacts with Indian tribes more regular and consistent, and seeks to establish voluntary protection programs, partnerships, and alliances with tribal groups in the interest of promoting job safety in Indian Country. OSHA also makes available workplace safety grants that Indian tribes may qualify for, such as the Susan Harwood Training Grants.

The Department's Mine Safety and Health Administration (MSHA) assists Indian tribes with training programs for miners and has provided annual grant funds to the Navajo Nation to educate miners and mine operators on safe working practices in the mining industry and compliance with applicable MSHA regulations.

These are among many of DOL's ongoing actions to engage with tribes and support the efforts of tribal governments to have sustainable tribal communities and achieve our mutual goals of ensuring fair wages, employee rights, and workplace safety while working to alleviate the high unemployment found on tribal lands. The Department is committed to building on these efforts to engage in regular and meaningful consultation and collaboration with tribal officials on policies and actions that have tribal implications, including the development of this formal tribal consultation policy. Accordingly, this policy has been developed in consultation with Indian tribes and tribal officials as set forth in Executive Order 13175.

Implementation of this tribal consultation policy will facilitate greater consistency across the DOL in carrying out tribal consultations and will improve collaboration with Indian tribes at all levels of Departmental organizations and offices. This policy will also ensure that a reporting structure and process is in place so that all Departmental tribal consultation work will be transparent and accountable. DOL employees having responsibility for the outcomes of consultation and collaborative activities will be better able to assess effectiveness and coordinate their efforts with other related Departmental initiatives. Through these efforts, the Department anticipates an even stronger relationship with Indian tribes and improved program delivery to meet the needs of Indian tribes and communities.

B. Referenced Authorities

This tribal consultation policy document was developed based upon:

1. Indian Self-Determination and Education Assistance Act, Public Law 93–638, as amended (25 U.S.C. 450 *et seq.*).

2. Indian Self-Determination Act Amendments of 1994, Public Law 103–413 (25 U.S.C. 450 *et seq.*).

3. Native American Programs Act, Public Law 93–644, as amended (42 U.S.C. 2991 *et seq.*).

4. Consolidated Appropriations Act of 2005, Public Law 108–447.

5. Executive Order 12866, Regulatory Planning and Review, September 30, 1993.

6. Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.

7. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.

8. Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004.

9. Presidential Memorandum, Tribal Consultation, November 5, 2009.

10. OMB Memorandum M–10–33, Guidance for Implementing E.O. 13175, July 30, 2010.

II. Guiding Principles

A. Government-to-Government Relationship and Tribal Self-Determination

The United States, in accordance with treaties, statutes, executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government and maintains a government-to-government relationship with federally recognized tribes. Indian tribes exercise inherent sovereign powers over their members and territory. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes. Based on this government-to-government relationship, DOL will continue to work with Indian tribes on its programs involving tribes in a manner that respects tribal self-government and sovereignty, honors tribal treaty and other rights, and meets the Federal Government's tribal trust responsibilities.

B. Open Communications and Respect for Cultural Values and Traditions

Communication and the exchange of ideas will be open and transparent. Department officials will respect the cultural values and traditions of the tribes. To ensure efficiency and avoid duplicative efforts, DOL will work with other Federal Departments to enlist their interest and support in cooperative efforts to assist tribes to accomplish their goals within the context of all DOL programs.

C. Ensuring Consultation Is Meaningful

The Department is committed to ongoing and continuous dialogue with Indian tribes, both formally and informally, on matters affecting tribal communities. Consultation is a critical ingredient of a sound and productive federal-tribal relationship that emphasizes trust, respect, and shared responsibility. Engaging with tribes and building relationships with tribal officials have improved the Department's policy toward Indian tribes on a broad range of DOL matters. The Department is committed to further improving its collaboration with Indian tribes and creating additional opportunities for input from all affected tribal communities. Consultation that is meaningful, effective, and conducted in good faith makes the Department's operation, decision making, and governance practices more efficient.

III. Policy Statement

A. Departmental Consultation Policy Generally

In accordance with Executive Order 13175, when formulating and implementing policies that will have tribal implications, it is the Department's policy that, to the extent practicable and permitted by law, consultation with affected Indian tribes will occur. As stated in the executive order, this refers to proposed legislation, regulations, policies, or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

B. Implementation Responsibilities of DOL Operating Agencies

Each DOL operating agency will have an accountable process to ensure meaningful and timely input by Indian tribes on policies or actions that have tribal implications. With respect to DOL programs administered by Indian tribal governments, operating agencies will grant Indian tribal governments the maximum administrative discretion permissible consistent with applicable law, contracting requirements, and grant agreements, and will defer to Indian tribes to develop their own policies and standards where legally permissible. The Department's operating agencies will review their existing tribal consultation and program administration practices, including those of their regional offices, and revise them as needed to comply with the Department's policy as set forth in this document. If DOL agencies require technical assistance in conducting consultations, the designated Departmental official's office (see section IX below) can provide and/or coordinate such assistance.

IV. Regulations

In accordance with Executive Order 13175, to the extent practicable and permitted by law, prior to the promulgation of any regulation that has tribal implications and preempts tribal law, the DOL agency involved will:

1. Notify and consult with affected Indian tribes early in the process of developing the proposed regulation consistent with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), Executive Order 12866, and Executive Order 13563, and ensure that the tribes are informed about opportunities to participate in stakeholder meetings and public forums about which they might not otherwise be aware;

2. Provide a tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, which consists of a description of the extent of the agency's prior consultation with Indian tribes, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

3. Make available to the Secretary any written communications submitted to the agency by tribal officials.

On issues relating to tribal self-governance, tribal self-determination, and implementation or administration of tribal programs, each DOL agency will make all practicable attempts where appropriate to use consensual mechanisms for developing regulations, including negotiated rulemaking in accordance with the Negotiated Rulemaking Act.

For any draft final regulation that has tribal implications that is submitted to the Office of Information and Regulatory Affairs for review under E.O. 12866, the agency will certify that the requirements of Executive Order 13175 have been met.

V. Unfunded Mandates

In accordance with Executive Order 13175, no DOL agency shall promulgate any regulation having tribal implications that is not required by statute and imposes substantial direct compliance costs on tribal communities, unless:

1. Funds necessary to pay the direct costs incurred by Indian tribes in complying with the regulation are provided by the Federal Government; or

2. Prior to the formal promulgation of the regulation, the agency:

a. Consulted with Indian tribes early in the process of developing the proposed regulation;

b. In a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected Indian tribes, a summary of the nature of their concerns and DOL's position supporting the need to issue the regulation; and

c. Makes available to the Director of the Office of Management and Budget any written communications submitted to DOL by such Indian tribes.

VI. Flexibility and Waivers

With respect to statutory or regulatory requirements that are discretionary and subject to waiver by DOL, each DOL agency will review the processes under which Indian tribes apply for waivers and take appropriate steps to streamline those processes as necessary.

When reviewing any application by an Indian tribe for a waiver of regulatory requirements in connection with any program administered by a DOL agency, the agency will consider the relevant factors with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is not inconsistent with the applicable federal policy objectives and is otherwise appropriate as determined by the agency.

Each DOL agency will promptly render a decision upon a complete application for a waiver. The agency will provide the applicant with timely written notice of the decision and, if the application for a waiver is not granted, the reasons for such denial, including a citation to any relevant legal authority that provides a basis for the denial.

VII. Consultation Process Guidelines

1. Notification. When a DOL agency or regional office determines that a proposed policy or action will have tribal implications, whether for an individual tribe, regionally, or nationally, the DOL agency will have an affirmative responsibility to provide advance notice to the potentially affected Indian tribes at the earliest practicable time, but not less than 60 days prior to DOL's action. An Indian tribe may initiate a request for consultation with DOL or a DOL agency on a DOL matter that it believes has tribal implications at any time by contacting that agency or the designated Departmental official (see section IX), and the tribe should disseminate any DOL-provided information to its members by the method(s) it deems appropriate (e.g., U.S. mail, electronic mail, hard-copy handouts). With respect to rulemaking proceedings of general applicability that have no particularized impact on Indian tribes, DOL agencies may use the existing **Federal Register** notice and comment process to provide notice, but should supplement this process with targeted outreach where appropriate.

2. Subjects of Consultation. To the extent consistent with applicable laws and administrative requirements, consultation can involve any DOL matter having tribal implications, including but not limited to: tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; and other matters of tribal interest. At the same time, DOL agencies should not create undue burdens on tribes with respect to regulations or other matters that do not have tribal implications. Routine matters, including normal DOL interactions with direct grantees such as monitoring, selecting grantees, and reporting requirements do not trigger further consultation processes under this policy. Enforcement policy, planning, investigations, cases and proceedings are not appropriate subjects for consultation under this policy.

3. Initial Planning and Scoping. Following notification to affected tribes that policies or actions have tribal implications, the DOL agency or regional office, in conjunction with the designated Departmental official's office, should engage with those tribes on initial planning and the appropriate scope of the consultation. Initial planning and scoping should include describing the nature and extent of the expected tribal implications; identifying any time constraints or deadlines, relevant existing policies, and potential resource issues; and making a determination as to the most useful and appropriate consultation mechanism.

4. Consultation Mechanisms. The manner of consultation should be appropriate to the nature and complexity of the matter and can occur via mailings (e.g., for remote tribes that may not have internet access), one or more face-to-face meetings or meetings via teleconference, roundtables, or other appropriate means and may include the use of electronic media and messaging and Web site portals. All meetings will be open to the public.

5. Conducting Consultations. When a consultation commences, DOL will solicit the views of the Indian tribes involved on the relevant subjects and issues. Consultation should involve a thorough examination of the subject at issue, including discussion of cultural, economic and other impacts on tribal programs, services, functions and activities; compliance guidance; programmatic and funding issues if relevant; any external constraints such as executive, judicial, or legislative actions; and any relevant technical or other regulatory issues as they affect tribes.

6. Frequency of Consultation Meetings. Consultation meetings may be scheduled on a regular basis or on an as needed basis except that at least one national tribal consultation meeting will be held by DOL each calendar year. For example, DOL agencies may establish a quarterly or semi-annual conference call with the tribes in order to consult with them on the regulatory proposals being considered by the agency and inform them about opportunities to participate in stakeholder meetings and public forums. To reduce costs, tribes and DOL agencies will make their best efforts to coordinate face-to-face consultation meetings to coincide with other regularly scheduled meetings (such as multi-agency and association meetings and regional tribal meetings).

7. Submissions of Tribal Comments. The DOL agency involved in the consultation will communicate clear and explicit instructions on the means and time frames for Indian tribes to submit comments to DOL on the matter, whether in person, by teleconference, and/or in writing, and if appropriate will allow a reasonable period of time following a consultation meeting for tribes to submit additional materials. A written communication on the correspondence of the highest elected official, appointed tribal official, or other third party designee of such authority (according to the procedures set forth under the definition of ''Indian Tribes'' in section X), will be considered by DOL to be the official position of the tribe on the subject at issue. If the DOL agency determines that the Administrative Procedure Act or other federal law or regulation prohibits continued discussion at a specified point in the decision-making process, the agency will so inform the Indian tribes. With respect to rulemaking proceedings of general applicability that will have no unique impacts on Indian tribes, DOL agencies may use existing **Federal Register** notices, dockets, and comment periods to obtain tribal comments, but should supplement them with additional means of obtaining tribal input where appropriate.

8. Time Frames. Time frames for the consultation process will depend on the nature and complexity of the consultation and the need to act quickly. Suggested guidelines are as follows:

a. The initial planning and scoping shall normally take place within 30 days from the date of the issuance of the notice of the proposed action;

b. If a consultation meeting will occur, the meeting shall normally be scheduled within 30 days of the completion of the planning and scoping;

c. For consultations involving one or more meetings, the consultation process shall normally be concluded within 60 days of the final consultation meeting; for consultations not involving meetings the consultation process shall normally

be concluded within 60 days of the planning and scoping.

These time frames may be compressed in exigent situations, such as when a critical deadline is involved, or expanded as necessary for novel or highly complex matters.

9. Reporting of Outcome of Consultation to Tribes. The DOL agency involved in the consultation will report the status or outcome of the issue involved to the affected Indian tribes within 30 days of the conclusion of the consultations on that issue. And, to the extent that tribal input was not adopted, the agency will provide a written explanation for why such input was not adopted or incorporated.

10. Formation of Tribal Committees, Task Forces, or Work Groups. Based on the government-to-government relationship, consultation under this policy is generally with one or more individual tribal governments. In some cases, it may become necessary for DOL to form a tribal committee, task force, or work group to study a particular policy, practice, issue, or concern. Members of such committees or work groups will include representatives of federally recognized tribal governments or their designees with authority to represent their interests or act on their behalf. Tribal representation on such committees or work groups should consist of geographically diverse small, medium and large tribes, whenever possible. Members of these committees or work groups shall make good-faith attempts to attend all meetings which shall be open to the public and may establish member roles and protocols for producing their work and obtaining input and comment on it. All final work group products or recommendations will be given serious consideration by the Department. [See Section XI below on the Federal Advisory Committee Act (FACA) exemption for consultations undertaken with officials of federally recognized tribal governments pursuant to this tribal consultation policy.]

11. Use of Existing Statutory Advisory Committees. DOL agencies may also use existing tribal advisory committees such as the NAETC as part of meeting their consultation responsibilities under this policy. If such an advisory committee is required by law to be used exclusively for a particular function or purpose, consultation shall take place in accordance with the requirements of such committee and nothing in this policy requires any further consultation (see, e.g., 29 U.S.C. § 2911(h)).

12. Submission of Comments by Other AI/AN Organizations. The primary focus of formal consultation activities under this policy is with representatives of federally recognized Indian tribes. DOL recognizes, however, that in some cases the consultation process would be negatively affected if other (non-federally recognized) AI/AN organizations lacking the government-to-government relationship were excluded. Accordingly, nothing in this policy prohibits other AI/AN organizations that are not representatives of Indian tribes from providing their views to the Department.

VIII. Performance and Accountability

The consultation process and activities conducted under this policy should be accountable, transparent, and result in a meaningful outcome for the Department and for the affected Indian tribes. To enable the Department and the Indian tribes to effectively evaluate the implementation and results of this consultation policy:

1. DOL agencies will maintain records of each consultation and the manner in which the tribal concerns were addressed, and will document the status or outcome of each subject of consultation.

2. DOL agencies will, with input from Indian tribes, develop and utilize appropriate evaluation measures to assess their efforts to determine whether their overall consultation process is effective over time.

3. DOL agencies will report annually to the office of the designated Departmental official on the frequency, scope, and effectiveness of their consultation activities including any recommendations received from Indian tribes on ways to improve the consultation process.

4. The designated Departmental official's office will compile the reports of the agencies and prepare an annual DOL consultation report evaluating the overall effectiveness of this policy which will be made available to the Indian tribes. The office will seek tribal feedback on the annual consultation report and consider any comments from Indian tribes and federal participants to determine whether DOL should make any amendments to this policy.

5. The designated Departmental official's office will prepare and submit any reports required to be submitted to the Office of Management and Budget under Executive Order 13175 and the November 5, 2009 Presidential Memorandum.

IX. Designated Officials and Points of Contact

A. Designated Departmental Official

The designated Departmental official to coordinate the implementation of this policy will be the Director, Office of Public Engagement, working in conjunction with the Department's Office of Intergovernmental Affairs in the Office of Congressional and Intergovernmental Affairs, or other Departmental official in the Office of the Secretary, as designated by the Secretary.

The duties and responsibilities of the designated Departmental official include: Serving as the Secretary's expert informational resource on tribal matters; maintaining an overall understanding of tribal concerns and issues as they relate to DOL programs and coordinating and managing the Secretary's policies for Indian tribes; coordination of tribal site visits for DOL executive leadership; serving as DOL's representative on interdepartmental working groups on tribal matters; conducting periodic intradepartmental meetings and otherwise overseeing the implementation of the Department's tribal consultation policy by DOL operating agencies; providing advice and assistance to DOL agencies and regional field offices on tribal matters; and conducting outreach to national tribal government organizations.

B. Point of Contact for Each DOL Operating Agency

Each DOL operating agency will designate a senior official as having primary responsibility for tribal matters. The designated Departmental official's office will maintain an up-to-date list clearly identifying the agency tribal officials and their contact information and this information will be made available to Indian tribes. DOL agencies should also designate an alternate official to serve in the absence of the primary official.

The duties of the agency officials having responsibility for tribal matters include: Having and maintaining knowledge of this policy and the government-to-government relationships and sovereign status of Indian tribes; serving as the primary liaison with Indian tribes for their agency; ensuring the consultation responsibilities of their agencies are carried out, including those of their regional offices; and reporting to the administration in their respective agencies, as well as the designated Departmental official. Unless otherwise approved by the designated Departmental official, these responsibilities shall not be placed within the agency Offices of Civil Rights, as tribal relations and consultations are treaty, trust, and government-to-government based, and

are not a function of civil rights based on race.

X. Definitions

For the purposes of this policy, the following definitions apply:

American Indian and Alaska Native (AI/AN)—A member of an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community of indigenous peoples in the United States, as membership is defined by the tribal community, including Native Hawaiians.

AI/AN Organization—An AI/AN organization or group having members that are not representatives of federally recognized Indian tribal governments, such as state tribes and members of urban AI/AN groups that are not located on Indian tribal lands.

Consultation—An enhanced form of communication consisting of an open and free exchange of information and opinion among parties which emphasizes trust, respect, and shared responsibility. The consultation process enables mutual understanding, facilitates the effort to reach consensus on issues, and contributes to informed decision making.

Deliberative Process Privilege—A privilege exempting the Federal Government from disclosure of government agency materials containing opinions, recommendations, and other internal communications that are part of the deliberative process within the Department or agency.

Department—Means the U.S. Department of Labor.

DOL Operating Agency—A Department of Labor administration, agency, bureau, office, or division that: (1) Has operational responsibility for a Departmental program that has tribal implications; or (2) has been designated by the Secretary to participate in this policy.

Executive Order—An order issued by the Federal Government's executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or a Congressional Act).

Indian Tribe—An Indian or Alaska Native tribe that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a), and with whom the Federal Government maintains a government-to-government relationship, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (Pub. L. 92–203; 43 U.S.C. 1601 et seq.). The Department of the Interior's Bureau of Indian Affairs maintains and regularly publishes the official list of federally recognized Indian tribes which are generally established pursuant to a federal treaty, statute, executive order, court order, or a federal administrative action making these tribes eligible for certain federal programs and benefits because of their status as Indians. A federally recognized Indian tribe may expressly delegate a third party to represent the tribe in all tribal consultations with the Department of Labor, provided the Department is notified of such delegation in writing prior to the consultation. An Indian tribe may rescind its delegation at any time, but the rescission should occur in writing, if practicable.

Policies or Actions with Tribal Implications—Refers to proposed legislation, regulations, policies, and actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This encompasses a broad range of DOL programs and activities targeted at tribal governments or having AI/ANs as participants including, but not limited to, tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; or other DOL activities that would have a substantial direct effect on a tribe's traditional way of life, tribal lands, tribal resources, or the ability of the tribe to govern its members or to provide services to its members. This term does not include matters that are the subject of litigation or that are undertaken in accordance with an administrative or judicial order.

Secretary—Means the Secretary of Labor.

Substantial Direct Compliance Costs—Those costs incurred directly from implementation of changes necessary to meet the requirements of a federal mandate. Because of the large variation in resources among tribes, ''substantial costs'' will vary by Indian tribe. Where necessary and appropriate, the Secretary will determine the level of costs that represent ''substantial costs'' in the context of an Indian tribe's resource base.

To the Extent Practicable and Permitted by Law—Refers to situations where the opportunity for consultation is limited due to practical constraints including time, budget, or other such reason, and situations where other legal requirements take precedence.

Tribal Committee, Task Force, or Work Group—A group composed of Indian tribal officials or their designees with authority to represent their interests or act on their behalf that is formed to work on a particular policy, practice, issue, or concern. This can include representatives of existing organizations representing federally recognized tribes, such as the National Congress of American Indians.

Tribal Officials—Tribal council members and delegates, chairpersons, or other elected or duly appointed officials of the governing bodies of Indian tribes or authorized intertribal organizations or their designees with authority to represent them or act on their behalf.

XI. Supplemental Terms and Effective Date

1. Inapplicability of the Federal Advisory Committee Act (FACA). In accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the provisions of FACA are not applicable to consultations between the Federal Government and elected officers of tribal governments or their designated employees with authority to act on their behalf. Therefore, FACA is generally not applicable to consultations undertaken pursuant to this tribal consultation policy. As the Office of Management and Budget stated in its guidelines implementing section 204(b):

This exemption applies to meetings between Federal officials and employees and * * * tribal governments acting through their elected officers, officials, employees, and Washington representatives, at which 'views, information, or advice' are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive Order. The scope of meetings covered by this exemption should be construed broadly to include meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus, exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. (OMB Memorandum 95–20 (September 21, 1995), pp. 6–7, published at 60 FR 50651, 50653 (September 29, 1995)).

If, however, DOL were to form an advisory committee consisting of (non-federally recognized) AI/AN organizations or groups lacking the

government-to-government relationship, the section 204(b) exception would not apply and all FACA requirements would need to be followed.

2. Reservation of Authorities. Nothing in this policy waives or diminishes the U.S. Government's rights, authorities, immunities, or privileges, including the deliberative process privilege. Among other things, internal communications on the development of proposed legislation, enforcement policy, and other internal policy matters are part of the deliberative process by the Executive Branch and will remain confidential. Nothing in this policy waives or diminishes any tribal rights, authorities, immunities, or privileges including treaty rights and sovereign immunities, and this policy does not diminish any rights or protections afforded to individual AI/ANs under federal law.

3. Disclaimer. This document is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. DOL has no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

4. Effective Date. The Tribal Consultation Policy is effective December 4, 2012 and shall apply to all prospective actions taken by the Department as described herein.

Dated: November 29, 2012.

Hilda L. Solis,

Secretary of Labor.

[FR Doc. 2012–29246 Filed 12–3–12; 8:45 am]

BILLING CODE 4510–23–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978, Public Law 95–541.

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. 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.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by January 3, 2013. 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. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

Permit Application: 2013–025

1. *Applicant:* Alison Cleary, University of Rhode Island, Graduate School of Oceanography, South Ferry Road, Narragansett, RI 02882.

Activity for Which Permit Is Requested

Introduce non-indigenous species into Antarctica. The applicant will use 5 × 100 mls each of *Ditylum brightwellii, Heterocapsa triguetra,* and *Tallassiosira rotula* cultures, as well as 500 grams of *Artemia salina* cysts as food for krill. They plan to measure how fast DNA is digested by feeding a group of krill a single prey type, and then taking away the prey, and preserving krill at a series of later time points. By measuring how much of the prey DNA is left in the krill guts after various amounts of time since feeding, they can calculate how quickly the DNA was digested. Applying this calculation to measurements of prey DNA in the stomachs of wild krill, they can then determine how much of each tpe of prey the wild krill were eating.

Location

West Antarctic Peninsula, specifically Flanders, Andvord, Wilhelmina and Charlotte Bays, and in the adjacent areas of the Gerlache Strait.

Dates

March 1, 2013 to March 1, 2014

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2012–29226 Filed 12–3–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–133; NRC–2010–0291]

Exemption of Material for Proposed Disposal Procedures at the US Ecology Idaho Resource Conservation and Recovery Act Subtitle C Hazardous Disposal Facility Located Near Grand View, Idaho for Material from the Humboldt Bay Power Plant, Unit 3, License DPR–007, Eureka, CA

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact.

FOR FURTHER INFORMATION CONTACT: John Hickman, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–00001; telephone 301–415–3017, email *john.hickman@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) staff is considering a request dated May 2, 2012, (ML12135A295) as supplemented by email dated July 16, 2012, (ML123200007) by Pacific Gas and Electric Company (PG&E, the licensee) for alternate disposal of approximately 100,000 ft^3 of hazardous waste, soil, and debris and 50,000 ft^3 of water solidified with clay containing low-activity radioactive material, at the US Ecology Idaho (USEI) Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous disposal facility located near Grand View, Idaho. Additionally, PG&E requested exemptions on behalf of USEI pursuant to § 30.11 of Title 10 of the *Code of Federal Regulations* (10 CFR) and 10 CFR 70.17 to allow USEI to receive and possess radioactive materials without an NRC license. These requests were made under the alternate disposal provision contained in 10 CFR 20.2002 and the exemption provisions in 10 CFR 30.11 and 10 CFR 70.17.

This Environmental Assessment (EA) has been developed in accordance with the requirements of 10 CFR 51.21.

II. Environmental Assessment

Identification of Proposed Action

On July 2, 1976, Humboldt Bay Power Plant (HBPP) Unit 3 was shut down for annual refueling and to conduct seismic modifications. In 1983, updated economic analyses indicated that restarting Unit 3 would probably not be cost-effective, and in June 1983, PG&E announced its intention to decommission the unit. On July 16, 1985, the NRC issued Amendment No. 19 to the HBPP Unit 3 Operating License to change the status to possess-but-not-operate. In December 2008, PG&E completed the transfer of spent fuel from the fuel storage pool to the dry-cask Independent Spent Fuel Storage Installation and the decontamination and dismantlement phase of HBPP Unit 3 decommissioning commenced.

PG&E requested NRC authorization for the disposal of waste from the decommissioning of HBPP Unit 3 at the USEI facility in accordance with 10 CFR 20.2002. This waste consists of approximately 100,000 ft^3 of hazardous waste, soil, and debris and 50,000 ft^3 of water solidified with clay containing low-activity radioactive material generated during the demolition of structures and remediation activities at Unit 3.

The waste would be transported by truck from HBPP in Eureka, California to the USEI facility, Grand View, Idaho in the Owyhee Desert. The USEI facility is a RCRA Subtitle C hazardous waste disposal facility permitted by the State of Idaho. The USEI site has both natural and engineered features that limit the transport of radioactive material. The natural features include the low precipitation rate [i.e., 18.4 cm/year (7.4 in./year)] and the long vertical distance to groundwater (i.e., 61-meter (203-ft) thick on average unsaturated zone below the disposal zone). The engineered features include an engineered cover, liners, and leachate monitoring systems. Because the USEI facility is not licensed by the NRC, this proposed action would require the NRC to exempt USEI from Atomic Energy Act of 1954, (AEA) and NRC licensing requirements with respect to the low-contaminated material authorized for disposal.

Need for Proposed Action

The subject waste material consists of hazardous waste, soil, and debris containing low-activity radioactive debris generated during the demolition of structures and remediation activities at Unit 3. This proposed alternate disposal would conserve low-level radioactive waste disposal capacity at licensed low-level radioactive waste disposal sites.

Environmental Impacts of the Proposed Action

The NRC staff has reviewed the evaluation performed by the licensee to demonstrate compliance with the 10 CFR 20.2002 alternate disposal criteria. Under these criteria, a licensee may seek NRC authorization to dispose of licensed material using procedures not otherwise authorized by the NRC's regulations. A licensee's supporting analysis must show that the radiological doses arising from the proposed 10 CFR 20.2002 disposal will be as low as reasonably achievable and within the 10 CFR Part 20 dose limits.

PG&E performed a radiological assessment in consultation with USEI. Based on this assessment, PG&E concludes that potential doses to members of the public, including workers involved in the transportation and placement of this waste will be approximately one millirem total effective dose equivalent in one calendar year for this project, and well within the ''few millirem'' criteria that the NRC has established (see NUREG–1757).

The staff evaluated activities and potential doses associated with transportation, waste handling and disposal as part of the review of this 10 CFR 20.2002 application. The projected doses to individual transportation and USEI workers have been appropriately estimated and are demonstrated to meet the NRC's alternate disposal requirement of not more than ''a few millirem per year'' to any member of the public. Independent review of the post-closure and intruder scenarios confirmed that the maximum projected dose over a period of 1,000 years is also within ''a few millirem per year.'' Additionally, the proposed action will not significantly increase the probability or consequences of accidents and there is no significant increase in occupational or public radiation exposures.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic sites. The proposed action does not affect non-radiological plant effluents, air quality, or noise.

The proposed action and attendant exemption of the material from further AEA and NRC licensing requirements will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure.

Due to the very small amounts of radioactive material involved, the environmental impacts of the proposed action are not significant.

Environmental Impacts of the Alternatives to the Proposed Action:

Since the proposed action will cause no significant environmental impacts, the only alternative the staff considered is the no-action alternative, under which the staff would deny the disposal request. This denial of the request would only change the location of the disposal site to be used for the material. All other factors would remain the same or similar. Therefore, the environmental impacts of the proposed action and the no-action alternative are similar and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action will not significantly impact the quality of the human environment and that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this EA to the State of Idaho Department of Environmental Quality for review on August 28, 2012. The State had no comments.

The NRC staff has determined that the proposed action is of a procedural nature and will not affect Endangered Species Act (ESA) listed species or their critical habitat. Therefore, no further consultation is required under Section 7 of the ESA. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to affect historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application and

supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

(1) Letter dated May 2, 2012, ''Humboldt Bay Power Plant Unit 3 Request for 10 CFR 20.2002 Alternate Disposal Approval, and 10 CFR 30.11 and 10 CFR 70.17 Exemption of Humboldt Bay Power Plant Waste For Disposal at US Ecology, Inc'' [ADAMS Accession Number ML121350326]

(2) Email dated July 16, 2012, providing responses to a request for additional information. [ML12241A273]

(3) NRC letter dated November 2, 2010, approving prior request from Humboldt Bay for 10 CFR 20.2002 alternate disposal and 10 CFR 30.11 exemption. [ML102870344]

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr@nrc.gov*. These documents may also be viewed on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 23 day of November, 2012.

For the U.S. Nuclear Regulatory Commission.

Andrew Persinko,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2012–29221 Filed 12–3–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission [NRC–2012–0002].

DATE: Weeks of December 3, 10, 17, 24, 31; 2012, January 7, 2013.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of December 3, 2012

Thursday, December 6, 2012

9:25 a.m. Affirmation Session (Public Meeting) (Tentative)

(a) *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), *Jones River Watershed Association and Pilgrim Watch Petition for Review of Memorandum and Order (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) LBP–12–11, June 18, 2012* (July 3, 2012) (Tentative)

(b) Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses (10 CFR part 51; RIN 3150–AI42) (Tentative)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

9:30 a.m. Meeting with the Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (Contact: Ed Hackett, 301–415–7360)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

Week of December 10, 2012—Tentative

There are no meetings scheduled for the week of December 10, 2012.

Week of December 17, 2012—Tentative

There are no meetings scheduled for the week of December 17, 2012.

Week of December 24, 2012—Tentative

There are no meetings scheduled for the week of December 24, 2012.

Week of December 31, 2012—Tentative

There are no meetings scheduled for the week of December 31, 2012.

Week of January 7, 2013—Tentative

Tuesday, January 8, 2013

9:00 a.m. Briefing on Fort Calhoun (Public Meeting) (Contact: Michael Hay, 817–200–1527)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

Additional Information

The Briefing on Fort Calhoun previously scheduled on October 30, 2012, has been rescheduled on January 8, 2013.

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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: November 29, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–29373 Filed 11–30–12; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, December 12, 2012, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.* A period for public comment will be offered following consideration of the last numbered item in the open session.

MATTERS TO BE CONSIDERED: The agenda for the Commission's November 7, 2012 meeting includes the items identified below.

PORTIONS OPEN TO THE PUBLIC:

1. Report on legislative activities.
2. Report on communications with the public.
3. Report from the Office of General Counsel on the status of Commission dockets.

4. Report from the Office of Accountability and Compliance.

5. Report from the Office of the Secretary and Administration.

6. Selection of vice chair.

Chairman's Public Comment Period (Opportunity for brief comments or questions from the public, including questions on completed dockets).

PORTION CLOSED TO THE PUBLIC:

7. Discussion of pending litigation.

CONTACT PERSON FOR MORE INFORMATION: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at 202–789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at 202–789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, access for handicapped or disabled persons, the audiocast, or similar matters).

By the Commission.

Dated: November 29, 2012.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2012–29286 Filed 11–30–12; 11:15 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

Board Votes To Close December 11, 2012 Meeting

At its meeting on November 14, 2012, members of the Board of Governors of the United States Postal Service met and voted unanimously to close to public observation its meeting on December 11, 2012, via teleconference.

Matters To Be Considered

1. Strategic Issues.
2. Financial Matters.
3. Pricing.
4. Personnel Matters and Compensation Issues.
5. Governors Executive Session—Discussion of prior agenda items and Board Governance.

General Counsel Certification

The General Counsel of the United States Postal Service has certified that the meeting was properly closed under the Government in the Sunshine Act.

Contact Person for More Information

Requests for information about the meeting should be addressed to the Secretary of the Board, Julie S. Moore, at (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. 2012–29432 Filed 11–30–12; 4:15 pm]

BILLING CODE 7710–12–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

Board Votes To Close November 26, 2012 Meeting

By telephone vote on November 26, 2012, members of the Board of Governors of the United States Postal Service met and voted unanimously to close to public observation its meeting held in Washington, DC, via teleconference. The Board determined that no earlier public notice was possible.

Matters Considered

1. Strategic Issues.
2. Pricing.

General Counsel Certification

The General Counsel of the United States Postal Service has certified that the meeting was properly closed under the Government in the Sunshine Act.

Contact Person for More Information

Requests for information about the meeting should be addressed to the Secretary of the Board, Julie S. Moore, at (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. 2012–29433 Filed 11–30–12; 4:15 pm]

BILLING CODE 7710–12–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, December 6, 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, and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting will be:

An adjudicatory matter;
Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: November 30, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–29392 Filed 11–30–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: [77 FR 71203, November 29, 2012]

STATUS: Closed Meeting.

PLACE: 100 F Street NE., Washington, DC

DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING: Monday, December 3, 2012 at 2:00 p.m.

CHANGE IN THE MEETING: Date Change.

The Closed Meeting scheduled for Monday, December 3, 2012 at 2:00 p.m., has been changed to Tuesday, December 4, 2012 at 2:30 p.m.

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: November 29, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–29319 Filed 11–30–12; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Encore Clean Energy, Inc., Energy & Engine Technology Corp., Equity Media Holdings Corporation, eTotalSource, Inc., Extensions, Inc., Firepond, Inc., and GNC Energy Corporation; Order of Suspension of Trading

November 29, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Encore Clean Energy, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Energy & Engine Technology Corp. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Equity Media Holdings Corporation because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of eTotalSource, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Extensions, Inc. because it has not filed any periodic reports since the period ended September 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Firepond, Inc. because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of GNC Energy Corporation because it has not filed any periodic reports since the period ended September 30, 2003.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on November 29, 2012, through 11:59 p.m. EST on December 12, 2012.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2012–29219 Filed 11–29–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68306; File No. SR–NYSEMKT–2012–68]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Rules To Delete Obsolete and Out-Dated Rules

November 28, 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 November 14, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to delete obsolete and out-dated 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its rules to delete obsolete and out-dated rules. By removing these obsolete and out-dated rules, the Exchange is not proposing to change or alter any obligations, rights, policies or practices enumerated within its rules. Rather, the proposal to delete obsolete and out-dated rules will reduce any potential confusion that may result from having obsolete rules continue to appear in the Exchange's rulebook.

As part of its review to identify obsolete and out-dated rules, the Exchange proposes to delete rules that relate to trading systems that have since been decommissioned by the Exchange and rules that were superseded by later-implemented rules governing the same conduct or circumstances. In particular, the proposed rule changes relate to Exchange rules that previously governed equity trading at the Exchange.

Background

In September 2008, NYSE Euronext acquired the American Stock Exchange LLC (''Amex'').[5] As part of the integration of the companies, in December 2008, the Exchange relocated trading in its listed equity securities from Amex's trading floor located at 86 Trinity Place in New York to the New York Stock Exchange's (''NYSE'') trading floor located at 11 Wall Street, and adapted the NYSE equities trading platform to trade those securities. The Exchange also adopted equity trading rules for NYSE MKT based on the NYSE's equities trading rules.[6] By their terms, the Exchange's new equities trading rules superseded the AEMI rules (and certain other Amex rules that were

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–Amex–2008–62 and SR–NYSE–2008–60).

[6] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63) (Order Granting Approval of Proposed Rule Change to Establish New Membership, Member Firm Conduct, and Equity Trading Rules Following the Exchange's Acquisition by NYSE Euronext).

inconsistent with the new rules) for all trading in Exchange-listed equity securities.[7]

Specifically, pursuant to Rule 0(b), all transactions conducted on or through the systems and facilities of the NYSE are governed by the Equities Rules in accordance with Rule 0-Equities. Rule 0-Equities further provides that the Equities Rules govern all transactions conducted on the Equities Trading System, i.e., the systems operated by the NYSE.

Proposed Rule Deletions

The following identifies by category the legacy Amex, now NYSE MKT Rules that can be deleted in their entirety as obsolete and out-dated:

AEMI Rules

Many of the rules being proposed for deletion relate to the ''Auction & Electronic Market Integration'' (''AEMI'') platform, which Amex operated from September 2006 to November 2008 for trading of listed equity securities. The so-called AEMI rules were adopted in September 2006 in conjunction with the rollout of the AEMI trading system.[8] As noted in Rule 0(a), the AEMI rules governed trading on the systems formerly located at 86 Trinity Place, which are no longer operating. NYSE MKT is now proposing to delete the AEMI rules on the basis that the system that they govern is no longer operative.[9]

Rules That Were Superseded by Aemi but never deleted

The AEMI system was rolled out in phases starting in 2006. Although the AEMI rules were intended to supersede the Amex's then-existing equities trading rules, certain of those equities trading rules were left in place pending the completion of the AEMI rollout, and upon completion, were to have been deleted via a rule filing with the Commission.[10] To the best of the Exchange's knowledge, that filing was never made. Because of the provision in the AEMI rules making those rules definitively obsolete, the adoption of new equities trading rules in December 2008, and the fact that those rules are no longer consistent with current Exchange systems, the Exchange proposes to delete those enumerated rules now in order to avoid any confusion within the rulebook.[11] For example, NYSE MKT Rule 100 is now addressed in NYSE MKT Rule 51- Equities (for equities trading) and NYSE MKT Rule 901NY (for options trading). As another example, NYSE MKT Rule 108, which governs priority and parity at openings for equities trading, is now governed by NYSE MKT Rules 72—Equities and 115A—Equities. In summary, the rules being deleted are now all covered in the equities rules that govern trading at the Exchange.[12]

Equities Trading Rules That Are Superseded by Later-Adopted Trading Rules

As noted above, in connection with its integration into NYSE Euronext, the Exchange adopted new equities trading rules based on the NYSE equities trading rules. Because the rules were adopted while NYSE MKT continued to operate at the 86 Trinity Place location, the Exchange did not simultaneously delete previous rules that were being superseded by the new equities trading rules. Instead, the Exchange adopted Rule 0- Equities, which explained that the new rules superseded any of the old rules that were inconsistent. For the sake of clarity, the Exchange now proposes to delete the former Amex equities trading rules that, pursuant to Rule 0-Equities are now superseded by the equities rules.[13]

After-Hours Trading Rules

Since the integration of the Exchange into NYSE Euronext, the Exchange has conducted its after-hours trading through the NYSE's trading systems, and consequently adopted a version of the NYSE's after-hours trading rules.[14] Because the Exchange has adopted superseding rules for after-hours trading, the Exchange proposes to delete the prior set of rules relating to after-hours trading.[15]

Cross-References

The Exchange is also proposing to amend those rules that cross-reference rules that are being deleted pursuant to this filing.[16]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular, in that, by deleting obsolete and out-dated rules, it promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, helps to protect investors and the public interest by providing transparency as to which rules are operable and reducing potential confusion that may result from having obsolete or out-dated rules in the Exchange's rulebook. The Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that members, regulators and the public can more easily navigate the Exchange's rulebook and better understand what obligations attach and when.

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

[7] *See* NYSE MKT Rule 0(b) and NYSE MKT Rule 0—Equities.

[8] *See* Securities Exchange Act Release No. 54552 (Sept. 29, 2006), 71 FR 59546 (Oct. 10, 2006) (SR–Amex–2005–104).

[9] *See* NYSE MKT Rules 1–AEMI through 719–AEMI and AEMI–One Rules.

Although the Exchange is proposing to delete most of the AEMI rules, it is retaining certain rules that contain definitions that are relevant to current listing and trading in Portfolio Depository Receipts (Rule 1000–AEMI); Index Fund Shares (Rule 1000A–AEMI); Rules of General Applicability (relating to trading of Trust Issued Receipts) (Rule 1200–AEMI); Commodity-Based Trust Shares (Rule 1200A–AEMI); Currency Trust Shares (Rule 1200B–AEMI); and Trading of Partnership Units (Rule 1500–AEMI). The Exchange intends to review the placement of these rules, and their possible relocation, in a subsequent phase of its rule review project. In addition, the Exchange is not proposing to delete NYSE MKT Rule 910—AEMI until such time that the Amex Company Guide is similarly updated to reflect the appropriate cross reference.

[10] *See* Section (e) of NYSE MKT Rule 1A–AEMI.

[11] *See* NYSE MKT Rules 100, 108, 109, 110, 112, 115, 118, 119, 123, 124, 126, 127, 131, 131A, 132, 135, 135A, 151, 152, 153, 154, 155, 156, 157, 178, 179, 200, 205, 206 and 207.

[12] *See supra,* notes 6 and 7.

[13] *See* NYSE MKT Rules 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 29, 30A, 60, 62, 63, 101, 102, 103, 104, 105, 106, 107, 111, 114, 116, 117, 117A, 119A, 120, 121, 122, 125, 128, 129, 130, 133, 134, 136, 140, 150, 153A, 176, 177, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 201, 202, 203, 204 and 208.

[14] *See* NYSE MKT Rules 900-Equities—907-Equities.

[15] *See* NYSE MKT Rules 1300 through 1306.

[16] *See* NYSE MKT Rules 905G and Commentary .02 to 906.

[17] 15 U.S.C. 78f(b)

[18] 15 U.S.C. 78f(b)(5)

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 [19] and Rule 19b–4(f)(6) thereunder.[20]

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–NYSEMKT–2012–68 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–NYSEMKT–2012–68. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–68 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29216 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 C.F.R. 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68308; File No. SR–OCC–2012–21]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes to Explicitly State That OCC May Reject a Request for Withdrawal of Margin or Make an Intra-Day Margin Call in Situations Where a Clearing Member's Projected Settlement Obligations Could Exceed OCC's Available Liquidity Resources

November 28, 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 November 26, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II and III below, which items have been prepared primarily by OCC. OCC filed the proposal pursuant to Section 19(b)(3)(A)(i) of the Act,[3] and Rule 19b–4(f)(1) [4] thereunder so that the proposal was effective upon filing with 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 Terms of Substance of the Proposed Rule Change

OCC proposes to explicitly state that OCC may reject a request for withdrawal of margin or make an intra-day margin call in situations where a clearing member's projected settlement obligations could exceed OCC's available liquidity resources.

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[5]

A. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to adopt certain interpretations under existing OCC Rules 608 and 609 in order to place clearing members on notice of situations in which OCC may exercise existing authority to reject a margin withdrawal request, or to make an intra-day margin call, including where a Clearing Member's projected settlement obligations could exceed OCC's available liquidity resources. For this purpose OCC would consider as liquidity resources only margin assets in the form of cash. In its sole discretion, OCC might also consider margin assets in the form of U.S. Government securities, which could be quickly converted to cash, and/or amounts that OCC would be able to borrow on short notice under its credit facility or otherwise.

Rule 609 currently provides that ''[OCC] may require the deposit of such additional margin by any Clearing Member in any account at any time during any business day, as such officer

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] The Commission has modified the text of the summaries prepared by OCC.

deems advisable to * * * protect [OCC], other Clearing Members or the general public.'' Rule 609 further provides that such intra-day margin calls must be satisfied in immediately available funds within one hour (or other prescribed time frame) after the issuance of the call. Ordinarily, clearing members are permitted to substitute other acceptable forms of margin assets to replace cash collected via an intra-day margin call. If a sufficient amount of such assets has been deposited to meet the clearing member's then current margin requirement, the clearing member may make a request to withdraw any excess margin pursuant to Rule 608. The return of specific excess margin assets, including cash, also may be requested, subject to the Rule's limitation that no clearing member may withdraw margin in any form or currency in excess of the amount of margin of that form or currency deposited in the clearing member's account from which the withdrawal is to be made. However, Rule 608 also provides that ''[OCC] may, if it deems advisable for any of the reasons described in Rule 609, reject any such withdrawal request.'' Accordingly, in the event OCC determines that such actions are necessary for the protection of OCC, other clearing members, or the general public, OCC may require a clearing member to deposit additional margin in the form of cash through an intra-day margin call and preclude the withdrawal of some or all of such assets from OCC's system.

OCC wishes to put Clearing Members on notice of certain specific circumstances in which OCC may take such actions under Rule 608 and 609 by adopting a similar interpretation under each Rule. Specifically, OCC wishes to state expressly that it may refuse a margin withdrawal request or request additional intra-day margin where a Clearing Member's future settlement obligations could result in a need for liquidity in excess of available liquidity resources. Such action might be taken even though OCC has made no adverse determination as to the financial condition of the Clearing Member, the market risk of the Clearing Member's positions, or the adequacy of the Clearing Member's total overall margin deposited in the accounts in question.

A circumstance in which OCC might desire to reject a margin withdrawal request or make an intra-day margin call to ensure that it had sufficient liquidity in connection with a pending settlement obligation involves the ''unwinding'' of a ''box spread'' position. A box spread position involves a combination of two long and two short options on the same underlying interest with the same expiration date that results in an amount to be paid or received upon settlement that is fixed regardless of fluctuations in the price of the underlying interest. Box spreads can be used as financing transactions, and they may require very large fixed payments upon expiration. In this situation, if much of the margin deposited by the relevant Clearing Member is in the form of common stock and if the Clearing Member failed to make the settlement payment, the available liquidity resources might be insufficient to cover the settlement obligation. In anticipation of this settlement, OCC might therefore require the Clearing Member to deposit intra-day margin in the form of cash, or reject a requested withdrawal of cash or U.S. Government securities, so that liquidity resources would be sufficient to cover the Clearing Member's settlement obligations. Under the proposed interpretations, OCC would always include margin assets of the relevant Clearing Member in the form of cash in determining available liquidity resources and could, in its discretion, consider the amount of margin assets in the form of highly liquid U.S. Government securities and/or the amount that OCC would be able to borrow on short notice. The proposed interpretations make it clear that OCC might exercise its authority under these Rules to address liquidity needs.

OCC believes the proposed rule change is consistent with Section 17A of the Act because it is designed to promote the prompt and accurate clearance and settlement of securities transactions,[6] including the safeguarding of securities and funds related thereto, and to protect investors and persons facilitating transactions by and acting on behalf of investors. It does so by interpreting OCC's existing authority to require deposits of additional margin or to reject requests to withdraw margin, minimize OCC's liquidity risk, and preserve its liquidity resources. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[6] 15 U.S.C. 78q–1(b)(3)(F).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii)[7] of the Act and Rule 19b–4(f)(1)[8] thereunder because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. 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.[9]

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 No. SR–OCC–2012–21 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–OCC–2012–21. 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

[7] 15 U.S.C. 78s(b)(3)(A)(i).
[8] 17 CFR 240.19b–4(f)(1).
[9] 15 U.S.C. 78s(b)(3)(C).

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 such filing also will be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's Web site at *http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_12_21.pdf*.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OCC–2012–21 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29217 Filed 12–3–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Available a New Market Data Offering

November 28, 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 November 15, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') 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.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make available, through its member MEB Options LLC (''MEB''), a new market data offering referred to as ''Spread Crawler.'' The text of the proposed rule change is available on the Exchange's Web site *www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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, Proposed Rule Change

1. Purpose

The Exchange proposes to make available, through MEB, a new market data offering referred to as ''Spread Crawler,'' which will serialize spread book data produced by certain U.S. options exchanges and provide electronic alerts based on end-user defined filters (the ''Service''). Spread Crawler, which was developed by MEB, listens to a streaming data feed from all of the U.S. options exchanges that broadcast open complex option orders (i.e. ISE, CBOE, C2, AMEX, ARCA, and PHLX) together with their instrument definition (i.e. option legs) over various multi-cast channels in a FIX format. Spread Crawler then serializes this enormous amount of data and turns each record back into a formal structure so it contains details of both sides of the order (i.e. bid and/or offer), as well as the instrument definition. In addition to actual order detail, this structure would contain the current option and underlying stock National Best Bid or Offer (''NBBO''), together with a calculated theoretical value based on the midpoint of the NBBO (''Order Object''). The Order Object is then run through MEB's filtering technology which applies filtering rules to each record based on a registered end-user input (i.e. custom-set parameters for particular symbols or industry sectors, minimum/maximum sizes, edge and specific expirations, etc.) to determine which registered end-user(s), if any, would be interested in seeing this order. These filtering rules are contained in a relational database and are maintained by the registered end-user through the Spread Crawler Web site where they can add or update individual parameters in real-time. From the matching list of registered end-users, Spread Crawler then creates and transmits individual alerts that outline details of the order in an electronic format selected by the registered end-user (i.e. email, instant messaging, etc.).

The Exchange has entered into an agreement with MEB to offer Spread Crawler to both ISE members and non-ISE members on a subscription basis. Under the Agreement, MEB will operate and maintain the Service and the Exchange will provide certain marketing, first line technical support, accounting and contract administration services for Spread Crawler. In exchange for the provision of such services, the Exchange will receive a percentage of the total monthly subscription fees received by MEB from parties who have subscribed to the Service.

While Spread Crawler will be provided exclusively through the Exchange to both ISE members and non-ISE members, the Exchange represents that it would enter into a similar arrangement for a similar market data offering with any third party, including another ISE member, on the same terms and conditions as the arrangement with MEB, should any such third party request to do so. Furthermore, because MEB does not rely solely on the ISE complex option orders data feed to provide the Service and instead utilizes a general aggregation of data from all of the U.S. options exchanges that broadcast open complex option orders, any third party (regardless of whether it is an ISE-member or non-ISE member) may develop and/or establish a similar market data offering, with or without ISE's participation, and increase the competitive landscape for such market data offerings. In addition, the Exchange confirms that: (i) MEB has not (and will not) receive any preferential treatment as a result of being a ISE member which acts as a service provider to other ISE members and non-ISE members pursuant to this arrangement; (ii) MEB will not have any special, different, or preferential access to the Exchange's data as a result of this arrangement; and (iii) ISE, in the context of being one of

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the marketplaces at which complex option orders may be executed as a result of the Service, will not receive any preferential treatment or informational advantage over any other exchange or marketplace at which complex option orders may be executed with respect to the way the Exchange is represented as part of the Service, or any resulting alerts transmitted by the Service to a subscriber.

The Exchange believes the Service provides valuable information that can help users make informed investment decisions. The Exchange will make Spread Crawler available to both ISE members and non-ISE members on a subscription basis later this year and will submit a separate proposal to establish fees for this market data offering. ISE expects to launch the Service, through MEB, during the fourth quarter of 2012.

2. Statutory Basis

The Exchange believe that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Section 6(b)(5) of the Act,[4] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and national market system, and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers.

The proposed rule change would allow the Exchange, through MEB, to offer a new market data service on a voluntary and non-discriminatory basis. Specifically, the Exchange believes that the Service is: (i) Voluntary on the part of the Exchange, which is not required to offer the Service and the subscription to the Service is not necessary to execute complex orders on the Exchange; (ii) voluntary on the part of prospective subscribers who are not required to use the Service and it is not necessary to subscribe to such Service in order to execute complex orders on the Exchange; and (iii) non-discriminatory as the Service is made available on a subscription basis to both ISE members and non-ISE members as a ''one-size fits all'' offering in which all subscribers, regardless of whether each such subscriber is an ISE member or non-ISE member, are subject to the same terms and conditions, receive the same level of service (i.e. there are no differing or advanced/upgraded levels of service or other ability to receive the data contained in the Service faster or differently than other subscribers), and receive alerts based on each user's input.

By offering the Service through an exchange environment in partnership with MEB, the Exchange believes that it will be promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating and processing information with respect to, and facilitating transactions in securities, and removing impediments to and perfecting the mechanism of a free and open market and national market system by: (i) Increasing the transparency associated with this product by converting it into an exchange-offered product versus a broker-dealer offered product through the wider dissemination and distribution of useful proprietary data; (ii) clarifying the non-discriminatory availability of such proprietary data to market participants; (iii) increasing availability as the data will be made available to a broader range of market participants (i.e. by offering exchange-wide distribution, this will significantly enhance the current distribution of this product as it is now currently only distributed by a single broker-dealer); and (iv) providing to subscribers of the Service, both ISE members and non-ISE members, a mechanism for managing the complexity of analyzing real-time complex order book data from multiple exchanges with high efficiency which will allow them to make more efficient trading decisions. As such, through this proposed rule change, the Exchange is making a voluntary decision to make this data available in order to improve market quality, to attract order flow, and to increase the transparency and the availability of certain proprietary market data.

B. Self-Regulatory Organization's Statement on Burden on Competition

ISE does not believe that this proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)[5] of the Act and Rule 19b–4(f)(6) thereunder.[6]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[7] However, Rule 19b–4(f)(6)(iii)[8] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that it may offer the Service immediately. The Exchange believes that a waiver of the operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange, through MEB, to bring an existing product that is currently offered in the marketplace as a non-exchange-offered product to market as an exchange-offered product in an exchange environment which will: (i) Improve market quality through the wider dissemination and distribution of useful proprietary data and also by clarifying the non-discriminatory availability of such proprietary data to market participants; (ii) increase transparency by bringing the Service to an exchange environment which will allow the data to be made available to a broader range of market participants; (iii) allow users of the Service, both ISE members and non-ISE members, to manage the complexity of analyzing real-time spread book data from multiple exchanges with high efficiency and

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6).

[7] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give 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. ISE has satisfied this requirement.

[8] *Id.*

allow them to make more efficient trading decisions; and (iv) help attract new users and new order flow to the Exchange, thereby improving the Exchange's ability to compete in the market for options order flow and executions. Allowing the Exchange to bring the Service to the market without delay would provide market participants with the potential benefits of the Service as soon as possible. The Commission believes that waiver of the operative delay is consistent with investor protection and the public interest. Therefore, the Commission is hereby waiving the 30-day operative delay.[9]

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–ISE–2012–75 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.

All submissions should refer to File Number SR–ISE–2012–75. 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 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–2012–75 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29218 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 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).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68311; File No. SR–CHX–2012–013]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change Relating to Adoption of Listing Standards for Compensation Committees and Advisors as Required by Rule 10C–1

November 28, 2012.

I. Introduction

On September 26, 2012, Chicago Stock Exchange, Inc. (''CHX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend certain of its rules relating to listing standards for compensation committees and advisors. The proposed rule change was published for comment in the **Federal Register** on October 16, 2012.[4] The Commission received no comment letters on this proposal.[5]

Section 19(b)(2) of the Act[6] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day from the publication of notice of filing of this proposed rule change is November 30, 2012. The Commission is extending the 45-day time period for Commission action on the proposed rule change.

The Commission finds it appropriate to designate a longer period within which to take action on this proposed rule change so that it has sufficient time to consider the proposed rule change, which would revise the rules relating to compensation committee and compensation advisor requirements.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[7] designates January 14, 2013, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove this proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29240 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 68033 (October 10, 2012), 77 FR 63370. (October 16, 2012) (SR–CHX–2012–13).

[5] The Commission notes, however, that fourteen comment letters were received in total concerning similar rule changes proposed by other national securities exchanges. *See* Securities Exchange Act Release No. 68313, (November 28, 2012) (Notice of Designation of Longer Period for Commission Action on Proposed Rule Changes Relating to Adoption of Listing Standards for Compensation Committees and Advisors as Required by Rule 10C–1 for BATS Exchange, Inc., NASDAQ OMX BX, Inc. Chicago Board Options Exchange, Inc., The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Arca LLC, and NYSE MKT LLC).

[6] 15 U.S.C. 78s(b)(2).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68313; File Nos. SR–BATS–2012–039; SR–BX–2012–063; SR–CBOE–2012–094; SR–NASDAQ–2012–109; SR–NYSE–2012–49; SR–NYSEArca–2012–105; SR–NYSEMKT–2012–48]

Self-Regulatory Organizations; BATS Exchange, Inc.; NASDAQ OMX BX Inc.; Chicago Board Options Exchange, Incorporated; The NASDAQ Stock Market LLC; New York Stock Exchange LLC; NYSE Arca LLC; NYSE MKT, LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Changes Relating to Adoption of Listing Standards for Compensation Committees and Advisors as Required by Rule 10C–1

November 28, 2012.

I. Introduction

On September 25, 2012, each of BATS Exchange, Inc. (''BATS''), NASDAQ OMX BX, Inc. (''BX''), Chicago Board Options Exchange, Incorporated (''CBOE''), The NASDAQ Stock Market LLC (''Nasdaq''), New York Stock Exchange LLC (''NYSE''), NYSE Arca LLC (''NYSE Arca''), and NYSE MKT LLC (''NYSE MKT'') (collectively ''Exchanges'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] proposed rule changes to amend certain of their respective rules relating to listing standards for compensation committees and advisors. The proposed rule changes were published for comment in the **Federal Register** on October 15, 2012.[4] The Commission received fourteen comment letters on these proposals in total. The Commission received six comment letters on the NYSE proposed rule change,[5] seven comment letters on the Nasdaq proposed rule change,[6] and one comment letter on the NYSE Arca proposed rule change.[7] The Commission received no other comment letters for any of the other Exchanges' proposed rule changes.[8]

Section 19(b)(2) of the Act [9] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether these proposed rule changes should be disapproved. The 45th day from the publication of notice of filing of these proposed rule changes is November 29, 2012. The Commission is extending the 45-day time period for Commission action on these proposed rule changes.

The Commission finds it appropriate to designate a longer period within which to take action on these proposed rule changes so that it has sufficient time to consider these proposed rule changes, which would revise the rules relating to compensation committee and compensation advisor requirements, and to consider the comment letters that have been submitted in connection with them.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[10] designates January 13, 2013, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove these proposed rule changes.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29180 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4

[4] *See* Securities Exchange Act Release Nos. 68022 (October 9, 2012), 77 FR 62572 (October 15, 2012) (SR–BATS–2012–039); 68018 (October 9, 2012), 77 FR 62547 (October 15, 2012) (SR–BX–2012–063); 68020 (October 9, 2012), 77 FR 62558 (October 15, 2012) (SR–CBOE–2012–094); 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (SR–NASDAQ–2012–109); 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (SR–NYSE–2012–49); 68006 (October 9, 2012), 77 FR 62587 (October 15, 2012) (SR–NYSEArca–2012–105); 68007 (October 9, 2012), 77 FR 62576 (October 15, 2012) (SR–NYSEMKT–2012–48).

[5] *See* Letter from Thomas R. Moore, Vice President, Corporate Secretary and Chief Governance Officer, Ameriprise Financial, Inc. to Elizabeth M. Murphy, Secretary, Commission, dated October 18, 2012; Letter from J. Robert Brown, Jr., Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law to Elizabeth M. Murphy, Secretary, Commission, dated October 30, 2012; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012; Letter from Brandon J. Rees, Acting Director, Office of Investment, AFL–CIO to Elizabeth M. Murphy, Secretary, Commission, dated November 5, 2012; Letter from Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters to Elizabeth M. Murphy, Secretary, Commission, dated November 5, 2012; and Letter from Wilson Sonsini Doorich & Rosati, P.C. to Elizabeth M. Murphy, Secretary, Commission, dated November 14, 2012.

[6] *See* Letter from J. Robert Brown, Jr., Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law to Elizabeth M. Murphy, Secretary, Commission, dated October 30, 2012; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012; Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012; Letter from Harold R. Carpenter, CFO, Pinnacle Financial Partners to Elizabeth M. Murphy, Secretary, Commission, dated November 5, 2012; Letter from Brandon J. Rees, Acting Director, Office of Investment, AFL–CIO to Elizabeth M. Murphy, Secretary, Commission, dated November 5, 2012; Letter from Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters to Elizabeth M. Murphy, Secretary, Commission, dated November 5, 2012; and Letter from Wilson Sonsini Doorich & Rosati, P.C. (''WSDR'') to Elizabeth M. Murphy, Secretary, Commission, dated November 14, 2012.

[7] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012.

[8] The Commission notes, however, that these comment letters apply to all of the other Exchanges' proposed rule changes, where applicable. The Commission also notes that it has designated a longer time period for Commission consideration of similar proposed rule changes for Chicago Stock Exchange, Inc., and National Stock Exchange, Inc. *See* Securities Exchange Act Release Nos. 68311 (November 28, 2012) and 68312 (November 28, 2012), respectively.

[9] 15 U.S.C. 78s(b)(2).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68305; File No. SR–NYSEMKT–2012–67]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Moving the Rule Text That Provides for Pegging on the Exchange From Supplementary Material .26 of Rule 70—Equities to Rule 13—Equities and Amending Such Text to (i) Permit Designated Market Maker Interest To Be Set as Pegging Interest; (ii) Change References From National Best Bid, National Best Offer and National Best Bid or Offer to Best Protected Bid, Best Protected Offer and Best Protected Bid or Offer, Respectively; (iii) Permit Pegging Interest To Peg to the Opposite Side of the Market; and (iv) Provide for An Offset Value To Be Specified for Pegging Interest

November 28, 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 November 14, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to move the rule text that provides for pegging on the Exchange from Supplementary Material .26 of Rule 70—Equities to Rule 13—Equities and amend such text to (i) permit Designated Market Maker (''DMM'') interest to be set as pegging interest; (ii) change references from national best bid (''NBB''), national best offer (''NBO'') and national best bid or offer (''NBBO'') to best protected bid (''PBB''), best protected offer (''PBO'') and best protected bid or offer (''PBBO''), respectively; (iii) permit pegging interest to peg to the opposite side of the market; and (iv) provide for an offset value to be specified for pegging interest. 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to move the rule text that provides for pegging on the Exchange from Rule 70.26—Equities (''Rule 70.26'') (Pegging for d-Quotes and e-Quotes) [5] to Rule 13—Equities (''Rule 13'') and amend such text to (i) permit DMM interest to be set as pegging interest; (ii) change references from NBB, NBO and NBBO to PBB, PBO and PBBO, respectively; (iii) permit pegging interest to peg to the opposite side of the market; and (iv) provide for an offset value to be specified for pegging interest. In moving this text to Rule 13, the Exchange proposes to make several other changes to the rule text, so that the proposed substantive changes described above can be incorporated in a logical and transparent manner and to streamline the rule in a non-substantive manner.

Background

The New York Stock Exchange LLC (''NYSE'') adopted NYSE Rule 70.26 as part of its Hybrid Market initiative to provide the ability for Floor brokers to add pegging instructions to e-Quotes.[6] Since its original adoption, the pegging functionality has been amended a number of times to, among other things, include d-Quotes and change the pegging functionality from pegging to the Exchange best bid or offer to pegging to the NBBO.[7]

As set forth in Rule 70.26(i), e-Quotes, other than tick-sensitive e-Quotes, may be set to peg to the NBB (for pegging interest to buy) or to the NBO (for pegging interest to sell) as the NBBO changes, so long as the NBBO is at or within the limit price. Rule 70.26(ii) specifies that d-Quotes may also employ pegging. Rule 70.26(iii) provides that pegging is active only when auto-quoting is active and that Exchange systems will reject e-Quotes that employ pegging that are entered 10 seconds or less before the scheduled close of trading. Rule 70.26(iv) provides that pegging e-Quotes and d-Quotes trade on parity with other interest at the NBBO after interest entitled to priority is executed, and Rule 70.26(vi) provides that a pegging e-Quote or d-Quote that sets the Exchange best bid or offer is entitled to priority.

Rule 70.26(v) provides that pegging is reactive, and that an e-Quote or d-Quote will not establish the NBBO as a result of pegging. Rule 70.26(vii) provides that pegging e-Quotes will only peg to non-pegging interest that is within the pegging range selected by the Floor broker, and that such non-pegging interest may be available on the Exchange or be a protected bid or offer on an away market. Rule 70.26(viii) provides that an e-Quote or d-Quote will not sustain the NBBO as a result of pegging if there is no other non-pegged interest at that price, and such price is not the e-Quote's or d-Quote's limit price. Rule 70.26(viii)(A) and (B) provide that if a buy (sell) pegging e-Quote reaches its lowest (highest) quotable price and it is the NBB (NBO), such interest will remain displayed at the NBB (NBO) even if all other interest at that price cancels. Rule 70.26(ix) further provides detail of definitions of the price range that a Floor broker may designate for pegging e-Quotes, which is a price range that a Floor broker can add that is in addition to the limit price for the pegging e-Quote, provided that it is not inconsistent with the order's limit price.

Rule 70.26(x) provides that pegging interest will join the NBB or NBO provided that it is within the e-Quote's pegging range. As noted in Rule 70.26(x)(A), a pegging e-Quote will not join the NBBO if it is locking or crossing the Exchange best bid or offer, in which case the pegging e-Quote would peg to the next available best-priced non-pegging interest. Rule 70.26(x)(B) further provides that if the NBBO is not within the price range specified for the pegging e-Quote, it will peg to the next available best-priced non-pegging interest within the price range selected by the Floor broker.

Rule 70.26(xi) also provides that if a pegging range has not been included, the pegging e-Quote will peg to the NBBO so long as the NBBO is within the limit price of the e-Quote. Rule 70.26(xii) provides that the discretionary price range of a d-Quote will move with a pegging d-Quote, subject to any floor or ceiling set by the Floor broker. Rule 70.26(xii)(A)–(C) then set forth that if the NBBO moves out of the range of the pegging e-Quote, the pegging e-Quote will remain at the best price to which there may be non-pegging interest to peg, and that once the NBBO returns to within the price range designated for the pegging e-Quote, it will once again peg to the NBBO. Finally, Rule 70.26(xiii) provides that a Floor broker may establish a minimum size of same-side volume to which the e-Quote or d-Quote will peg.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] E-Quotes are Floor broker agency interest files. D-Quotes are e-Quotes for which a Floor broker has entered discretionary instructions as to size and/or price.

[6] *See* Securities Exchange Act Release No. 54577 (October 5, 2006), 71 FR 60208 (October 12, 2006) (SR–NYSE–2006–36). In 2008, the Exchange adopted the NYSE's equity trading rules, including NYSE Rules 70.26 and 13. *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63).

[7] *See* Securities Exchange Act Release No. 61081 (December 1, 2009), 74 FR 64105 (December 7, 2009) (SR–NYSEAmex–2009–76).

Summary of Proposed Rule Changes

As noted above, the Exchange proposes to permit DMM interest to be set as pegging interest. Because pegging for DMM interest would generally be the same as pegging for e-Quotes and d-Quotes, the Exchange proposes to amend the existing text, as described in more detail below, to define the term ''pegging interest'' to include e-Quotes, d-Quotes, and DMM interest.[8] The Exchange believes that it is appropriate to expand the availability of pegging interest to DMM interest because it will assist DMMs in meeting their obligations pursuant to Rule 104(a)(1)—Equities to maintain a continuous, two-sided quote at or near the NBBO throughout the trading day.

In particular, the Exchange notes that other markets have recently been approved to provide market makers with pegging order functionality so that market makers may automatically track the NBBO in compliance with the market-wide market maker quoting requirements.[9] The rules adopted or proposed by those markets set the pegging functionality to automatically track the designated percentages set forth in the market-wide quoting rule (i.e., Rule 104(a)(1)(B)(iii)—Equities designated percentages). While the Exchange's expansion of pegging functionality to DMMs would not include those set percentages, the Exchange believes that providing DMMs with the flexibility to engage in same-side or opposite-side pegging with offset values of their own choosing, as discussed in more detail below, will enable DMMs to set their market-making quoting interest to automatically track the PBBO at a tighter ratio than the quoting requirements contemplated by Rule 104(a)(1)(B)—Equities.[10]

The Exchange also proposes to change references to NBB, NBO and NBBO throughout Rule 70.26 to PBB, PBO and PBBO, respectively. The Exchange believes that these changes are more consistent with the requirements of the Regulation NMS Order Protection Rule[11] and the related definition of protected bid and offer, as set forth in Regulation NMS Rule 600(b)(57),[12] which defines a protected bid or protected offer as a quote in an NMS stock that is (i) displayed by an automated trading center; (ii) disseminated pursuant to an effective national market system plan; and (iii) an automated quotation that is the best bid or best offer of a national stock exchange or a national securities association. Exchange systems monitor the PBBO for purposes of the Order Protection Rule and, in this respect, Exchange systems also move pegging interest based on moves to the PBBO, not the NBBO.[13]

The Exchange further proposes to expand the pegging functionality to permit pegging to the opposite side of the market. The existing functionality, for which pegging interest to buy (sell) pegs to the PBB (PBO), would be renamed in the rule as a ''Primary Pegging Interest.''[14] The proposed new functionality, whereby pegging interest would peg to the opposite side of the market (buy (sell) pegs to the PBO (PBB)) would be referred to in the proposed rule as a ''Market Pegging Interest.''[15] The Exchange believes that adding Market Pegging Interest functionality would contribute to narrower spreads for securities and is consistent with approved rules of other markets.[16]

The Exchange also proposes to provide for an offset value, which would be a specified amount by which the price of pegging interest would differ from the price of the interest to which it pegs.[17] The Exchange proposes to specify that an offset value would be optional for Primary Pegging Interest,[18] but would be required for Market Pegging Interest.[19] As proposed, when applying an offset value to Primary Pegging Interest, the adjusted price for buy (sell) pegging interest would be the PBB (PBO) minus (plus) the offset value. When applying the offset value to Market Pegging Interest, the adjusted price for buy (sell) pegging interest would be the PBO (PBB) minus (plus) the offset value.[20] If the offset value of pegging interest to buy (sell) would result in a price that is greater than $1.00 in an increment smaller than $0.01, the price of the pegging interest to buy (sell) would be rounded down (up) to the nearest permissible minimum price variation, consistent with Rule 61—Equities.[21]

[8] Trading interest that has been set to peg, i.e., e-Quotes, d-Quotes, and DMM interest, will be referred to collectively as ''pegging interest.''

[9] *See, e.g.,* Securities Exchange Act Release Nos. 67584 (Aug. 2, 2012), 77 FR 47472 (Aug. 8, 2012) (SR–NASDAQ–2012–066) (approving The NASDAQ Stock Market LLC (''Nasdaq'') Rule 4751(f)(15), which establishes a ''Market Maker Peg Order''); 67756 (Aug. 29, 2012), 77 FR 54633 (Sept. 5, 2012) (SR–BATS–2012–026) (approving The BATS Exchange, Inc. (''BATS'') Rule 11.8(e), which establishes a ''Market Maker Peg Order''); and 67755 (Aug. 29, 2012), 77 FR 54630 (Sept. 5, 2012) (SR–BYX–2012–012) (approving BATS–Y Exchange, Inc. (''BYX'') Rule 11.8(e), which establishes a Market Maker Peg Order).

[10] Member organizations are responsible for determining whether their trading activity qualifies as bona fide market making for purposes of the ''locate'' exception and close-out requirements of Regulation SHO under the Exchange Act. Compliance with the quoting requirements of Rule 104(a)(1)(B)—Equities, or any other rules of the Exchange, does not necessarily mean that the DMM, or other form of Exchange-registered market maker, is engaged in bona fide market making for purposes of Regulation SHO. *See* 17 CFR 242.203(b)(2)(iii); 17 CFR 242.204(a)(3). The Commission adopted a narrow exception to Regulation SHO's ''locate'' requirement for market makers that may need to facilitate customer orders in a fast moving market without possible delays associated with complying with such requirement. Only market makers engaged in bona fide market making in the security at the time they effect the short sale are excepted from the ''locate'' requirement. *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48015 (August 6, 2004) (providing guidance as to what does not constitutes bona fide market making for purposes of claiming the exception to Regulation SHO's ''locate'' requirement). *See also* Exchange Act Release No. 58775 (October 14, 2008), 73 FR 61690, 61698–9 (October 17, 2008) (providing guidance regarding what is bona fide market making for purposes of complying with the market maker exception to Regulation SHO's ''locate'' requirement including without limitation whether the market maker incurs any economic or market risk with respect to the securities, continuous quotations that are at or near the market on both sides and that are communicated and represented in a way that makes them widely accessible to investors and other broker-dealers and a pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers).

[11] 17 CFR 242.611.

[12] 17 CFR 242.600(b)(57).

[13] In most instances, the PBBO and the NBBO are the same. However, if the NBBO is based on a quote that is no longer protected, i.e., a stale quote, the PBBO may change before the NBBO changes. In this regard, the Exchange notes that current Rule 70.26(vii) already specifies that pegging interest may peg to interest available on the Exchange or a protected bid or offer on an away market.

[14] *See* proposed paragraph (c) of the pegging interest text of Rule 13.

[15] *See* proposed paragraph (d) of the pegging interest text of Rule 13.

[16] *See, e.g.,* Nasdaq Rule 4751(f) and BATS Rule 11.9(c)(8).

[17] *See* proposed paragraph (b) of the pegging interest text of Rule 13.

[18] *See* proposed paragraph (c)(4) of the pegging interest text of Rule 13.

[19] *See* proposed paragraph (d)(4) of the pegging interest text of Rule 13. Because an offset value would be required for Market Pegging Interest, Exchange systems would reject Market Pegging Interest that does not include an offset value.

[20] For example, if the PBB is $2.00 and the PBO is $2.05, pegging interest to buy that is set to peg to the same side of the market with an offset of $0.01 would be priced at $1.99 (i.e., $2.00 PBB minus $0.01 offset). Pegging interest to sell that is set to peg to the same side of the market with an offset of $0.01 would be priced at $2.06 (i.e., $2.05 PBO plus $0.01 offset). In contrast, pegging interest to buy that is set to peg to the opposite side of the market with an offset of $0.05 would be priced at $2.00 (i.e., $2.05 PBO minus $0.05 offset). Pegging interest to sell that is set to peg to the opposite side of the market with an offset of $0.05 would be priced at $2.05 (i.e., $2.00 PBB plus $0.05 offset).

[21] Continuing with the example above, if the PBB is $2.00 and the PBO is $2.05, pegging interest to buy that is set to peg to the same side of the market with an offset of $0.015 would be priced at $1.98 (i.e., $2.00 PBB minus $0.015 offset equals $1.985 and rounded down to nearest permissible minimum price variation). Pegging interest to sell that is set to peg to the same side of the market with an offset of $0.015 it would be priced at $2.07 (i.e., $2.05 PBO plus $0.015 offset equals $2.065 and rounded up to nearest permissible minimum price variation).

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The Exchange believes that adding Market Pegging functionality would enable pegging interest to potentially establish a better price than is currently available, thereby reducing the size of the spread for a security. For example, if the PBBO in a security is $10.05–$10.07, and the buy pegging interest is pegged to the PBO with an offset of $0.01, the buy pegging interest would post on the Exchange as a $10.06 bid, which would be a new PBB that reduces the spread and creates a tighter market. The Exchange notes that unlike Primary Pegging Interest, which currently cannot establish or sustain the PBBO as a result of pegging, Market Pegging Interest can establish or sustain a PBB or PBO.

Proposed Specific Rule Changes

As noted above, the Exchange proposes to delete Rule 70.26 in its entirety and move the text that provides for pegging to Rule 13. Because pegging interest is being expanded to include DMM interest, the Exchange believes that Rule 70, which concerns Floor broker interest only, is no longer the proper rule within which to provide for pegging. Rather, because pegging is a type of modifier, the Exchange believes it is more appropriate to provide for pegging within Rule 13 as a defined term referred to as ''pegging interest.'' The Exchange notes that Rule 13 is currently titled ''Definition of Orders.'' However, Rule 13 currently provides for orders *and* order modifiers.[22] Accordingly, the Exchange proposes to change the title of Rule 13 to ''Orders and Modifiers.''

As proposed, the new pegging interest section of Rule 13 would replace the existing text of Rule 70.26, with numerous non-substantive changes, as well as add new rule text to incorporate the elements proposed above, i.e., permitting DMM interest to be set as pegging interest, changing NBBO to PBBO, adding the Market Pegging Interest functionality, and providing for an offset value to be specified. The Exchange believes that the proposed changes to the rule text, as incorporated in Rule 13, result in a more streamlined rule that eliminates redundancy in the current rule while also incorporating the new elements in a logical and comprehensive manner. For example, rather than referring to ''pegging e-Quotes'' or ''pegging d-Quotes'' throughout the rule, the Exchange proposes to use the term ''pegging interest,'' unless the rule is specific only to a particular type of interest. In addition, the Exchange proposes to combine concepts that are currently addressed separately or in multiple locations within Rule 70.26, but that can be logically combined into streamlined rule text (e.g., the text discussing the permissible price range and how it impacts pegging).

The following sets forth the proposed rule changes (all references to proposed paragraphs are to the proposed new pegging interest text of Rule 13):

- Proposed paragraph (a) provides that ''pegging interest'' means displayable or non-displayable interest to buy or sell at a price set to track the PBB or PBO as the PBBO changes. The proposed rule text would replace the general description of pegging in Rule 70.26(i), with certain changes. As discussed above, from a substantive perspective, the Exchange proposes to replace references to the NBB, NBO, and NBBO with references to the PBB, PBO, and PBBO. The Exchange proposes to delete the reference to the limit price of an e-Quote as that concept will now be part of proposed paragraph (a)(4), relating to the specified price range of pegging interest. In addition, the Exchange proposes a clarifying rule change to add that pegging interest may be for displayable or non-displayable interest. The current pegging functionality is available for all e-Quotes and d-Quotes, whether intended for display or not, and the Exchange proposes a clarifying rule change to make clear that pegging interest is available for both displayable and non-displayable interest.
- Proposed paragraph (a)(1) provides that pegging interest can be an e-Quote, d-Quote, or DMM Interest. The proposed rule text would replace without any substantive change rule text from Rule 70.26(i) referencing e-Quotes and Rule 70.26(ii), which references d-Quotes. The proposal to add DMM interest is new rule text, as described in more detail above.
- Proposed paragraph (a)(1)(A) provides that pegging interest may not include a sell ''plus'' or buy ''minus'' instruction, which replaces without any substantive change the current text in Rule 70.26(i) that a tick-sensitive e-Quote is not permitted to peg. A ''tick sensitive'' e-Quote is one that includes a sell ''plus'' or buy ''minus'' instruction, which are existing defined terms in Rule 13. Therefore, the Exchange proposes to use the sell ''plus'' or buy ''minus'' terminology instead of the current ''tick sensitive'' language, which is not a defined term in Exchange rules.[23]
- Proposed paragraph (a)(1)(B) would replace without any substantive change the second sentence of Rule 70.26(iii), which provides that Exchange systems shall reject a pegging e-Quote or d-Quote that is entered 10 seconds or less before the scheduled close of trading.[24] The Exchange notes that the rationale for excluding pegging e-Quotes and d-Quotes 10 seconds prior to the close is to assist the DMM with arranging the close, and because the DMM is aware of DMM interest, this prohibition is not necessary for DMM interest. The Exchange notes that this does not confer any additional benefit to the DMM because the DMM may be required to supply additional liquidity as needed as part of the closing transaction in order to meet the obligation set forth in Rule 104(a)(3)—Equities to facilitate the close of trading for each of the securities in which the DMM is registered.
- Proposed paragraph (a)(1)(C) would replace without any substantive change Rule 70.26(xii) by specifying that discretionary instructions associated with a pegging d-Quote would move as the d-Quote pegs to the PBBO, subject to any price range and limit price that may be specified. The Exchange does not propose to include the reference to e-Quote that is currently in Rule 70.26(xii) because a d-Quote is an e-Quote with discretionary instructions.[25] Also, the Exchange proposes to refer to the specified price range instead of the current reference to floor or ceiling price in Rule 70.26(xii). Finally, the Exchange proposes to include a reference to the pegging interest's limit price. The Exchange notes that the textual differences between proposed paragraph (a)(1)(C) and current Rule 70.26(xii) do not make any substantive changes to the rule.
- Proposed paragraph (a)(2) would replace without any substantive change the first sentence of Rule 70.26(iii), by specifying that pegging is only active when auto-quoting is active.
- Proposed paragraph (a)(3) would replace the rule text in Rule 70.26(vii) by specifying that pegging interest shall peg to a price that is based on either (A)

In contrast, pegging interest to buy that is set to peg to the opposite side of the market with an offset of $0.015 would be priced at $2.03 (i.e., $2.05 PBO minus $0.015 offset equals $2.035 and rounded down to nearest permissible minimum price variation). Pegging interest to sell that is set to peg to the opposite side of the market with an offset of $0.015 would be priced at $2.02 (i.e., $2.00 PBB plus $0.015 offset equals $2.015 and rounded up to nearest permissible minimum price variation).

[22] For example, a sell ''plus'' or buy ''minus'' order is not an order type per se, but is instead an order modifier.

[23] This change does not alter the meaning of the current rule text.

[24] The current rule text only refers to e-Quotes, but since d-Quotes are a subset of e-Quotes, Exchange systems currently reject both pegging e-Quotes and d-Quotes that are entered 10 seconds or less before the scheduled close of trading.

[25] *See supra* note 5.

a protected bid or offer, which may be available on the Exchange or an away market, or (B) interest that establishes a price on the Exchange, which may include Primary or Market Pegging Interest that has established a price as a result of an offset value. The current rule provides that pegging interest only pegs to other non-pegging interest, which may be available on the Exchange or a protected bid or offer on an away market. The proposed rule text modifies the existing rule text to take into consideration the possibility that either Primary Pegging Interest or Market Pegging Interest may establish a price on the Exchange and therefore pegging interest may peg to other pegging interest.[26] The circumstances where pegging interest may establish a price is as a result of the proposed new offset function, which is why the Exchange proposes to change this aspect of the rule.

• Example 1: Assume that the Exchange best bid and offer, which is also the PBBO, is $10.05—$10.07, and there is buy Market Pegging Interest pegged to the PBO with an offset value of $0.01, such Market Pegging Interest would establish a new PBB and Exchange best bid of $10.06. Because the Market Pegging Interest established a new PBB, Primary Pegging Interest to buy could peg to that $10.06 price and therefore would be pegging to pegging interest.

• Example 2: Assume again that the Exchange best bid or offer, which is also the PBBO, is $10.05—$10.07, with 100 shares at the bid, and there is buy Primary Pegging Interest ''A'' of 500 shares with an offset of $0.01, which would be at a priced at $10.04, and that is the only Exchange interest priced at $10.04. Assume further there is buy Primary Pegging Interest ''B'' that will only peg if there is minimum same-side volume of 500 shares.[27] Because the Exchange best bid is only 100 shares, Primary Pegging Interest ''B'' would peg to the price that meets the minimum size requirement, which in this case would be the price established by the Primary Pegging Interest ''A'' at $10.04. In this scenario, because of the offset value associated with Primary Pegging Interest ''A'', that interest has established a price and as a result, Primary Pegging Interest ''B'' is pegging to pegging interest.

• Proposed paragraph (a)(4) provides that pegging interest shall peg only within the specified price range for the pegging interest. The Exchange notes that while the proposed language is new rule text, the proposed paragraph does not make any substantive changes to the current rule, but rather consolidates rule text from separate parts of the existing rule in a streamlined format. In particular, the proposed rule would replace the remaining text in Rules 70.26(i) (that pegging interest must be within the e-Quote's limit price), 70.26(vii) (that pegging interest pegs to interest within the price range selected by the Floor broker), and 70.26(ix), including (A) through (D) of that subsection, by replacing the detailed ''price range'' discussion within current Rule 70.26(ix) by specifying instead that pegging interest shall peg only within the specified price range for the pegging interest. For example, Rule 70.26(ix)(D) currently specifies that the price to which pegging interest pegs cannot be higher (lower) than the limit price of the buy (sell) pegging interest, which is also currently covered in Rule 70.26(i).[28] In this regard, the Exchange proposes not to include the text of current Rule 70.26(ix)(A), (B) and (C), which refer to the ''quote price,'' ''ceiling price'' and ''floor price,'' respectively, of pegging interest. The Exchange does not consider these terms necessary and believes that proposed paragraph (a)(4) is clearer and more streamlined without their inclusion.[29]

• Proposed paragraph (a)(4)(A) specifies that if the PBBO, combined with any offset value, is not within the specified price range, the pegging interest would instead peg to the next available best-priced interest that is within the specified price range. Other than addressing how the offset value impacts the pegging interest, the reference to NBBO changing to PBBO, replacing the phrase ''the price range selected by the Floor broker'' with ''the specified price range,'' this text is substantively the same and replaces current Rule 70.26(x)(B).[30]

• Proposed paragraph (a)(4)(B) would replace without any substantive change the current Rule 70.26(xii)(A), (B) and (C) by specifying that pegging interest that has reached its specified price range will remain at that price if the PBBO goes beyond such price range and that if the PBBO returns to a price within the specified price range, it shall resume pegging. The Exchange notes that this text is substantively the same as in current Rule 70.26(xii)(A), (B), and (C), albeit in a streamlined format. The Exchange further notes that the proposed rule text replaces without any substantive change concepts set forth in Rule 70.26(x) (that pegging interest will peg to the NBBO so long as it is in the specified price range) and 70.26(xi) (pegging interest without a specified price range will peg based on the limit price of the order).

• Proposed paragraph (b) defines the ''offset value,'' as discussed in more detail above.

• Proposed paragraph (c) defines the term ''Primary Pegging Interest,'' as discussed in more detail above.

• Proposed paragraph (c)(1) would replace Rule 70.26(x)(A) by specifying that Primary Pegging Interest shall not peg to a price that is locking or crossing the Exchange best offer (bid), but instead would peg to the next available best-priced interest that would not lock or cross the Exchange best offer (bid). In moving the text from Rule 70.26(x)(A), the Exchange proposes two minor changes: to change the reference from the NBB (NBO) to the term ''price'' and to delete the term ''non-pegging interest.'' The Exchange proposes these modifications because, as discussed above in connection with proposed paragraph (a)(3), there may be circumstances where because of the offset value, pegging interest may peg to a price established by pegging interest, which in some cases, may not be the PBBO.

• Proposed paragraph (c)(2) would replace without substantive change Rules 70.26(v), (viii), (viii)(A), and (viii)(B) by specifying that Primary Pegging Interest will not establish a PBB (PBO) or sustain a PBB (PBO) as a result of pegging.[31]

[26] *See* proposed paragraph (d)(2) of the pegging interest text of Rule 13.

[27] *See* proposed paragraph (c)(5) of the pegging interest text of Rule 13.

[28] This addition would not result in a substantive change to pegging. Also, the Exchange notes that Rule 70.26(ix) currently says that the price may not be ''inconsistent with'' the limit price. The Exchange believes that using ''specified price range'' would be clearer than the current ''inconsistent with'' text because the specified price range concept is broad enough to include the limit price of the order as well as any other pricing instructions that may be included with the pegging interest.

[29] The Exchange considers it inherent that a price ''range'' will have upper and lower bounds and therefore does not consider these terms necessary.

[30] The Exchange notes that Rule 70.26(x)(B) provides that pegging interest will ''join'' the interest to which it pegs. The Exchange believes that using ''peg to'' terminology would be more precise than the current ''join'' language.

[31] The Exchange believes that the proposed rule text ''as a result of pegging'' clarifies that the only time that Primary Pegging Interest will not establish or sustain the PBBO is if it is following its pegging instructions. When a Primary Pegging Interest is at a price because it is the limit price of the Primary Pegging Interest, such interest will not have established or sustained the PBBO ''as a result of pegging'' and the Exchange believes that it is no longer necessary to specifically state that pegging interest at its limit price may remain displayed at the PBBO, as currently set forth in Rules

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• Proposed paragraph (c)(3) would replace without any substantive change Rule 70.26(vi) by specifying that Primary Pegging Interest may establish an Exchange best bid or offer. The Exchange proposes to replace the rule text set forth in Rule 70.26(vi) that pegging interest that sets the Exchange best bid or offer is entitled to priority by adding to Rule 72—Equities that pegging interest may have priority interest.[32]

• Proposed paragraph (c)(4) provides that Primary Pegging Interest may include an offset value for which the adjusted price for buy (sell) pegging interest shall be the PBB (PBO) minus (plus) the offset value, which is new rule text, as discussed in greater detail above.

• Proposed paragraph (c)(5) would replace without any substantive change Rule 70.26(xiii) by specifying that Primary Pegging Interest may be designated with a minimum size of same-side volume to which such pegging interest shall peg. Other than the references to NBB and NBO changing to PBB and PBO, respectively, this text is substantively the same as in current Rule 70.26(xiii).

• Proposed paragraph (d) provides for new rule text related to the new Market Pegging Interest, which is discussed in greater detail above. More specifically, proposed paragraph (d)(1) would provide that Market Pegging Interest shall not peg to a price that is locking or crossing the Exchange best offer (bid), but instead shall peg to a price one minimum price variation lower (higher) than the Exchange best bid or offer. This proposed functionality is intended to prevent Market Pegging Interest from locking or crossing the Exchange best bid or offer. [33] Proposed paragraph (d)(2) would provide that Market Pegging Interest to buy (sell) may establish or sustain a PBB (PBO). Proposed paragraph (d)(3) would mirror paragraph (c)(3) by specifying that Market Pegging Interest may establish an Exchange best bid or offer. Finally, proposed paragraph (d)(4), would require Market Pegging Interest to include an offset value, as discussed in more detail above.

The Exchange proposes to delete without replacing Rule 70.26(iv), which provides that pegging interest trades on parity with other interest at the NBBO after interest entitled to priority is executed. The Exchange believes that this text is superfluous, in that pegging interest is not treated differently than non-pegging interest for purposes of determining parity, as set forth in Rule 72—Equities, and Rule 72—Equities governs the allocation of executions and priority.[34] The Exchange therefore is not proposing to address this concept in new pegging interest section of Rule 13.

The Exchange further proposes to add new subsection (xii) to Rule 72(c)—Equities to codify how Exchange systems treat modifications to orders for purposes of time sequencing. Specifically, if an order is modified solely to reduce the size of the order, Exchange systems accept such a modification without changing the time stamp of original order entry.[35] Accordingly, the Exchange proposes to codify in Rule 72(c)(xii)—Equities that an order that is modified to reduce the size of the order shall retain the time stamp of original order entry.

Currently, any other modification to an order, including increasing the size of the order or changing the price of the order, results in the order receiving a new time stamp. Accordingly, the Exchange proposes to codify that any other modification of an order, such as increasing the size or changing the price of an order, shall receive a new time stamp. The Exchange notes that the proposed rule language covers any modification of an order, whether directed by a member organization that entered the order or entered by Exchange systems pursuant to rule.[36] For example, Exchange systems may re-price an order if the interest is being re-priced because it is pegging interest, pursuant to Rule 13, or because it is a short sale order during a Short Sale Period, pursuant to Rule 440B(e)—Equities.

The proposed changes to Rule 72(c)(xii)—Equities will be effective on the operative date of this filing. The Exchange will announce the implementation date of the proposed rule change as it relates to pegging interest changes in a Trader Update to be published no later than 90 days following publication of the notice in the **Federal Register**. The implementation date will be no later than 90 days following publication of the Trader Update announcing publication of the notice in the **Federal Register**.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[37] in general, and furthers the objectives of Section 6(b)(5),[38] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the

70.26(viii)(A) and (B). In addition, the Exchange proposes not to replace the statement in Rule 70.26(v) that pegging is reactive because that concept was intended to mean that pegging interest cannot create a PBB or PBO. However, because proposed Market Pegging Interest can establish a new PBB or PBO, the limitation to ''reactive'' is no longer relevant and the Exchange believes that the proposed rule text that Primary Pegging Interest cannot establish or sustain the PBBO obviates the need to separately say that pegging is reactive. The Exchange also proposes to delete the term ''new'' as being redundant of the concept of establishing a PBB or PBO.

[32] The Exchange proposes to further amend Rule 72—Equities to change a reference to current Rule 70.26 to the proposed new pegging interest text within Rule 13 and change a reference to e-Quotes to ''pegging interest,'' generally.

[33] A potential scenario when Market Pegging Interest could lock or cross the Exchange best bid or offer could be if a liquidity replenishment point (''LRP'') is reached pursuant to Rule 1000—Equities, and automatic executions on one side of the market are suspended at the Exchange. In such scenario, assume that the Exchange best bid is $10.04, an LRP is reached and the Exchange is slow on the buy side, a new PBB is published at $10.03, and there is Market Pegging Interest to sell with a $0.01 offset. Because the Market Pegging Interest to sell would peg to the PBB priced at $10.03, with a penny offset, and lock the Exchange's best bid at $10.04, the Exchange proposes to reprice the Market Pegging Interest to sell to $10.05 so that it does not lock the Exchange best bid.

[34] The Exchange proposes to amend Rule 72(a)(i)—Equities and (ii)—Equities to specify that displayable interest may include pegging interest. Because pegging interest would be included as ''displayable interest,'' the description of allocation of orders would not include pegging interest with any reference to displayable interest. The Exchange also proposes conforming edits to Rule 72(a)(ii)(G)—Equities to replace references to Rule 70.26 and e-Quotes with references to Rule 13 and ''pegging interest.''

[35] The manner by which a member organization may reduce the size of an order without impacting the time stamp is to submit a partial cancellation message. For example, if a member organization has entered an order for 400 shares to buy at $10.00 and wants to reduce it to 200 shares to buy at $10.00, the member organization would submit a cancel message for 200 shares to buy at $10.00, which would leave the remaining 200 shares of the buy order with the time stamp of original order entry.

[36] To change the price of an order or increase the size of an order, a member organization would need to enter a ''cancel/replace'' message, which serves to cancel the original order and replace it with a new order. The replacement order receives a new time stamp. The ''cancel/replace'' message can also be used to change the order marking under Regulation SHO of a pending sell order (i.e., from ''long'' to ''short''). For example, if a seller increases the size of a pending sell order, the resulting modified order is considered a new order and must be marked by the broker-dealer to reflect the seller's net position at the time of order modification pursuant to Rule 200 of Regulation SHO. The Exchange notes that if a member organization uses a ''cancel/replace'' message to reduce the size of the order, rather than a partial cancellation, because the ''cancel/replace'' message cancels the original order in its entirety, the replacement order would receive a new time stamp, even if the replacement order represents only a reduction in size of the order.

[37] 15 U.S.C. 78f(b).

[38] 15 U.S.C. 78f(b)(5).

mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change is also not designed to permit unfair discrimination.

The Exchange believes that expanding the pegging functionality to DMM interest is consistent with the Act because it will remove impediments to, and perfect the mechanism of a free and open market and national market system and, in general, protect investors and the public interest by providing a mechanism for DMMs to assist them with meeting their market-making obligations to maintain quoting interest at or near the NBBO. The Exchange notes that two other markets have been approved to offer pegging functionality expressly for market markers for a similar purpose.[39] The Exchange's proposal differs because as proposed, the DMM would be able to select whether to enter Primary Pegging Interest or Market Pegging Interest, and would be able to select the offset value, thereby providing the DMM with flexibility to track the PBBO at a tighter ratio than contemplated by the rules of other exchanges that offer a market maker pegging functionality.

The Exchange further notes that expanding pegging functionality to DMM interest is not designed to permit unfair discrimination. The Exchange believes that expanding the functionality to DMMs is consistent with the existing approved rules, as well as consistent with the Act because the expansion is narrowly tailored to offer the functionality to a class of participants that has an affirmative obligation to maintain a quote at or near the NBBO.[40] The Exchange notes that another class of member organizations, Supplemental Liquidity Providers (''SLP''), provide liquidity to the Exchange, and certain SLPs can register as market makers at the Exchange.[41] While the Market Pegging Interest functionality will not be available to SLPs at this time, the Exchange does not believe that this is discriminatory because there is no requirement that a security be assigned to an SLP, and a member organization's participation in the SLP program is voluntary. By contrast, all securities traded at the Exchange must be assigned to a DMM, and a DMM unit cannot withdraw from registration in securities assigned to it.

As discussed above, rather than adding the concepts for the Market Peg functionality, the offset value, and expansion to DMM interest in Rule 70.26, the Exchange proposes to restructure the text of Rule 70.26 and move it to Rule 13. The Exchange believes that this will more appropriately address how pegging operates and consolidates rule text relating to orders and modifiers in single location in the rules. In this regard, the proposal to change references to NBB, NBO and NBBO to PBB, PBO and PBBO, respectively, would add greater specificity regarding the interest to which pegging interest may peg. The Exchange also believes that these changes are more consistent with the requirements of the Regulation NMS Order Protection Rule[42] and the related definition of protected bid and offer, as set forth in Regulation NMS Rule 600(b)(57).[43] As noted above, Exchange systems monitor the PBBO for purposes of the Order Protection Rule and, in this respect, Exchange systems also move pegging interest based on moves to the PBBO, not the NBBO.[44] The Exchange believes that this increased specificity would perfect the mechanism of a free and open market and a national market system and, in general, would protect investors and the public interest.

Additionally, use of the proposed Market Pegging Interest with an offset value, as well as the proposed offset functionality for Primary Pegging Interest, would provide greater flexibility with respect to the price to which pegging interest may peg and would encourage tighter spreads that move as the PBBO moves. The Exchange believes that this would remove impediments to, and perfect the mechanism of, a free and open market and a national market system. Additionally, requiring an offset value to be specified for pegging interest that pegs to the opposite side of the market would prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and foster cooperation and coordination with persons engaged in facilitating transactions in securities by preventing pegging interest from locking or crossing the opposite side of the market. The Exchange further believes that the proposal fosters competition as other markets already offer similar functionality.

The Exchange also believes that the proposed rule change would promote clarity and transparency by adding greater specificity with respect to the interest to which pegging interest may peg. In this regard, the proposed realignment and consolidation of existing rule text would result in a clearer rule, which would benefit all member organizations as well as others that read the rule.

The Exchange further believes that the proposed rule change would promote clarity and transparency by removing superfluous rule text that merely describes the manner in which all trading interest is treated, regardless of whether it is pegging interest. For example, removing the text within current Rule 70.26(iv), which provides that pegging interest trades on parity with non-pegging interest, would eliminate potential confusion regarding whether pegging interest is treated differently than non-pegging interest with respect to determining parity.

Finally, the Exchange believes that the proposed change to Rule 72-Equities to codify which modifications to an order that Exchange systems accept and time stamp treatment for such modified orders would promote clarity and transparency and therefore remove impediments to, and perfect the mechanism of, a free and open market and a national market system because the proposed rule change makes clear when a modification to an order results in a new time stamp for that order.

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

[39] *See supra* note 9.

[40] *See* Rule 104(a)(1)(A)—Equities.

[41] *See* Rule 107B—Equities.

[42] *See supra* note 10.

[43] *See supra* note 11.

[44] *See supra* note 12.

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[45] and Rule 19b-4(f)(6) thereunder.[46]

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–NYSEMKT–2012–67 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–NYSEMKT–2012–67. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–67 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[47]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29179 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[45] 15 U.S.C. 78s(b)(3)(A).

[46] 17 CFR 240.19b–4(f)(6).

[47] 17 C.F.R. 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68312; File No. SR–NSX–2012–015]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change Relating to Adoption of Listing Standards for Compensation Committees and Advisors as Required by Rule 10C–1

November 28, 2012.

I. Introduction

On September 26, 2012, National Stock Exchange, Inc. (''NSX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] proposed a rule change to amend certain of its rules relating to listing standards for compensation committees and advisors. The proposed rule change was published for comment in the **Federal Register** on October 17, 2012.[4] The Commission received no comment letters on this proposal.[5]

Section 19(b)(2) of the Act[6] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day from the publication of notice of filing of this proposed rule change is December 1, 2012. The Commission is extending the 45-day time period for Commission action on the proposed rule change.

The Commission finds it appropriate to designate a longer period within which to take action on this proposed rule change so that it has sufficient time to consider this proposed rule change, which would revise the rules relating to compensation committee and compensation advisor requirements.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[7] designates January 15, 2013, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove this proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29241 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 68039 (October 10, 2012), 77 FR 63914 (October 17, 2012) (SR–NSX–2012–15).

[5] The Commission notes, however, that fourteen comment letters were received in total concerning similar rule changes proposed by other national securities exchanges. *See* Securities Exchange Act Release No. 68313, (November 28, 2012) (Notice of Designation of Longer Period for Commission Action on Proposed Rule Changes Relating to Adoption of Listing Standards for Compensation Committees and Advisors as Required by Rule 10C–1 for BATS Exchange, Inc., NASDAQ OMX BX, Inc. Chicago Board Options Exchange, Inc., The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Arca LLC, and NYSE MKT LLC).

[6] 15 U.S.C. 78s(b)(2).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68310; File No. SR–EDGX–2012–47]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 15.1(a) and (c)

November 28, 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 November 26, 2012 the EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGX Rule 15.1(a) and (c). All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to introduce new flags ZA and ZR for Members that utilize Retail Orders. Flag ZA is proposed to be yielded for those Members that use Retail Orders that add liquidity to EDGX and is proposed to be assigned a rebate of $0.0032 per share. Flag ZR is proposed to be yielded for those Members that use Retail Orders that remove liquidity from EDGX and is proposed to be assigned a charge of $0.0030 per share. Footnote 4, in turn, is proposed to be amended to define a ''Retail Order'' as an agency order that originates from a natural person and is submitted to the Exchange by a Member, provided that no change is made to the terms of the order (e.g., price or side of market), and the order does not originate from a trading algorithm or any other computerized methodology. The Exchange proposes to append Footnote 4 to its default, non-tiered rebate of $0.0023 per share at the top of its fee schedule to signify a rate change if the conditions in Footnote 4 are met.[4] For additional transparency, the Exchange also proposes to append Footnote 4 to the default, non-tiered removal rate of $0.0030 per share, even though a rate change is not signified.

The Exchange notes that Members will only be able to designate their orders as ''Retail Orders'' that add/remove liquidity using the FIX order entry protocol (FIX) but not the HP–API order entry protocol (HP–API). The Exchange also notes that Members using HP–API only who would like to take advantage of the new ''Retail Order'' flags can subscribe to FIX logical ports with the first five logical ports being provided free of charge while $500.00/month is charged for each additional logical port.

The Exchange also proposes to specify in Footnote 4 that to the extent Members qualify for a rebate higher than $0.0032 per share through other volume tiers, such as the Mega Tier ($0.0035 per share) or Market Depth Tier ($0.0033 per share), Members will earn the higher rebate on Flag ZA instead of its assigned rate. In addition, to the extent Members qualify for a removal rate lower than $0.0030 per share through any other tier, such as the Mega Tier ($0.0029 per share) or Step-up Take Tier ($0.0028 per share), then Members will earn [sic] the lower removal rate on Flag ZR instead of its assigned rate.

A Member would be required to attest, in a form and/or manner prescribed by the Exchange, that they have implemented policies and procedures that are reasonably designed to ensure that every order designated by the Member as a ''Retail Order'' complies with the Exchange's definition of a Retail Order, as described above. The proposed use of Flags ZA and ZR to identify Retail Orders would be optional for Members. Accordingly, a Member that does not opt to identify qualified orders as Retail Orders would choose not to make an attestation to the Exchange and thereby, not receive the rates associated with Flags ZA or ZR.

Additionally, a Member would be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the Member to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements specified by the Exchange, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the Member represents Retail Orders from another broker-dealer customer, the Member's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The Member must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements specified by the Exchange, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[5]

The Exchange further proposes that it may disqualify a Member from qualifying for Flags ZA and ZR if the Exchange determines, in its sole discretion, that a Member has failed to abide by the requirements proposed herein, including, for example, if a Member designates orders submitted to the Exchange as Retail Orders but those orders fail to meet any of the requirements of Retail Orders. Tiered or non-tiered default rates would apply based on the Member's qualifying levels for a Member that is disqualified from qualifying for Flags ZA and ZR.

The Exchange also proposes to amend the text of the first paragraph of Footnote 1 to include Flag ZR as part of the list of ''removal flags,'' where Flag ZR removes liquidity from the EDGX Book [6] and qualifies for the removal rate of $0.0029 per share in connection with satisfying the criteria for the Mega Tier rebate.

The Exchange also proposes to amend the text of Footnote 2 to include Flag ZR as part of the ''remove liquidity'' flags

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As defined in Exchange Rule 1.5(n).

[4] Currently, the Exchange offers Members a default rate rebate of $0.0023 per share for orders in securities at or above $1.00 that add liquidity to the Exchange, where ''default'' refers to the standard rebate offered by the Exchange to Members absent Members qualifying for additional volume tiered pricing.

[5] The Financial Industry Regulatory Authority, Inc., on behalf of the Exchange, will review a Member's compliance with these requirements through an exam-based review of the Member's internal controls.

[6] As defined in Exchange Rule 1.5(d).

listed therein that qualify for the Step-Up Take Tier reduced charge of $0.0028 per share for the removal flags.[7]

The Exchange proposes to amend the text of Footnote 13, sections (i) and (ii), to include Flags ZA and ZR as qualifying ''added flags'' and ''removal flags,'' respectively, for the Investor Tier.

The Exchange proposes to implement these amendments to its fee schedule on December 1, 2012.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(4) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its Members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed rule change is reasonable, equitable and not unfairly discriminatory because it would encourage Members to send additional Retail Orders that add liquidity to the Exchange for execution in order to qualify for an incrementally higher credit for such executions that add liquidity on the Exchange.[10] In this regard, the Exchange believes that maintaining or increasing the proportion of Retail Orders in exchange-listed securities that are executed on a registered national securities exchange (rather than relying on certain available off-exchange execution methods) would contribute to investors' confidence in the fairness of their transactions and would benefit all investors by deepening the Exchange's liquidity pool, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange notes that a significant percentage of the orders of individual investors are executed over-the-counter.[11] The Exchange believes that it is thus appropriate to create a financial incentive to bring more retail order flow to a public market, such as the Exchange over off-exchange venues. The Exchange believes that investor protection and transparency is promoted by rewarding displayed liquidity on exchanges over off-exchange executions. By offering a proposed rebate of $0.0032 per share for Flag ZA, the Exchange believes it will encourage use of Retail Orders, while maintaining consistency with the Exchange's overall pricing philosophy of encouraging displayed liquidity. The Exchange places a higher value on displayed liquidity because the Exchange believes that displayed liquidity is a public good that benefits investors and traders generally by providing greater price transparency and enhancing public price discovery, which ultimately lead to substantial reductions in transaction costs.

The Exchange also notes that the Commission recently approved a similar proposal by the New York Stock Exchange, Inc. (''NYSE'') and NYSE MKT LLC (''NYSE MKT'').[12] Accordingly, the proposal generally encourages competition between exchange venues for retail order flow and encourages additional retail order flow.

The Exchange believes that a differential pricing structure for Retail Orders is not unfairly discriminatory. As stated in the NYSE RLP Approval Order, the ''Commission has previously recognized that the markets generally distinguish between individual retail investors, whose orders are considered desirable by liquidity providers because such retail investors are presumed on average to be less informed about short-term price movements, and professional traders, whose orders are presumed on average to be more informed.'' [13] The Exchange's proposed differential pricing structure for Retail Orders raises similar policy considerations as the rules approved by the Commission in the NYSE RLP Approval Order, which account for the difference of assumed information and sophistication level between different trading participants by providing Retail Orders access to better rebates.

The Exchange understands that Section 6(b)(5) of the Act [14] prohibits an exchange from establishing rules that are designed to permit unfair discrimination between market participants. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of retail order flow from other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better rebates than they currently do through bilateral internalization arrangements. Additionally, the Exchange believes that the proposed Retail Order rate for Flag ZA (rebate of $0.0032 per share) will incentivize Members to submit Retail Orders that add liquidity to the Exchange. As a result of the additional liquidity, the Exchange believes that this would result in improved market quality.

The Exchange also believes that the proposed rates for Retail Orders (Flags

[7] The Exchange notes that where Members that have Retail Orders that add liquidity to EDGX and also qualify for the Step-Up Take Tier, the Exchange would provide such Members the more favorable rebate of $0.0032 per share. This is made clear in the language in the second paragraph of proposed Footnote 4, as described above.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] The Exchanges notes that the removal fee through Flag ZR is the same as the default, non-tiered removal rate. Thus, the Exchange believes that there would be a neutral effect on removers of liquidity as the Exchange is neither incenting nor disincentivizing the use of Flag ZR.

[11] *See* Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (noting that dark pools and internalizing broker-dealers executed approximately 25.4% of share volume in September 2009). *See also* Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) (available on the Commission's Web site). In her speech, Chairman Schapiro noted that nearly 30 percent of volume in U.S.-listed equities was executed in venues that do not display their liquidity or make it generally available to the public and the percentage was increasing nearly every month.

[12] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55; SR–NYSEAmex–2011–84) (the ''RLP Approval Order'').

[13] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55; SR–NYSEAmex–2011–84) (the ''NYSE RLP Approval Order''). In conjunction with the approval of the NYSE Retail Liquidity Program, a nearly identical program was proposed and approved to operate on NYSE MKT (formerly, the American Stock Exchange), at 40679–40680 (citing Concept Release on Equity Market Structure and approval of an options exchange program related to price improvement for retail orders). Certain options exchanges deploy this same rationale today through pricing structures that vary for a trading participant based on the capacity of the contra-side trading participant. *See, e.g.,* Securities Exchange Act Release No. 63632 (January 3, 2011), 76 FR 1205 (January 7, 2011) (SR–BATS–2010–038) (notice of filing and immediate effectiveness of proposal to modify fees for BATS Exchange Inc. (''BATS'') Options, including liquidity rebates that are variable depending on the capacity of the contra-party to the transaction; see also Securities Exchange Act Release No. 67171 (June 8, 2012), 77 FR 35732 (June 14, 2012) (SR–NASDAQ–2012–068) (notice of filing and immediate effectiveness of proposal to modify fees for the NASDAQ Options Market, including certain fees and rebates that are variable depending on the capacity of the contra-party to the transaction).

[14] 15 U.S.C. 78f(b)(5).

ZA and ZR, respectively) are equitable and not unfairly discriminatory because Members could qualify for the same rates (rebate of $0.0032 per share and charge of $0.0030 per share, respectively) through other volume discounts or through the default, non-tiered removal rate. For example, Members could achieve the rebate of $0.0032 per share if they satisfy the conditions for the Mega Tier rebate of $0.0032 per share. Members could also achieve the removal fee of $0.0030 per share without satisfying an additional tier as $0.0030 per share is the default rate for removing liquidity on the Exchange's fee schedule. Thus, the Exchange believes that there would be a neutral effect on removers of liquidity as the Exchange is neither incenting nor disincentivizing the use of Flag ZR.

Moreover, the proposed use of Retail Orders, which are available for all Members that utilize FIX, is equitable and not unfairly discriminatory because FIX is available for all Members on an equal and non-discriminatory basis, as all Members can sign up for new logical ports using FIX or HP–API at a cost of $500/month (the first five DIRECT logical ports being provided free). The Exchange also notes that all Members that it expects will send Retail Orders currently maintain logical ports that utilize FIX. The Exchange also notes that the Members that only utilize HP–API are generally those that are more concerned with latency as they trade for their own accounts where their order flow typically would not qualify as retail order flow. Finally, all order entry protocols on the Exchange do not necessarily support all Exchange functions and are designed differently in order to support the Member base most likely to utilize them.

The Exchange believes its amendments to footnotes 1, 2, and 13 support the Exchange's efforts to achieve consistent application and specificity among the flags on the fee schedule and provide transparency for its Members. First, in SR–EDGX–2012–39, the Exchange discounted certain ''removal flags'' if a Member satisfied the criteria for the Mega Tier rebate in Footnote 1.[15] Since Flag ZR is a removal flag with an assigned rate of $0.0030 per share, the Exchange believes it is appropriate to include Flag ZR in its list of removal flags that would qualify for a discounted removal rate of $0.0029 per share. The Exchange also believes that these proposed amendments are non-discriminatory because they apply to all Members.

Secondly, in SR–EDGX–2012–46,[16] the Exchange listed in Footnote 2 of the fee schedule those removal flags that would qualify for the Step-up Take Tier if a Member satisfied the criteria. Since Flag ZR is a removal flag with an assigned rate of $0.0030 per share, the Exchange believes it is appropriate to include Flag ZR in its list of removal flags that would qualify for a discounted removal rate of $0.0028 per share.[17] The Exchange also believes that these proposed amendments are non-discriminatory because they apply to all Members.

Finally, in SR–EDGX–2012–12, the Exchange included ''added'' and ''removal flags'' in its calculation of the ''add liquidity'' to ''removed liquidity'' ratio to qualify for the Investor Tier.[18] Since Flag ZR is a removal flag and Flag ZA is an add flag, the Exchange believes it is appropriate to include the volume from both of these flags in its calculation of the ''add liquidity'' to ''removed liquidity'' ratio. The Exchange also believes that these proposed amendments are non-discriminatory because they apply to all Members.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(2) [20] thereunder. 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–EDGX–2012–47 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–EDGX–2012–47. 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

[15] *See* Securities Exchange Act Release No. 67818 (September 10, 2012), 77 FR 56890 (September 14, 2012) (SR–EDGX–2012–39).

[16] *See* Securities Exchange Act Release No. 68166 (November 6, 2012), 77 FR 67695 (November 13, 2012) (SR–EDGX–2012–46).

[17] The Exchange notes that Flag ZA is not yielded with the Step-Up Take Tier, like other listed add liquidity flags listed in Footnote 2, as the rate provided on the Step-Up Take Tier for adding liquidity (rebate of $0.0030 per share) is not as favorable to Members as the rate yielded on Flag ZA itself (rebate of $0.0032 per share). As a result, Members that have Retail Orders that add liquidity to EDGX would receive the rebate of $0.0032 per share in the situation where the Member also qualifies for the Step-Up Take Tier. This is made clear in the language in the second paragraph of proposed Footnote 4, as described above.

[18] *See* Securities Exchange Act Release No. 66762 (April 6, 2012), 77 FR 22053 (April 12, 2012) (SR–EDGX–2012–12).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 19b–4(f)(2).

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–EDGX–2012–47 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29239 Filed 12–3–12; 8:45 am]

BILLING CODE 8011–01–P

[21] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–50]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATE: Comments on this petition must identify the petition docket number and must be received on or before December 24, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–1132 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Theresa White, ANM–113, Standardization Branch, Federal Aviation Administration, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA 98057–3356; email *Theresa.j.White@FAA.gov*; (425) 227–2956; fax: 425–227–1320; or Andrea Copeland, ARM–208, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; email *andrea.copeland@faa.gov*; (202) 267–8081.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 29, 2012.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–1132.

Petitioner: The Boeing Company.

Sections of 14 CFR Affected: 14 CFR 25.901(c) and 25.981(a)(3).

Description of Relief Sought: The petitioner seeks exemption from the provisions of 14 CFR 25.901(c), at Amendments 25–126, and 25.981(a)(3), at Amendments 25–125, at the system level as they apply to the fuel quantity indication system (FQIS) installed on the 767–200/–300/–300F/–400ER airplanes for the fuel quantity processor unit (FQPU) parts obsolescence modification.

[FR Doc. 2012–29278 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–46]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 24, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0579 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://*

www.regulations.gov, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Keira Jones (202) 267–4024, or Tyneka Thomas (202) 267–7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 29, 2012.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–0579

Petitioner: Jetstream Aviation (Jetstream).

Section of 14 CFR Affected: 14 CFR 125.1.

Description of Relief Sought: Jetstream Aviation seeks relief from applicability as stated in § 125.1 to add its Challenger (CL–600–2B16) aircraft to the Operations Specifications of Jetstream's existing part 125 operating certificate.

[FR Doc. 2012–29280 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–51]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 24, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–1137 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Theresa White, ANM–113, Standardization Branch, Federal Aviation Administration, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA 98057–3356; email *Theresa.j.White@FAA.gov*; (425) 227–2956; fax: 425–227–1320; or Andrea Copeland, ARM–208, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW.; Washington, DC 20591; email *andrea.copeland@faa.gov*; (202) 267–8081.

Issued in Washington, DC, on November 29, 2012.

Lirio Liu,

Director, Office of Rulemaking,

Petition for Exemption

Docket No.: FAA–2012–1137.

Petitioner: The Boeing Company.

Sections of 14 CFR Affected: 14 CFR 25.901(c) and 25.981(a)(3).

Description of Relief Sought: The petitioner seeks exemption from the provisions of 14 CFR 25.901(c), at Amendment 25–126, and 25.981(a)(3), at Amendment 25–125, at the system level as they apply to the fuel quantity indication system (FQIS) installed on the 737–600/–700/–700C/–800/–900/–900ER airplanes for the fuel quantity processor unit (FQPU) parts obsolescence modification, the semi-monolithic side of body and forward bulkhead production improvement changes.

[FR Doc. 2012–29277 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Over-the-Road Bus Accessibility Grant Program

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Announcement of Project Selections.

SUMMARY: The U.S. Department of Transportation (DOT) Federal Transit Administration (FTA) announces the selection of projects to be funded under Fiscal Year (FY) 2012 appropriations for the Over-the-Road Bus (OTRB) Accessibility Program, authorized by Section 3038 of the Transportation Equity Act for the 21st Century (TEA–21). The OTRB Accessibility Program makes funds available to private operators of over-the-road buses to help finance the incremental capital and training costs of complying with DOT's over-the-road bus accessibility rule, published in the **Federal Register** on September 24, 1998. Under the rule, all new buses obtained by large fixed-route carriers after October 30, 2000, must be accessible with wheelchair lifts and tie downs that allow passengers to ride in their own wheelchairs. October 29, 2012 was the deadline whereby the fixed-route bus fleets of large carriers must be 100 percent accessible.

FOR FURTHER INFORMATION CONTACT: Successful applicants should contact the appropriate FTA Regional Office for grant-specific issues; or Élan Flippin, Office of Program Management, 202–366–3800, for general information about the OTRB Program. Contact information for FTA Regional Offices can be found at *http://www.fta.dot.gov/.* For information related to the OTRB accessibility rule, contact Peter Chandler, Federal Motor Carrier Safety Administration, 202–366–5763.

SUPPLEMENTARY INFORMATION: A total of $8.8 million was made available for the program in FY 2012: $6.6 million for intercity fixed-route providers and $2.2 million for all other providers, such as commuter, charter, and tour operators. A total of 114 applicants requested $34.5 million: $23.2 million was requested by intercity-fixed route providers, and $11.3 million was requested by other providers. A total of 77 projects were selected for funding. Project selections were made on a discretionary basis, based on each applicant's responsiveness to statutory project selection criteria published in the April 30, 2012 Notice of Funding Availability.

Project Implementation: Due to the high demand for the funds available, most successful applicants received less funding than they requested. The selected projects will provide funding for the incremental cost of adding at least one new lift to vehicles, retrofitting vehicles, and providing training not to exceed $2,250. Training was only made available to providers of ''Other'' service and is listed in Table II where approved.

Grantees selected for competitive discretionary funding should work with their FTA regional office to finalize the electronic grant application in FTA's Transportation Electronic Awards Management System (TEAM) for the projects identified in Tables I and II. A discretionary project identification number has been assigned to each project for tracking purposes and must be used in the TEAM application. Awardees who are new to FTA should contact their regional office immediately for guidance about becoming an FTA grantee. Regional office contact information can be found at *http://www.fta.dot.gov/.* The grant applications will be sent to the U.S. Department of Labor (DOL) for certification under labor protection requirements pursuant to 49 U.S.C. 5333(b). After referring applications to affected employees represented by a labor organization, DOL will issue a certification to FTA. Terms and conditions of the certification will be incorporated in the FTA grant agreement under the Special Warranty Provisions of the Department of Labor Guidelines ''*Section 5333(b), Federal Transit Law'' at 29 CFR 215.7.* The grantee must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal requirements in carrying out the project supported by the FTA grant. This is the final year for discretionary awards under the Over-the-Road Bus program as the program was repealed under the Moving Ahead for Progress in the 21st Century Act, signed by President Obama on July 6, 2012, and effective on October 1, 2012. Funds allocated in this announcement must be obligated in a grant by September 30, 2015.

Issued in Washington, DC, this 29th day of November, 2012.

Peter Rogoff,

Administrator.

BILLING CODE 4910–57–P

Table I
Federal Transit Administration
FY 2012 Over-the-Road Bus Discretionary Program
Intercity Project Awards

State	Project IDs	Recipient	Project Description	Allocation
CA	D2012-OTRB-001	American Star Tours, Inc.	Retrofits	$53,712
CA	D2012-OTRB-002	Lux Bus America	New lifts	$33,218
CA	D2012-OTRB-003	Orange Belt Stages	Retrofits	$61,405
CO	D2012-OTRB-004	Ramblin' Express, Inc.	New lifts	$61,405
FL	D2012-OTRB-005	Latin Express Service, Inc.	New lifts	$29,700
FL	D2012-OTRB-006	Red Coach, Inc.	New lifts	$59,516
GA	D2012-OTRB-007	American Coach Lines of Atlanta, Inc.	Retrofits	$95,224
IA	D2012-OTRB-008	Burlington Stage Lines, LTD	New Lifts	$65,640
IN	D2012-OTRB-009	Free Enterprise System/Royal, LLC	Retrofits	$57,888
IN	D2012-OTRB-010	Star of America, LLC	New lifts	$31,950
IN	D2012-OTRB-011	TRI-STATE COACH LINES, INC.	Retrofits	$29,644
MA	D2012-OTRB-012	Peter Pan Bus Lines, Inc.	New lifts	$283,734
MA	D2012-OTRB-013	Plymouth & Brockton Street Railway	New lifts	$93,167
MD	D2012-OTRB-014	Dillon's Bus Service, Inc.	Retrofits	$254,250
NE	D2012-OTRB-015	Busco, Inc.	Retrofits	$258,111
NH	D2012-OTRB-016	Jalbert Leasing, Inc. dba C&J Bus Lines	New lifts	$46,583

Table I
Federal Transit Administration
FY 2012 Over-the-Road Bus Discretionary Program
Intercity Project Awards

State	Project IDs	Recipient	Project Description	Allocation
NJ	D2012-OTRB-017	Academy Bus, LLC	New Lifts	$1,000,000
NJ	D2012-OTRB-018	Hudson Transit Lines, Inc.	New Lifts	$235,034
NY	D2012-OTRB-019	Adirondack Transit Lines, Inc.	New lifts and Retrofits	$266,795
NY	D2012-OTRB-020	Chenango Valley Bus Lines Inc	Retrofits	$27,526
OH	D2012-OTRB-021	Lakefront Lines, Inc.	Retrofits	$82,602
PA	D2012-OTRB-022	Fullington Auto Bus Company (d/b/a Fullington Trailways, LLC	Retrofits	$120,693
RI	D2012-OTRB-023	Bonanza Acquisition LLC	New Lifts	$105,871
TX	D2012-OTRB-024	Greyhound Lines, Inc.	New Lifts	$2,983,771
UT	D2012-OTRB-025	All Resorts Coach, INC	New Lifts	$74,110
WI	D2012-OTRB-026	Badger Coaches Inc	New Lifts	$93,167
WI	D2012-OTRB-027	Sam Van Galder Inc	Retrofits	$95,284
			Total	$6,600,000

Table II
Federal Transit Administration
FY 2012 Over-the-Road Bus Discretionary Program
Other Project Awards

State	Project IDs	Recipient	Project Description	Allocation
AR	D2012-OTRB-028	Eventure America, Inc. dba Little Rock Tours	Retrofits and training	$30,082
AZ	D2012-OTRB-029	Mountain View Tours, INC	New lifts and training	$35,468
CA	D2012-OTRB-030	CUSA AWC, LLC	Retrofit	$25,200
CA	D2012-OTRB-031	Hot Dogger Tours, INC	New lifts and training	$35,468
CA	D2012-OTRB-032	McClintock - Hartley Enterprises, Inc.	New lifts and training	$35,218
CA	D2012-OTRB-033	Screamline Investment Corporation	Retrofit	$35,000
CA	D2012-OTRB-034	Silver State Coaches, Inc.	New lifts	$65,000
CA	D2012-OTRB-035	SureRide Charter Inc.	Lifts and training	$98,686
CT	D2012-OTRB-036	Arrow Line Acquisition LLC	New lifts and training	$34,237
CT	D2012-OTRB-037	DATTCO, Inc.	New lifts and training	$102,250
FL	D2012-OTRB-038	Classic Bus Lines, Inc.	New lifts	$29,700
FL	D2012-OTRB-039	Escot Bus Lines Inc	New lifts and training	$71,552
FL	D2012-OTRB-040	Express Transportation, Inc.	New lifts and training	$25,834
FL	D2012-OTRB-041	Treasure Coast Motor Coach, Inc.	New lifts and training	$32,146
GA	D2012-OTRB-042	Southeastern Stages, Inc.	Retrofits	$57,180
IL	D2012-OTRB-043	Let Me Arrange It Inc.	New lifts	$35,000
IL	D2012-OTRB-044	Vandalia Bus Lines, Inc.	New lifts	$29,896
IN	D2012-OTRB-045	Free Enterprise System Inc	Retrofits and training	$67,250
IN	D2012-OTRB-046	Kaser Enterprises, Inc.	New lifts and training	$29,127
MA	D2012-OTRB-047	Bloom's Bus Lines Inc	New lifts	$25,200

Table II
Federal Transit Administration
FY 2012 Over-the-Road Bus Discretionary Program
Other Project Awards

State	Project IDs	Recipient	Project Description	Allocation
MA	D2012-OTRB-048	Crystal Transport	Retrofits	$35,000
MD	D2012-OTRB-049	Adventure Tours by Dawn, LLC	New lifts and training	$27,450
MD	D2012-OTRB-050	First Priority Tours, Inc.	New lifts, retrofits and training	$37,250
MD	D2012-OTRB-051	Golden Ring Travel and Transportation, Inc.	New lifts and training	$37,250
MD	D2012-OTRB-052	Rill's Bus Service	New lifts	$29,700
ME	D2012-OTRB-053	ISHERWOOD ENTERPRISES, INC. dba CUSTOM COACH AND LIMOUSINE	New lifts and training	$37,250
MN	D2012-OTRB-054	Lorenz Bus Service, Inc.	New lifts, retrofits and training	$57,362
MN	D2012-OTRB-055	Trobec's Bus Service, Inc.	New lifts and training	$37,250
MN	D2012-OTRB-056	Voigt's Bus Service Inc	New lifts and training	$37,250
MS	D2012-OTRB-057	Vision Tours, LLC	Retrofits and training	$37,250
NC	D2012-OTRB-058	T.R.Y., Inc.	New lifts	$30,075
NJ	D2012-OTRB-059	OLYMPIA TRAILS BUS COMPANY, INC.	Retrofits and training	$61,950
NJ	D2012-OTRB-060	Stout's Charter Service Inc.	New lifts and training	$37,250
NV	D2012-OTRB-061	Celebrity Coaches of America, Inc.	Lifts and retrofits	$31,285
NV	D2012-OTRB-062	CUSA ELKO LLC	Retrofits	$86,000
NY	D2012-OTRB-063	L & G Leasing, Inc.	New lifts and training	$30,170
OR	D2012-OTRB-064	CUSA RAZ, LLC	Retrofits and training	$31,950
PA	D2012-OTRB-065	Butler Motor Transit, Inc.	Retrofits and training	$72,250
PA	D2012-OTRB-066	MGR Travel, Ltd.	New lifts	$25,700
PA	D2012-OTRB-067	O.D. Anderson, Inc.	New lifts and training	$67,250
PA	D2012-OTRB-068	Transportation Management Services, Inc	Retrofits and training	$59,917
TN	D2012-OTRB-069	RLCL Acquisition, LLC	New lifts and training	$67,250

Table II
Federal Transit Administration
FY 2012 Over-the-Road Bus Discretionary Program
Other Project Awards

State	Project IDs	Recipient	Project Description	Allocation
TX	D2012-OTRB-070	Lone Star Coaches, Inc.	New lifts and training	$31,543
TX	D2012-OTRB-071	Star Shuttle, Inc.	New lifts and training	$31,950
VA	D2012-OTRB-072	DC Trails, Inc.	New lifts and training	$72,250
VA	D2012-OTRB-073	QT Transport Inc	Retrofits and training	$27,450
VA	D2012-OTRB-074	Venture Tours, Inc.	Retrofits and training	$22,311
VT	D2012-OTRB-075	Premier Coach Company, Inc.	New lifts and training	$87,060
WA	D2012-OTRB-076 ($53,883); D2012-OTRB-06092($31,817)	GTO LLC	New lifts	$85,700
WV	D2011-OTRB-098 ($18,308); D2012-OTRB-09001($10,022)	Coach USA, Inc.	New lifts and training	$28,330
			Total	$2,260,147

[FR Doc. 2012–29272 Filed 12–3–12; 8:45 am]
BILLING CODE 4910–57–C

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2012–0106]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before February 4, 2013.

FOR FURTHER INFORMATION CONTACT: Michael Hokana, Maritime Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: 202–366–0760; or email *michael.hokana@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title of Collection: Jones Act Vessel Availability Determinations.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0545.

Form Numbers: MA–1074 and 1075.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This collection of information will be used to gather information regarding the availability, location, and specifications of U.S.-flag vessels for the purpose of making vessel availability determinations. *Need and use of the Information:* The information is needed in order for the Maritime Administrator to make a timely and informed decision on the availability of coastwise qualified vessels in support of a request from the Department of Homeland Security prior to the final decision on granting a waiver request under 46 U.S.C. 501(b). The information will be specifically used to determine if there are coastwise qualified vessels available for a certain requirement.

Description of Respondents: Respondents include but are not limited to coastwise qualified vessel owners, operators, charterers, brokers and representatives.

Annual Responses: 255 responses.

Annual Burden: 383 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://www.regulations.gov.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. *EDT (or EST*), Monday through Friday, except Federal Holidays. An electronic version

of this document is available on the World Wide Web at *http://www.regulations.gov.*

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.regulations.gov.*

Authority: 49 CFR 1.66.

By Order of the Maritime Administrator,

Dated: November 28, 2012.

Julie Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–29268 Filed 12–3–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 30186]

Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, MT; Extension of Comment Period for the Draft Scope of Study

The Surface Transportation Board's Office of Environmental Analysis (OEA) issued a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS), a Draft Scope of Study, and a notice of scoping meetings in the above-captioned proceeding on October 22, 2012 and published it in the **Federal Register** on the same day. In the NOI, OEA invited public comments on the Draft Scope of Study, potential alternative routes for the proposed rail line, and environmental issues and concerns by December 6, 2012. In response to a number of requests for an extension of the comment period, OEA is issuing this Notice to advise the public and all interested parties that the comment period will be extended until January 11, 2013.

OEA will issue a Final Scope of Study for the EIS after the close of the scoping comment period. Any comments previously submitted on the NOI and Draft Scope of Study need not be resubmitted.

Scoping comments submitted by mail should be addressed to: Ken Blodgett, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, Attention: Environmental filing, Docket No. FD 30186.

Scoping comments may also be filed electronically on the Board's Web site, *http://www.stb.dot.gov*, by clicking on the ''E–FILING'' link.

Please refer to Docket No. FD 30186 in all correspondence, including e-filings, addressed to the Board. Scoping comments are now due by January 11, 2013. For more information about the Board's environmental review process and this EIS, please call OEA's toll-free number for the project at 1–866–622–4355 or visit the Board-sponsored project Web site at *www.tonguerivereis.com.*

By the Board, Victoria Rutson, Director, Office of Environmental Analysis.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–29230 Filed 12–3–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 56–F

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–F, Notice Concerning Fiduciary Relationship of Financial Institution.

DATES: Written comments should be received on or before February 4, 2013 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 notice should be directed to Martha R. Brinson, at (202) 622–3869, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice Concerning Fiduciary Relationship of Financial Institution.

OMB Number: 1545–2159.

Notice Number: Form 56–F.

Abstract: The filing of Form 56–F by a fiduciary (FDIC or other federal agency acting as a receiver or conservator of a failed financial institution (bank or thrift)) gives the IRS the necessary information to submit send letters, notices, and notices of tax liability to the federal fiduciary now in charge of the financial institution rather than sending the notice, etc. to the institution's last known address.

Current Actions: Extension of currently approved collection. There are no changes being made to the notice at this time.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 106.

Estimated Average Time per Respondent: 9 hrs., 23 mins.

Estimated Total Annual Burden Hours: 997 hrs.

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: November 26, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–29147 Filed 12–3–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 an existing Treatment of Shareholders of Certain Passive Foreign Investment Companies.

DATES: Written comments should be received on or before February 4, 2013 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 regulation should be directed to Martha R. Brinson, at (202) 622–3869, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Martha.R.Brinson@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Treatment of Shareholders of Certain Passive Foreign Investment Companies.

OMB Number: 1545–1507.

Regulation Project Number: INTL–656–87 (TD 8701).

Abstract: The reporting requirements affect United States persons that are direct and indirect shareholders of passive foreign investment companies (PFICSs). The requirements enable the Internal Revenue Service to identify PFICs, United States shareholders, and transactions subject to PFIC taxation and verify income inclusions, excess distributions, and deferred tax amounts.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals, business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 131,250.

Estimated Time per Respondent: 46 minutes.

Estimated Total Annual Burden Hours: 100,000.

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: November 26, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–29148 Filed 12–3–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Disciplinary Appeals Board Panel

AGENCY: Department of Veterans Affairs.

ACTION: Notice with request for comments.

SUMMARY: Section 203 of the Department of Veterans Affairs Health Care Personnel Act of 1991 (Pub. L. 102–40), dated May 7, 1991, revised the disciplinary grievance and appeal procedures for employees appointed under 38 U.S.C. 7401(1). It also required the periodic designation of employees of the Department who are qualified to serve on Disciplinary Appeals Boards. These employees constitute the Disciplinary Appeals Board Panel from which Board members in a case are appointed. This notice announces that the roster of employees on the Panel is available for review and comment. Employees, employee organizations, and other interested parties shall be provided, without charge, a list of the names of employees on the Panel upon request and may submit comments concerning the suitability for service on the Panel of any employee whose name is on the list.

DATES: Names that appear on the Panel may be selected to serve on a Board or as a grievance examiner after January 3, 2013.

ADDRESSES: Requests for the list of names of employees on the Panel and written comments may be directed to: Secretary of Veterans Affairs (051), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420. Requests and comments may also be faxed to (202) 273–9776.

FOR FURTHER INFORMATION CONTACT: Larry Ables, Employee Relations and Performance Management Service (051), Office of Human Resources Management, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420. Mr. Ables may be reached at (202) 461–6172.

SUPPLEMENTARY INFORMATION: Public Law 102–40 requires that the availability of the roster be posted in the **Federal Register** periodically, and not less than annually.

Approved: November 27, 2012.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2012–29228 Filed 12–3–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Performance Review Board Members

AGENCY: Corporate Senior Executive Management Office, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Under the provisions of 5 U.S.C. 4314(c)(4) agencies are required to publish a notice in the **Federal Register** of the appointment of

Performance Review Board (PRB) members. This notice announces the appointment of persons to serve on the Performance Review Board of the Department of Veterans Affairs.

DATES: *Effective Date:* December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Christine Kluh, Deputy Assistant Secretary, Corporate Senior Executive Management Office (052), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–7890.

SUPPLEMENTARY INFORMATION: The membership of the Department of Veterans Affairs Performance Review Board is as follows:

Primary Board Members

Jose Riojas, Assistant Secretary for Operations, Security, and Preparedness: Chairperson

Michael Cardarelli, Principal Deputy Under Secretary for Benefits, Veterans Benefits Administration

Laura Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals

Robert Jesse, Principal Deputy Under Secretary for Health, Veterans Health Administration

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Dated: November 28, 2012.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Revised Critical Habitat for the Northern Spotted Owl; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2011–0112; 4500030114]

RIN 1018–AX69

Endangered and Threatened Wildlife and Plants; Designation of Revised Critical Habitat for the Northern Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate revised critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act. In total, approximately 9,577,969 acres (ac) (3,876,064 hectares (ha)) in 11 units and 60 subunits in California, Oregon, and Washington fall within the boundaries of the critical habitat designation.

DATES: The rule becomes effective on January 3, 2013.

ADDRESSES: The final rule and the associated economic analysis and environmental assessment are available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2011–0112. 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, Oregon Fish and Wildlife Office, 2600 SE. 98th Ave., Suite 100, Portland, OR 97266; telephone 503–231–6179; facsimile 503–231–6195.

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/oregonfwo,* at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2011–0112, and at the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). The additional tools and supporting information that we developed for this critical habitat designation are available at the Fish and Wildlife Service Web site and Field Office set out above and at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Henson, Field Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE. 98th Ave., Suite 100, Portland, OR 97266; telephone 503–231–6179; facsimile 503–231–6195. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Organization of the Final Rule

This final rule describes the revised critical habitat designation for the northern spotted owl under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). The pages that follow summarize the comments and information received in response to the proposed designation published on March 8, 2012 (77 FR 14062), and in response to the notice of availability of the draft economic analysis and draft environmental assessment of the proposed revised designation published on June 1, 2012 (77 FR 32483), describe any changes from the proposed rule, and detail the final designation for the northern spotted owl. To assist the reader, the content of the document is organized as follows:

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I. Executive Summary

Why we need to publish a rule. This is a final rule to designate revised critical habitat for the northern spotted owl. Under the Endangered Species Act of 1973, as amended (Act), designations and revisions of critical habitat can only be completed through rulemaking.

We, the U.S. Fish and Wildlife Service (Service), listed the northern spotted owl as threatened on June 26, 1990 (55 FR 26114), because of widespread loss of habitat across its range and the inadequacy of existing regulatory mechanisms to conserve it. We previously designated critical habitat for the northern spotted owl in 1992 and 2008. The 2008 designation (73 FR 47326, August 13, 2008) was subsequently challenged in court. In July 2009, the Federal Government requested voluntary remand of the 2008 revised critical habitat designation. On March 8, 2012, we published in the **Federal Register** a revised proposed critical habitat designation for the northern spotted owl (77 FR 14062). This rule complies with the court-ordered deadline to submit a final revised critical habitat rule for the northern spotted owl to the **Federal Register** by November 21, 2012.

Section 4(b)(2) of the Act states that the Secretary shall designate 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 critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the

definition of critical habitat for the northern spotted owl.

The rule revises our designation of critical habitat in Washington, Oregon, and California. Consistent with the best scientific data available, the standards of the Act and our regulations, we are designating 9,577,969 ac (3,876,064 ha) in 11 units and 60 subunits in California, Oregon, and Washington that meet the definition of critical habitat. The approximate totals by State and comparison to previous designations are outlined below, as follows (note some units and subunits overlap State boundaries; therefore, totals do not add up to 11 units and 60 subunits):

- Approximately 2,918,067 ac (1,180,898 ha) in 4 units and 26 subunits in Washington.
- Approximately 4,557,852 ac (1,844,496 ha) in 8 units and 58 subunits in Oregon.
- Approximately 2,102,050 ac (850,669 ha) in 5 units and 36 subunits in California.
- This designation increases previously designated critical habitat, including the addition of 272,026 ac (110,085 ha) ac of State lands. However, this final critical habitat designation is a decrease from the 13,962,449 ac (5,649,660 ha) identified as meeting the definition of critical habitat in the March 8, 2012 (77 FR 14062) proposed rule.
- We have also excluded areas of State and private land from this designation of critical habitat under section 4(b)(2) of the Act, as explained in the Exclusions section of this rule.

The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011; hereafter ''Revised Recovery Plan'') recommends that land managers: (1) conserve older forest, high-value habitat, and areas occupied by northern spotted owls; and (2) actively manage forests to restore ecosystem health in many parts of the species' range. In developing this critical habitat designation, we also recognize the importance of the Northwest Forest Plan (NWFP) and its land management strategy for conservation of native species associated with old-growth and late-successional forest, including the northern spotted owl. The designation of areas as critical habitat does not change land use allocations or Standards and Guidelines for management under the NWFP, nor does this rule establish any management plan or prescriptions for the management of critical habitat. However, we encourage land managers to consider implementation of forest management practices recommended in the Revised Recovery Plan to restore natural ecological processes where they have been disrupted or suppressed (*e.g.,* natural fire regimes), and application of ''ecological forestry'' management practices (e.g., Gustafsson *et al.* 2012, entire; Franklin *et al.* 2007, entire; Kuuluvian and Grenfell *et al.* 2012 entire) within critical habitat to reduce the potential for adverse impacts associated with commercial timber harvest when such harvest is planned within or adjacent to critical habitat. In sum, the Service encourages land managers to consider the conservation of existing high-quality northern spotted owl habitat, the restoration of forest ecosystem health, and the ecological forestry management practices recommended in the Revised Recovery Plan that are compatible with both the goals of northern spotted owl recovery and Standards and Guidelines of the NWFP.

The basis for our action. This final critical habitat designation is based on the current status and recent scientific research on northern spotted owl populations. We used the best scientific information available to identify those specific areas within the geographical area occupied by the species at the time it was listed on which are found those physical or biological features essential to the conservation of the species, and which may require special management considerations or protection. For the northern spotted owl, these features include particular forest types that are used or likely to be used by northern spotted owls for nesting, roosting, foraging, or dispersing habitat. In addition, we used the best available information to identify those areas that are otherwise determined to be essential to the conservation of the species.

We relied on the recovery criteria set forth in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) to determine what is essential to the conservation of the species; therefore we have identified a habitat network that meets the following criteria:

- Ensures sufficient habitat to support stable, healthy populations across the range, and also within each of the 11 recovery units;
- Ensures distribution of northern spotted owl populations across the range of habitat conditions used by the species;
- Incorporates uncertainty, including potential effects of barred owls, climate change, and wildfire disturbance risk; and
- Recognizes that these protections are meant to work in concert with other recovery actions, such as barred owl management.

To assist us in determining critical habitat, we integrated habitat and demographic information (relating to occupancy, survival, reproduction, and movement) to develop a modeling tool that assesses the distribution of habitat quality and population dynamics across the range, and provides a more accurate picture of where high-quality northern spotted owl habitat exists. This model synthesized more than 20 years of data from on-the-ground demographic surveys, and allowed for analysis of how northern spotted owl populations would fare under different habitat conservation scenarios. We determined what is essential to recovery of the northern spotted owl by evaluating the performance of each potential critical habitat scenario considered against the recovery needs of the owl.

Peer reviewers support our methods. We solicited expert opinions from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule.

Consistency with Presidential Directive. On February 28, 2012, the President issued a memorandum to the Secretary of the Interior regarding the proposed revised critical habitat for the northern spotted owl, specifically on minimizing regulatory burdens. The Service has fully addressed each of the directives in this memo and has taken steps to comply with this directive, including:

- We conducted and completed, as is the Service's normal practice, an economic analysis on the probable impacts of the proposed revised critical habitat.
- We provided a description of ecological forestry management actions that may be compatible with both northern spotted owl recovery and timber harvest, as recommended in the Revised Recovery Plan for the Northern Spotted Owl. This discussion appears in the following sections of this rule:
  - An Ecosystem-based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat
  - Special Management Considerations or Protection
  - Determination of Adverse Effects and Application of the ''Adverse

Modification'' Standard.

We note, however, that this discussion of ecological forestry is provided to Federal, State, local and private land managers, as well as the public, for their consideration as they make decisions on the management of forest land under their jurisdictions and through their normal processes. This critical habitat rule itself does not take any action or adopt any policy, plan, or program in relation to active forest management.

- As per the Service's normal practice, we solicited public review and comment on this rulemaking action, using information thus gained to correct and refine our designation.
- We fully considered exclusion of private lands and State lands from the final revised critical habitat, consistent with the best available scientific and commercial information.

The Service appreciates, and is sensitive to, the potential for regulatory burden that may result from our designation of critical habitat for the northern spotted owl under the Act. Our analysis indicated that the revision of critical habitat could have relatively little incremental effect above and beyond the conservation measures already required as a result of its threatened species status under the Act, and thus is not expected to impose substantial additional regulatory burdens. The Service appreciates, and relies on the many partners we have in conservation, including private landowners, Tribes, States, and local governments, and strongly desires to promote conservation partnerships to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people.

Costs and benefits. In order to identify and analyze the potential economic impacts of the designation of critical habitat for the northern spotted owl, we worked with a contractor to draft an economic analysis report, which was released in May of 2012 and finalized following consideration and incorporation of public comment. The report looked at a variety of economic activities including timber harvest, wildlife management, road construction, and other forest management activities, but focused primarily on timber management. It concludes that only a relatively small portion of the overall proposed revised designation may result in more than minor incremental administrative costs. It found that potential incremental changes in timber harvests on Bureau of Land Management and U.S. Forest Service lands may occur on approximately 1,449,534 ac (585,612 ha) proposed for designation, or 10 percent of the total lands included in the proposed designation and that there is the potential for 307,308 ac (123,364 ha) of private land to experience incremental changes in harvests, or approximately 2 percent of total lands proposed. No incremental changes in harvests are expected on State lands.

II. Background

It is our intent to discuss only those topics directly relevant to the revised designation of critical habitat in this rule. For further details regarding northern spotted owl biology and habitat, population abundance and trend, distribution, demographic features, habitat use and conditions, threats, and conservation measures, please see the Northern Spotted Owl 5-year Review Summary and Evaluation, completed October 26, 2011, and the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), completed July 1, 2011. Both of these documents are available on the U.S. Fish and Wildlife Service's Endangered Species Web site at *http://ecos.fws.gov/;* under ''Species Search,'' enter ''northern spotted owl.'' As detailed below, Appendix C of the Revised Recovery Plan is particularly informative, as we used the habitat modeling process it describes as a tool to help identify areas containing the essential physical and biological features or areas that were otherwise essential to the conservation of the northern spotted owl in this revised designation of critical habitat. Furthermore, the recovery criteria for the northern spotted owl, as described in the Revised Recovery Plan (USFWS 2011, pp. I–1 to I–2), helped to discriminate between the various scenarios considered in the modeling process in terms of assessing which of the habitat networks evaluated included what is essential to the conservation of the northern spotted owl in the most efficient configuration possible.

Introduction

The northern spotted owl inhabits structurally complex forests from southwestern British Columbia through Washington and Oregon to northern California. The northern spotted owl was listed under the Act as a threatened species in 1990 because of widespread loss of habitat across its range and the inadequacy of existing regulatory mechanisms to conserve it (55 FR 26114; June 26, 1990). Although the rate of loss of habitat due to timber harvest has been reduced on Federal lands over the past two decades, both past and current habitat loss remain a threat to the northern spotted owl. Despite implementation of habitat conservation measures in the early 1990s, Thomas *et al.* (1990, p. 5) and USDI (1992, Appendix C) foresaw that owl populations would continue to decline for several decades, even with habitat conservation, as the consequence of lag effects at both individual and population levels. However, many populations of northern spotted owls have declined at a faster rate than anticipated, especially in the northern parts of the subspecies' range (Anthony *et al.* 2006, pp. 31–32; Forsman *et al.* 2011, pp. 65, 76). We now know that the suite of threats (detailed below) facing the northern spotted owl differs from those at the time it was listed; in addition to the effects of historical and ongoing habitat loss, the northern spotted owl faces a new significant and complex threat in the form of competition from the congeneric (referring to a member of the same genus) barred owl (USFWS 2011, pp. I–7 to I–8).

During the second half of the 20th century, barred owls expanded their range from eastern to western North America, and the range of the barred owl now completely overlaps that of the northern spotted owl (Gutiérrez *et al.* 1995, p. 3; Crozier *et al.* 2006, p. 761). Barred owls compete with northern spotted owls for habitat and resources for breeding, feeding, and sheltering, and the presence of barred owls has significant negative effects on northern spotted owl reproduction, survivorship, and successful occupation of territories (see Population Status and Trends, below). The loss of habitat has the potential to intensify competition with barred owls by reducing the total amount of resources available to the northern spotted owl and by increasing the likelihood and frequency of competitive interactions. While there are important differences in the ecology between barred owls and northern spotted owls, barred owls select very similar habitat for breeding, feeding, and sheltering, and loss of habitat has the potential to intensify competition between species. While conserving habitat will not completely alleviate the barred owl threat, Dugger *et al.* (2011, pp. 2464–2465) found that northern spotted owl occupancy and colonization rates decreased as both barred owl presence increased and available habitat decreased. Similar to another case in which increased suitable habitat was required to support two potentially competing raptors, these authors concluded that increased habitat protection for northern spotted owls

may be necessary to provide for sustainable populations in the presence of barred owls in some areas (Dugger *et al.* 2011, p. 2467). Maintaining high-quality habitat has been important since the northern spotted owl was initially listed as a threatened species in 1990, and this competitive pressure from barred owls has intensified the need to conserve and restore large areas of contiguous, high-quality habitat across the range of the northern spotted owl (Dugger *et al.* 2011, p. 2464; Forsman *et al.* 2011, p. 76; USFWS 2011, Recovery Action 32 [RA32], p. III–67).

It is becoming increasingly evident that solely securing habitat will not be effective in achieving the recovery of the northern spotted owl when barred owls are present (USFWS 2011, p. vi). While conservation of high-quality habitat is essential for the recovery and conservation of the owl, habitat conservation alone is not sufficient to achieve recovery objectives. As stated in the Revised Recovery Plan, ''* * * addressing the threats associated with past and current habitat loss must be conducted simultaneously with addressing the threats from barred owls. Addressing the threat from habitat loss is relatively straightforward with predictable results. However, addressing a large-scale threat of one raptor on another, closely related raptor has many uncertainties'' (USFWS 2011, p. I–8). A designation of critical habitat is intended to ameliorate habitat-based threats to an endangered or threatened species; critical habitat cannot reasonably be expected to fully address other, non-habitat-related threats to the species. In the case of the northern spotted owl, the recovery goal of supporting population viability and demographically stable populations of northern spotted owls will likely require habitat conservation in concert with the implementation of recovery actions that address other, non-habitat-based threats to the species, including the barred owl. In addition, recovery actions include scientific evaluation of potential management options to reduce the impact of barred owls on northern spotted owls (USFWS 2011, Recovery Action 29 [RA29], p. III–65), and implementation of management actions determined to be effective (USFWS 2011, Recovery Action 30 [RA30], p. III–65).

When developing a critical habitat rule, the Service must use the best scientific information available to identify critical habitat as defined in section (3)(5)(A) of the Act, which are (i) the specific areas within the geographical area occupied by the species at the time it was listed that provide the physical or biological features essential for the conservation of the species, and which may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by the species at the time it was listed that are otherwise determined to be essential to the conservation of the species. However, like most critical habitat designations, this rule addresses elements of risk management, because we must make recommendations and decisions in the face of incomplete information and uncertainty about factors influencing northern spotted owl populations. This uncertainty exists even though the northern spotted owl is among the most thoroughly studied of listed species. We understand a great deal about the habitats the subspecies prefers and the factors that influence its demographic trends. Nonetheless, considerable uncertainty remains, particularly about interactions among different factors that threaten the owl.

In the face of such uncertainty, the Revised Recovery Plan proposes strategies to address the primary threats to the northern spotted owl from habitat loss and barred owls (USFWS 2011, p. I–7). The effects of climate change and of past management practices are changing forest ecosystem processes and dynamics, including patterns of wildfires, insect outbreaks, and disease, to a degree greater than anticipated in the Northwest Forest Plan (NWFP) (Hessburg *et al.* 2005, pp. 134–135; Carroll *et al.* 2010, p. 899; Spies *et al.* 2010, entire; USFWS 2011, p. I–8). At the same time, the expansion of barred owl populations is altering the capacity of intact habitat to support northern spotted owls. Projecting the effects of these factors and their interactions into the future leads to even higher levels of uncertainty, especially considering how the influences of different threats may vary across the owl's large geographical range. It is clear that ecosystem-level changes are occurring within the northern spotted owl's forest habitat.

The development of a critical habitat network for the northern spotted owl must take into account current uncertainties, such as those associated with barred owl impacts and climate change predictions (USFWS 2011, p. III–10). These uncertainties require that we make some assumptions about likely future conditions in developing, modeling, and evaluating potential critical habitat for the northern spotted owl; those assumptions are identified clearly in this rule (see Criteria Used to Identify Critical Habitat, below) and in our supporting documentation (Dunk *et al.* 2012b, entire).

Given the continued decline of northern spotted owl populations, the apparent increase in severity of the threat from barred owls, and information indicating a recent loss of genetic diversity for the subspecies, retaining both occupied northern spotted owl sites and unoccupied, high-value northern spotted owl habitat across the subspecies' range are key components for recovery (USFWS 2011, p. I–9). High-value habitat is defined in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) as habitat that is important for maintaining northern spotted owls on landscapes, including areas with current and historic use by northern spotted owls. We refer readers to the glossary (Appendix G) of the Revised Recovery Plan for definitions of forest stand conditions and habitat types discussed in this rule.

Accordingly, in this rule, we have identified areas of habitat occupied at the time of listing that provide the physical or biological features essential to the conservation of the northern spotted owl, and that may require special management considerations or protection. When occupied areas were not adequate to achieve essential recovery goals, we also identified some unoccupied areas as critical habitat for the northern spotted owl only upon a determination that such areas are essential to the conservation of the species (see the second part of the definition of critical habitat in section (3)(5)(a)(ii), which states that critical habitat also includes ''specific areas outside the geographical area occupied by the species at the time of listing in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.'') However, it is important to note that this revised designation of critical habitat does not include all sites where northern spotted owls are presently known to occur. The habitat modeling that we used, in part, to assist us in developing this revised designation was based primarily on present habitat suitability. While we did also consider the present known locations of northern spotted owls in refining the identified habitat network, not all such sites were included in the revised designation if those areas did not make a significant contribution to population viability (for example, if known sites were too small or isolated to play a meaningful role in the conservation of the species; see Criteria Used to Identify Critical Habitat). This is in accordance with section 3(5)(C) of

the Act, which specifies that ''critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.''

Because of the uncertainties associated with the effects of barred owl interactions with the northern spotted owl and habitat changes that may occur as a result of climate change, active adaptive forest management strategies will be needed to achieve results in certain landscapes. Active adaptive forest management is a systematic approach for improving resource management by learning from the results of explicit management policies and practices and applying that learning to future management decisions (USFWS 2011, p. G–1). This critical habitat rule identifies key sources of uncertainty, and the need to learn from our management of forests that provide habitat for northern spotted owls. We have designated a critical habitat network that was developed based on what we determined to be the areas containing the physical and biological features essential for the conservation of the northern spotted owl or are otherwise essential to owl conservation, after taking into consideration information on essential habitats, the current distribution of those habitats, and the best available scientific knowledge about northern spotted owl population dynamics, while acknowledging uncertainty about future conditions in Pacific Northwest forests.

An Ecosystem-Based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat

Section 2 of the Act states, ''The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'' Although the conservation of the listed species is the specific objective of a critical habitat designation, the essential physical or biological features that serve as the basis of critical habitat are often essential components of the ecosystem upon which the species depends. In such cases, a fundamental goal of critical habitat management is not only to conserve the listed species, but also to conserve the ecosystem upon which that species depends. This is the case with the northern spotted owl.

An ecosystem is defined as a biological community of interacting organisms and their physical environment, or as the complex of a community of organisms and its environment functioning as an ecological unit (Krebs 1972, pp. 10–11; Ricklefs 1979, pp. 31–32, 869). These ecosystem interactions and functions are often referred to as ecological relationships or processes. Thus, to conserve the northern spotted owl as directed by the Act, one must also conserve the ecological processes that occur within the ecological landscape inhabited by the species. These processes—such as vegetation succession, forest fire regimes, and nutrient cycling—create and shape the physical or biological features that form the foundation of critical habitat. The northern spotted owl was initially listed as a threatened species largely due to the loss or degradation of the late-successional forest ecosystems upon which it depends. A complex interaction of physical or biological factors contribute to the development and maintenance of these ecosystems, which in turn provide the northern spotted owl with the environmental conditions required for its conservation and survival, such as large areas of suitable habitat, nest structures, and sufficient prey to sustain interconnected populations of owls across the landscape. A fundamental goal of critical habitat management should thus be to understand, describe, and conserve these processes, which in turn will maintain the physical or biological features essential to the conservation of the species. This ''ecosystem approach'' will ultimately have the highest likelihood of conserving listed species such as the northern spotted owl in the long term (Knight 1998, p. 43).

The U.S. Forest Service, which manages the great majority of areas being designated as revised northern spotted owl critical habitat, has prioritized restoring and maintaining natural ecological function and resiliency to its forest lands (Blate *et al.* 2009, entire; USDA 2010, entire; Tidwell 2011, entire). Active adaptive forest management within critical habitat, as discussed herein for the consideration of land managers, may be fully compatible and consistent with these landscape-level ecosystems. Most importantly, this approach is compatible with the ecosystem-based approach of the Northwest Forest Plan.

Revised critical habitat for the northern spotted owl includes a diverse forest landscape that covers millions of acres and contains several different forest ecosystems and thousands of plant and animal species. It ranges from moist old-growth conifer forest in the western portion, to a mix of conifers and hardwood trees in the Klamath region, to dry, fire-prone forests in the eastern Cascades. Thousands of species occur in these forest ecosystems, including other listed and sensitive species with very specific biological needs. In areas where prescribed management is needed to maintain ecosystem function, such management is often expensive, logistically difficult, and contentious (Thompson *et al.* 2009, p. 29). Many scientists believe a single-species approach to forest management is limited and that land managers need to focus on broader landscape goals that address ecosystem process and future habitat conditions (see, e.g., Thomas *et al.* 2006, p. 286; Boyd *et al.* 2008, p. 42; Hobbs *et al.* 2010, p. 487; Mori 2011, pp. 289–290). The Revised Recovery Plan (USFWS 2011) encourages the application of ecosystem management principles to ensure the long-term conservation of the northern spotted owl and its habitat, as well as other species dependent on these shared ecosystems.

We reference here the recommendations for habitat management as made in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). This discussion is provided primarily for consideration by Federal, State, local, and private land managers, as they make decisions on the management of forest land under their jurisdictions and through their normal processes. This critical habitat rule does not take any action or adopt any policy, plan or program in relation to active forest management.

Critical Habitat and the Northwest Forest Plan

It is important to understand the relationship between northern spotted owl critical habitat and the Northwest Forest Plan (NWFP). In brief, the designation of areas as critical habitat does not change land use allocations or Standards and Guidelines for management under the NWFP. Critical habitat for the northern spotted owl was first designated in 1992 (January 15, 1992; 57 FR 1796). Since 1994, the NWFP has also served as an important landscape-level plan that has contributed to the conservation of the northern spotted owl and late-successional forest habitat on Federal lands across the range of the species (Thomas *et al.* 2006, pp. 278–284). The NWFP introduced a system of reserves where conservation of late-successional forest, riparian habitats, northern spotted owls, and other species dependent on older forest would be the priority, and matrix areas where timber harvest would be the goal. The Standards and Guidelines for the NWFP (USDA and USDI 1994) prescribe an ecosystem-based approach to management for the Federal action

agencies that manage these lands, and provide guidance for activities conducted on different land use allocations. All Bureau of Land Management and U.S. Forest Service lands identified as northern spotted owl critical habitat in this rule fall under the NWFP, and should be managed consistent with its standards. Here we briefly provide a summary of how our designation of critical habitat has been informed by and relates to forest management under the NWFP.

In developing this critical habitat designation, the Service recognizes the importance of the NWFP as the overarching land management strategy for conservation of the northern spotted owl and other native species associated with old-growth and late-successional forest. The system of reserves within the NWFP is essential for the conservation and development of large areas of late-successional forest across the landscape; however, because the NWFP was designed to benefit multiple species not every acre of the late-successional reserves (LSRs) provide high-quality habitat for northern spotted owls. In addition, barred owls have become increasingly abundant in the Pacific Northwest and likely have a large effect on the continued decline of northern spotted owl populations. With barred owls now sharing the range of the northern spotted owl, conservation of northern spotted owls outside NWFP reserved areas is increasingly important for species recovery.

In our designation of critical habitat on Federal lands, we identified lands that contain the features essential to the conservation of the species including lands both within NWFP reserves and matrix that function as highly valuable northern spotted owl habitat. As noted above, designation as critical habitat does not change these land use allocations or Standards and Guidelines for management under the NWFP, and we fully recognize the ecological functions and land management goals of the different land use allocations as outlined under the NWFP. While the NWFP has been successful in conserving large blocks of late-successional forest (Thomas *et al.* 2006, p. 283, Davis *et al.* 2011, p. 38), concerns have been expressed that it provides less than the anticipated level of commercial timber harvest on matrix lands, does not promote active restoration in areas that may contain uncharacteristically high risk of severe fire (Spies *et al.* 2006, pg. 359; Thomas *et al.* 2006, p. 277), and does not promote development of complex early-seral forest in areas where regeneration harvest has been conducted (Betts *et al.* 2010, p. 2117; Hagar 2007, p. 109; Swanson *et al.* 2011, p. 124) (''seral'' refers to developmental or successional stages of the forest community that influences species composition, i.e., early, mid, late seral stages).

Thomas *et al.* (2006, pp. 284–287) provided three recommendations to improve the NWFP. These recommendations are highly relevant to northern spotted owl critical habitat conservation and management:

1. Conserve old-growth trees and forests on Federal lands *wherever they are found* (emphasis added), and undertake appropriate restoration treatment in the threatened forest types.

2. Manage NWFP forests as dynamic ecosystems that conserve all stages of forest development (e.g., encompassing the range of conditions between early-seral and old-growth), and where tradeoffs between short-term and long-term risks are better balanced.

3. Recognize the NWFP as an integrated conservation strategy that contributes to all components of sustainability across Federal lands.

It is our hope that management of critical habitat for the northern spotted owl will be compatible with these broader landscape management goals articulated by Thomas *et al.* (2006, pp. 284–287). Furthermore, the Standards and Guidelines for the NWFP encourage an ecosystem-based approach to land management (*e.g.,* USDA and USDI 1994, p. A–1, Standards and Guidelines, pp. C–12, C–13). As discussed in the Revised Recovery Plan, recovery of the northern spotted owl will likely require that an ecosystem management approach that includes both passive and active management, to meet a variety of conservation goals that support long-term northern spotted owl conservation, be implemented. We fully support the land use allocation goals and the Standards and Guidelines for management under the NWFP (USDA and USDI 1994) as informed by the recommendations of the Revised Recovery Plan. Some general considerations for managing the threats to the essential physical or biological features for the northern spotted owl are discussed in the *Special Management Considerations or Protections* and *Determinations of Adverse Effects and Application of the ''Adverse Modification'' Standard* sections of this document, below, as well as in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, pp. III–11 to III–39).

Forest Management Activities in Northern Spotted Owl Critical Habitat

As stated above, many areas of critical habitat do not require active management, and active forest management within such areas could negatively impact northern spotted owls. We are not encouraging land managers to consider active management in areas of high-quality owl habitat or occupied owl sites; rather, we encourage management actions that will maintain and restore ecological function where appropriate. In some areas, forest stands are not on a trajectory to develop into high-value habitat, ecological processes have been disrupted by human actions, or projected climate change is expected to further disrupt or degrade desired forest conditions. In these areas, land managers may choose to implement active management, as recommended in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), to improve ecological health and development of forest conditions more favorable to northern spotted owls and other biodiversity. For example, LSRs are to be managed to protect and enhance old-growth forest conditions (defined in the Revised Recovery Plan as forests that have accumulated specific characteristics related to tree size, canopy structure, snags, and woody debris and plant associations). According to the NWFP Standards and Guidelines (USDA and USDI 1994), no programmed timber harvest is allowed inside the reserves. However, thinning or other silvicultural treatments inside these reserves may occur in younger stands if the treatments are beneficial to the creation and maintenance of late-successional forest conditions. On the east of the Cascades and in Oregon and California Klamath Provinces, additional management activities may be considered both within and outside reserves to reduce risks of large-scale disturbance (NWFP Standards and Guidelines, p. C–12—C–13).

We also recognize that ecological restoration is not the management goal on all NWFP land use allocations (*e.g.,* matrix) within designated critical habitat, and we provide a discussion of options land managers could consider to tailor traditional forest management activities on these lands to consistent with conservation of current and future northern spotted owl habitat (see, *e.g.,* Gustafsson *et al.* 2012, entire; Franklin *et al.* 2007, entire; Kuuluvainen and Grenfell 2012, entire; North and Keeton 2008; Long 2009, entire; Lindenmayer *et al.* 2012; entire). Our discussion of potential management considerations

for the northern spotted owl are intended to be fully compatible with the objectives and Standards and Guidelines of the NWFP as informed by the conservation guidelines presented in the 2011 Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) to provide a means whereby the ecosystems on which northern spotted owls depend will be conserved.

Mimicking natural disturbance regimes, such as fire, is an important strategy in North American forest management (Seymour and Hunter 1999, p. 56; Long 2009, p. 1868; Gustafsson *et al.* 2012, p. 635; Kuuluvainen and Grenfell 2012, entire). This change is occurring in response to: (1) The simplification of forests in terms of structure, age-class diversity, and species composition as a result of management for timber production, and (2) a recognition of fundamental changes in ecosystem function and processes due to land management practices, especially fire and successional patterns (Franklin *et al.* 2002, pp. 402–408; Hessburg *et al.* 2005, pp. 134–135; Drever *et al.* 2006, p. 2291). Although human disturbance is unlikely to precisely mimic natural forest disturbance, it can be used to better maintain the resilience of landscapes and wildlife populations to respond to natural disturbance and climate change (Lindenmayer *et al.* 2008, p. 87). In general, prescriptions (e.g., vegetation management, prescribed fire, etc.) that apply ecological forestry principles to address the restoration and conservation of broader ecological processes in areas where this is needed, while minimizing impacts to structurally diverse or mature and old forest that does not require such management can be compatible with maintaining the critical habitat's essential features in the long term at the landscape scale (USFWS 2011, p. III–14). The Service has recently consulted on these types of management actions in occupied northern spotted owl habitat on Bureau of Land Management (BLM) and U.S. Forest Service (USFS) lands.

Specifically prescribing such management is beyond the scope or purpose of this document, and should instead be developed by the appropriate land management agency at the appropriate land management scale (e.g., National Forest or Bureau of Land Management District) (USDA 2010, entire; Fontaine and Kennedy 2012, p. 1559; Gustafsson *et al.* 2012, pp. 639–641, Davis *et al.* 2012, entire) through the land managing agencies' planning processes and with technical assistance from the Service, as appropriate. Furthermore, we encourage an active adaptive forest management approach, should agencies choose to implement ecological forestry practices, as we continue to learn from continuing research on these methods (see *Research and Adaptive Management,* below).

Some general considerations for managing for the conservation of essential physical or biological features within northern spotted owl critical habitat are discussed in more detail in the *Special Management Considerations or Protections* and *Determinations of Adverse Effects and Application of the ''Adverse Modification'' Standard* sections of this document, below. In sum, vegetation and fuels management in dry and mixed-dry forests may be appropriate both within and outside designated critical habitat where the goal of such treatment is to conserve natural ecological processes or restore them (including fire) where they have been modified or suppressed (Allen *et al.* 2002, pp. 1429–1430; Spies *et al.* 2006, pp. 358–361; Fielder *et al.* 2007, entire; Prather *et al.* 2008, entire; Lindenmayer *et al.* 2009, p. 274; Tidwell 2011, entire; Stephens *et al.* 2009, pp. 316–318; Stephens *et al.* 2012a, p. 13; Stephens *et al.* 2012b, pp. 557–558; Franklin *et al.* 2008, p. 46; Miller *et al.* 2009, pp. 28–30; Fule *et al.* 2012, pp. 75–76). These types of management are encouraged in the NWFP (USDA and USDI 1994, p. C–13). Likewise, in some moist and mixed forests, management of northern spotted owl critical habitat should be compatible with broader ecological goals, such as the retention of high-quality older forest, the continued treatment of young or homogenous forest plantations to enhance structural diversity, heterogeneity and late-successional forest conditions, and the conservation or restoration of complex early-seral forest habitat, where appropriate (Spies *et al.* 2007b, pp. 57–63; Betts *et al.* 2010, pp. 2117, 2126–2127; Swanson *et al.* 2011, entire).

In general, actions that promote ecological restoration and those that apply ecological forestry principles at appropriate scales as described above and in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, pp. III–11 to III–41) may be, in the right circumstances, consistent with the conservation of the northern spotted owl and the management of its critical habitat. However, we emphasize that this rule does not take any action or adopt any policy, plan or program in relation to active forest management. The discussion is provided only for consideration by Federal, State, local and private land managers, as well as the public, as they make decisions on the management of forest land under their jurisdictions and through their normal processes.

Research and Adaptive Management

The Service supports the goals of maintaining and restoring ecological function and development of future northern spotted owl habitat. We encourage land managers to consider a stronger focus on ecological forestry in areas where commercial harvest and restoration are planned. We recognize the need to balance both the conservation of current owl sites and the development of future owl habitat. However, a better understanding of how ecological forestry approaches affect owls and their prey is needed. Studies have shown negative effects of commercial thinning and other conventional forestry practices on both northern spotted owls (Forsman *et al.* 1984, pp. 16–17; Meiman *et al.* 2003, p. 1261) and their prey (Waters *et al.* 1994, p. 1516; Luoma *et al.* 2003, pp. 343–373; Wilson 2010, entire).This need was recognized in Recovery Action 11 of the Revised Recovery Plan, which states ''When vegetation management treatments are proposed to restore or enhance habitat for northern spotted owls (e.g., thinnings, restoration projects, prescribed fire, etc.), consider designing and conducting experiments to better understand how these different actions influence the development of northern spotted owl habitat, northern spotted owl prey abundance and distribution, and northern spotted owl demographic performance at local and regional scales.'' Furthermore, the recovery strategy outlined in the Revised Recovery Plan (USFWS 2011) identifies monitoring and research, as well as active adaptive forest management, as important steps in achieving recovery goals.

Given these concerns, and recognizing that appropriate management actions will vary depending upon site-specific conditions, we provide the following suggestions regarding active forest management for consideration by land managers within critical habitat as consistent with the recommendations of the Revised Recovery Plan for the Northern Spotted Owl:

1. Focus active management in younger forest, lower quality owl habitat, or where ecological conditions are most departed from the natural or desired range of variability.

2. In moist forests on Federal lands, follow NWFP guidelines as informed by the Revised Recovery Plan and focus on areas outside of LSRs (i.e., matrix). In dry forests, follow NWFP guidelines and focus on lands in or outside of reserves

that are most ''at-risk'' of experiencing uncharacteristic disturbance and where the landscape management goal is to restore more natural or resilient forest ecosystems (see, *e.g.,* Davis *et al.* 2012, entire; Franklin *et al.* 2008, p. 46).

3. Avoid or minimize activities in active northern spotted owl territories (or the high-quality habitat within these territories).

4. Ensure transparency of process so the public can see what is being done, where it is done, what the goal of the action is, and how well the action leads to the desired goal.

5. Practice active adaptive forest management by incorporating new information and learning into future actions to make them more effective, focusing on how these actions affect northern spotted owls and their prey.

Towards this objective of learning critical new scientific insights from research and adaptive management, we especially encourage research and active adaptive forest management on the seven Forest Service Experimental Forests (H.J. Andrews Experimental Forest, Pringle Falls Experimental Forest, South Umpqua Experimental Forest, and Cascades Head Experimental Forest in Oregon; Wind River Experimental Forest and Entiat Experimental Forest in Washington; and Yurok Redwood Experimental Forest in California) within designated northern spotted owl critical habitat. We acknowledge the specific value and contributions of research done within experimental forests in furtherance of the research and active adaptive forest management objectives in the Revised Recovery Plan. These Experimental Forests have four principal scientific advantages that support the specific kinds of research needed to better understand how management affects and potentially enhances northern spotted owl habitat:

(1) These sites are intended for and enabled to conduct manipulative research to test forest management strategies in a rigorous scientific manner;

(2) They have long-term baseline datasets that enable detailed climate/environmental change assessments;

(3) The sites represent a diversity of forest types within the range of northern spotted owl; and

(4) Experimental forests have been the subject of intensive, long-term study that can serve as a backdrop for new research.

Essential research and active adaptive forest management questions, detailed in the Revised Recovery Plan, that could be conducted on Experimental Forests include (but are not limited to):

(a) What vegetation management treatments best accelerate the development of forest structure associated with northern spotted owl habitat functions while maintaining or restoring natural disturbance and provide greater ecosystem resiliency?

(b) What are the effects of wildland and prescribed fire on the structural elements of northern spotted owl habitat?

(c) Can strategically-placed restoration treatments be used to reduce the risk of northern spotted owl habitat being burned by high severity fire within dry forest ecosystems?

(d) What are the effects of epidemic forest insect outbreaks on northern spotted owl occupancy and habitat use immediately following the event and at specified time periods after treatment?

Sound scientific information represents a vital component of our path to recovery for the northern spotted owl (and almost all threatened or endangered species). We believe it would be counterproductive to inhibit or curtail research that is designed to benefit the northern spotted owl and the ecosystem in which it is found, and therefore support research activities within experimental forests.

The Biology and Ecology of the Northern Spotted Owl

Physical Description and Taxonomy

The northern spotted owl is a medium-sized owl and the largest of the three subspecies of northern spotted owls currently recognized by the American Ornithologists' Union (Gutiérrez *et al.* 1995, p. 2). It is dark brown with a barred tail and white spots on the head and breast, and has dark brown eyes that are surrounded by prominent facial disks. The taxonomic separation of these three subspecies is supported by numerous factors (reviewed in Courtney *et al.* 2004, pp. 3–3 to 3–31), including genetic (Barrowclough and Gutiérrez 1990, p. 739; Barrowclough *et al.* 1999, p. 922; Haig *et al.* 2004, p. 1353; Barrowclough *et al.* 2005, p. 1113), morphological (Gutiérrez *et al.* 1995, pp. 2 to 3), behavioral (Van Gelder 2003, p. 30), and biogeographical characteristics (Barrowclough *et al.* 1999, p. 928).

Distribution and Habitat

The current range of the northern spotted owl extends from southwest British Columbia through the Cascade Mountains, coastal ranges, and intervening forested lands in Washington, Oregon, and California, as far south as Marin County, California. The subspecies is listed as a threatened species under the Act throughout its range (55 FR 26114; June 26, 1990). Within the United States, the northern spotted owl ranges across 12 ecological regions, based on recognized landscape subdivisions exhibiting different physical and environmental features, often referred to as ''physiographic provinces'' (Franklin and Dyrness 1988, pp. 5–26; Thomas *et al.* 1990, p. 61; USDA and USDI 1994, p. A–3). These include the Olympic Peninsula, Western Washington Lowlands, Western Washington Cascades, Eastern Washington Cascades, Oregon Coast Ranges, Western Oregon Cascades, Willamette Valley, Eastern Oregon Cascades, Oregon Klamath, California Klamath, California Coast Ranges, and California Cascades Provinces (based on USDA and USDI 1994, p. A–3). Very few northern spotted owls are found in British Columbia, in the Western Washington Lowlands or Willamette Valley; therefore, the subspecies is restricted primarily to 10 of the 12 provinces within its range.

For the purposes of developing this rule, and based on Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, pp. C–7 to C–13), we have divided the range of the northern spotted owl into 11 different regions. We used these 11 regions in the habitat modeling that informed this revised designation of critical habitat. The regions used here are more ''owl specific'' than the physiographic provinces used in the past. In addition to regional patterns of climate, topography, and forest communities, which the physiographic provinces also considered, the 11 regions are based on specific patterns of northern spotted owl habitat relationships and prey base relationships across the range of the species. The 11 regions include the North Coast Olympics; West Cascades North; West Cascades Central; West Cascades South; East Cascades North; East Cascades South; Oregon Coast; Klamath West; Klamath East; Redwood Coast; and Inner California Coast Ranges. We additionally grouped these 11 regions into 4 broad ecological zones (West Cascades/Coast Ranges of Oregon and Washington; East Cascades; Redwood; and Klamath and Northern California Interior Coast Ranges). A map of the 11 regions used for the purposes of habitat modeling, as well as the 4 ecological zones, is provided in Figure 1 of this document. We used these 11 regions as the organizing units for our designation of critical habitat, and the 4 ecological zones for the identification of region-specific primary constituent

elements (PCEs) for the northern spotted owl.

Northern spotted owls generally rely on older forested habitats because such forests contain the structures and characteristics required for nesting, roosting, and foraging, and dispersal. Forest characteristics associated with northern spotted owls usually develop with increasing forest age, but their occurrence may vary by location, past forest practices, and stand type, history, and condition. Although northern spotted owl habitat is variable over its range, some general attributes are common to the owl's life-history requirements throughout its range. To support northern spotted owl reproduction, a home range requires appropriate amounts of nesting, roosting, and foraging habitat arrayed so that nesting pairs can survive, obtain resources, and breed successfully. In northern parts of the range where nesting, roosting, and foraging habitat have similar attributes, nesting is generally associated with late-seral or old-growth forest in the core area (Swindle *et al.* 1999, p. 1216). In some southern portions of the range, northern spotted owl survival is positively associated with the area of old forest habitat in the core, but reproductive output is positively associated with amount of edge between older forest and other habitat types in the home range (Franklin *et al.* 2000, pp. 573, 579). This pattern suggests that where dusky-footed woodrats (*Neotoma fuscipes*) are the primary prey species, core areas that have nesting habitat stands interspersed with varied types of foraging habitat may be optimal for northern spotted owl survival and reproduction. Both the amount and spatial distribution of nesting, roosting, foraging, and dispersal habitat influence reproductive success and long-term population viability of northern spotted owls.

Population growth can occur only if there is adequate habitat in an appropriate configuration to allow for the dispersal of owls across the landscape. This includes support of dispersing juveniles, as well as nonresident subadults and adults that have not yet recruited into the breeding population. The survivorship of northern spotted owls is likely greatest when dispersal habitat most closely resembles nesting, roosting, and foraging habitat, but owls may use other types of habitat for dispersal on a short-term basis. Dispersal habitat, at a minimum, consists of stands with adequate tree size and canopy cover to provide protection from avian predators and at least minimal foraging opportunities (57 FR 1805, January 15, 1992). In this rule, we consider canopy cover as a vertical measurement of the amount of canopy that would cover the ground.

The three essential functions served by habitat within the home range of a northern spotted owl are:

(1) *Nesting.* Nesting habitat is essential to provide structural features for nesting, protection from adverse weather conditions, and cover to reduce predation risks. Habitat requirements for nesting and roosting are nearly identical. However, nesting habitat is specifically associated with a high incidence of large trees with various deformities (large cavities, broken tops, mistletoe (*Arceuthobium* spp.) infections, and other evidence of decadence) or large snags suitable for nest placement. Additional features that support nesting and roosting typically include a moderate to high canopy cover; a multilayered, multispecies canopy with large overstory trees; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly (Thomas *et al.* 1990, p. 164). Forested stands with high canopy cover also provide thermal cover (Weathers *et al.* 2001, p. 686) and protection from predators. Patches of nesting habitat, in combination with roosting habitat, must be sufficiently large and contiguous to maintain northern spotted owl core areas and home ranges, and must be proximate to foraging habitat. Ideally, nesting habitat also functions as roosting, foraging, and dispersal habitat.

(2) *Roosting.* Roosting habitat is essential to provide for thermoregulation, shelter, and cover to reduce predation risk while resting or foraging. As noted above, the same habitat generally serves for both nesting and roosting functions; technically ''roosting habitat'' differs from nesting habitat only in that it need not contain those specific structural features used for nesting (cavities, broken tops, and mistletoe platforms), but does contain moderate to high canopy cover; a multilayered, multispecies canopy; large accumulations of fallen trees and other woody debris on the ground; and open space below the canopy for northern spotted owls to fly. In practice, however, roosting habitat is not segregated from nesting habitat. Nesting and roosting habitat will also function as foraging and dispersal habitat.

(3) *Foraging.* Foraging habitat is essential to provide a food supply for survival and reproduction. Foraging habitat is the most variable of all habitats used by territorial northern spotted owls, and is closely tied to the prey base, as described below. Nesting and roosting habitat always provides for foraging, but in some cases owls also use more open and fragmented forests, especially in the southern portion of the range where some younger stands may have high prey abundance and structural attributes similar to those of older forests, such as moderate tree density, subcanopy perches at multiple levels, multilayered vegetation, or residual older trees. Foraging habitat generally has attributes similar to those of nesting and roosting habitat, but foraging habitat may not always support successfully nesting pairs (USDI 1992, pp. 22–25). Foraging habitat can also function as dispersal habitat. The primary function of foraging habitat is to provide a food supply for survival and reproduction.

Because northern spotted owls show a clear geographical pattern in diet, and different prey species prefer different habitat types, prey distribution contributes to differences in northern spotted owl foraging habitat selection across the range. In the northern portion of their range, northern spotted owls forage heavily in older forests or forests with similar complex structure that support northern flying squirrels (*Glaucomys sabrinus*) (Carey *et al.* 1992, p. 233; Rosenberg and Anthony 1992, p. 165). In the southern portion of their range, where woodrats are a major component of their diet, northern spotted owls are more likely to use a variety of stands, including younger stands, brushy openings in older stands, and edges between forest types in response to higher prey density in some of these areas (Solis 1983, pp. 89–90; Sakai and Noon 1993, pp. 376–378; Sakai and Noon 1997, p. 347; Carey *et al.* 1999, p. 73; Franklin *et al.* 2000, p. 579). Both the amount and distribution of foraging habitat within the home range influence the survival and reproduction of northern spotted owls.

Dispersal Habitat and Habitat for Nonresident Owls

Successful dispersal of northern spotted owls is essential to maintaining genetic and demographic connections among populations across the range of the species. Habitats that support movements between larger habitat patches that provide nesting, roosting, and foraging habitats for northern spotted owls act to limit the adverse genetic effects of inbreeding and genetic drift and provide demographic support to declining populations (Thomas *et al.* 1990, pp. 271–272). Dispersing juvenile northern spotted owls experience high mortality rates (more than 70 percent in some studies (Miller 1989, pp. 32–41;

Franklin *et al.* 1999, pp. 25, 28; 55 FR 26115; June 26, 1990)) from starvation, predation, and accidents (Miller 1989, pp. 41–44; Forsman *et al.* 2002, pp. 18–19). Juvenile dispersal is thus a highly vulnerable life stage for northern spotted owls, and enhancing the survivorship of juveniles during this period could play an important role in maintaining stable populations of northern spotted owls.

Successful juvenile dispersal may depend on locating unoccupied suitable habitat in close proximity to other occupied sites (LaHaye *et al.* 2001, pp. 697–698). Dispersing juveniles are likely attracted to conspecific calls, and may look for suitable sites preferentially in the vicinity of occupied territories. When all suitable territories are occupied, dispersers may temporarily pursue a nonresident (nonbreeding) strategy; such individuals are sometimes referred to as ''floaters'' (Forsman *et al.* 2002, pp. 15, 26). Floaters prospect for territorial vacancies created when residents die or leave their territories. Floaters contribute to stable or increasing populations of northern spotted owls by quickly filling territorial vacancies. Where large blocks of habitat with multiple breeding pairs occur, the opportunities for successful recruitment of dispersers and floaters are enhanced due to the within-block production of potential replacement birds (Thomas *et al.* 1990, pp. 295, 307).

Juvenile dispersal occurs in steps (Forsman *et al.* 2002, pp. 13–14), between which dispersing juveniles settle into temporary home ranges for up to several months (Forsman *et al.* 2002, p. 13). Natal dispersal distances, measured from natal areas to eventual home range, tend to be larger for females (about 15 mi (24 km)) than males (about 8.5 mi (13.7 km)) (Courtney *et al.* 2004, p. 8–5). Forsman *et al.* (2002, pp. 15–16) reported dispersal distances of 1,475 northern spotted owls in Oregon and Washington for the period from 1985 to 1996. Median maximum dispersal distance (the straight-line distance between the natal site and the farthest location) for radio-marked juvenile male northern spotted owls was 12.7 mi (20.3 km), and that of female northern spotted owls was 17.2 mi (27.5 km) (Forsman *et al.* 2002, Table 2).

Northern spotted owls can utilize forests with the characteristics needed for nesting, roosting, foraging, and dispersal, and likely experience greater survivorship under such conditions. However, dispersing or nonresident individuals may also make use of other forested areas that do not meet the requirements of nesting or roosting habitat on a short-term basis. Such short-term dispersal habitats must, at minimum, consist of stands with adequate tree size and canopy cover to provide protection from avian predators and at least minimal foraging opportunities.

Population Status and Trends

Demographic data from studies initiated as early as 1985 have been analyzed every 5 years to estimate northern spotted owl demographic rates and population trends (Anderson and Burnham 1992, entire; Burnham *et al.* 1994, entire; Franklin *et al.* 1999, entire; Anthony *et al.* 2006, entire; Forsman *et al.* 2011, entire). The most current evaluation of population status and trends is based on data through 2008 (Forsman *et al.* 2011, p. 1). Based on this analysis, populations on 7 of 11 study areas (Cle Elum, Rainier, Olympic Peninsula, Oregon Coast Ranges, H.J. Andrews, Northwest California, and Green Diamond) were declining (Forsman *et al.* 2011, p. 64, Table 22).

Estimates of realized population change (cumulative population change across all study years) indicated that, in the more rapidly declining populations (Cle Elum, Rainier, and Olympic Peninsula), the 2006 populations were 40 to 60 percent of the population sizes observed in 1994 or 1995 (Forsman *et al.* 2011, pp. 47–49). Populations at the remaining areas (Tyee, Klamath, Southern Oregon Cascades, and Hoopa) showed declining population growth rates as well, although the estimated rates were not significantly different from stable populations (Forsman *et al.* 2011, p 64). A meta-analysis combining data from all 11 study areas indicates that rangewide the population declined at a rate of about 2.9 percent per year for the period from 1985 to 2006. Northern spotted owl populations on Federal lands had better demographic rates than elsewhere, but still declined at a mean annual rate of about 2.8 percent per year for 1985–2006 (Forsman *et al.* 2011, p. 67).

In addition to declines in population growth rates, declines in annual survival were reported for 10 of the 11 study areas (Forsman *et al.* 2011, p. 64, Table 22). Number of young produced each year showed declines at 5 areas (Cle Elum, Klamath, Southern Oregon Cascades, Northwest California, and Green Diamond), was relatively stable at 3 areas (Olympic Peninsula, Tyee, Hoopa), and was increasing at 2 areas (Oregon Coast Ranges, H. J. Andrews) (Forsman *et al.* 2011, p. 64 Table 22).

As noted above, the barred owl has emerged as a greater threat to the northern spotted owl than was previously recognized. The range of the barred owl has expanded in recent years and now completely overlaps that of the northern spotted owl (Crozier *et al.* 2006, p. 761). The presence of barred owls has significant negative effects on northern spotted owl reproduction (Olson *et al.* 2004, p. 1048), survival (Anthony *et al.* 2006, p. 32), and number of territories occupied (Kelly *et al.* 2003, p. 51; Olson *et al.* 2005, p. 928). The determination of population trends for the northern spotted owl has become complicated by the finding that northern spotted owls are less likely to call when barred owls are also present; therefore, they are more likely to be undetected by standard survey methods (Olson *et al.* 2005, pp. 919–929; Crozier *et al.* 2006, pp. 766–767). As a result, it is difficult to determine whether northern spotted owls no longer occupy a site, or whether they may still be present but are not detected. The 2011 Revised Recovery Plan for the Northern Spotted Owl concludes that ''barred owls are contributing to the population decline of northern spotted owls, especially in Washington, portions of Oregon, and the northern coast of California.'' (USFWS 2011, p. B–12).

British Columbia has a small population of northern spotted owls. This population has declined at least 49 percent since 1992 (Courtney *et al.* 2004, p. 8–14), and by as much as 90 percent since European settlement (Chutter *et al.* 2004, p. 6) to a 2004 breeding population estimated at about 23 birds (Sierra Legal Defence [sic] Fund and Western Canada Wilderness Committee 2005, p. 16) on 15 sites (Chutter *et al.* 2004, p. 26). Chutter *et al.* (2004, p. 30) suggested immediate action was required to improve the likelihood of recovering the northern spotted owl population in British Columbia. In 2007, the Northern Spotted Owl Population Enhancement Team recommended to remove northern spotted owls from the wild in British Columbia. Personnel in British Columbia captured and brought into captivity the remaining 16 known wild northern spotted owls. Prior to initiating the captive-breeding program, the population of northern spotted owls in Canada was declining by as much as 35 percent per year (Chutter *et al.* 2004, p. 6). The amount of previous interaction between northern spotted owls in Canada and the United States is unknown (Chutter *et al.* 2004, p. 24). Although the status of the northern spotted owl in Canada is informative in terms of the overall declining trend of the northern spotted owl throughout its range, and consequently the increased need for conservation in those areas

where it persists, the Service does not designate critical habitat in foreign countries (50 CFR 424.12(h)).

Life History

Northern spotted owls are a long-lived species with relatively stable and high rates of adult survival, lower rates of juvenile survival, and highly variable reproduction. Franklin *et al.* (2000, p. 576) suggested that northern spotted owls follow a ''bet-hedging'' life-history strategy, where natural selection favors individuals that reproduce only during favorable conditions. For such species, population growth rate is more susceptible to changes in adult survival than to recruitment of new individuals into the population. For northern spotted owls, recent demographic analyses have indicated declining trends in both adult survival and recruitment across much of the species range (Forsman *et al.* 2011, p. 64, Table 22).

Northern spotted owls are highly territorial (Courtney *et al.* 2004, p. 2–7). They maintain large home ranges; however, they actively defend a smaller area, and overlap between the outer portions of the home ranges of adjacent pairs is common (Forsman *et al.* 1984, pp. 5, 17, 22–24; Solis and Gutiérrez 1990, p. 742; Forsman *et al.* 2005, p. 374). Pairs are nonmigratory and remain on their home range throughout the year, although they often increase the area used for foraging during fall and winter (Forsman *et al.* 1984, p. 21; Sisco 1990, p. 9), likely in response to potential depletion of prey in the core of their home range (Carey *et al.* 1992, p. 245; Carey 1995, p. 649; but see Rosenberg *et al.* 1994, entire). The northern spotted owl shows strong year-round fidelity to its territory, even when not nesting (Solis 1983, pp. 23–28; Forsman *et al.* 1984, pp. 52–53) or after natural disturbance alters habitat characteristics within the home range (Bond *et al.* 2002, pp. 1024–1026). A discussion of northern spotted owl home range size and use is included in the Primary Constituent Elements section of this rule.

Prey

Northern spotted owl diets vary across owl territories, years, seasons, and geographical regions (Forsman *et al.* 2001, pp. 146–148; 2004, pp. 217–220). However, four to six species of nocturnal mammals typically dominate their diets (Forsman *et al.* 2004, p. 218), with northern flying squirrels being a primary prey species in all areas. In Washington, diets are dominated by northern flying squirrels, snowshoe hare (*Lepus americanus*), bushy-tailed woodrats (*Neotoma cinerea*), and boreal red-backed voles (*Clethrionomys gapperi*) (Forsman *et al.* 2001, p. 144). In Oregon and northern California, northern flying squirrels in combination with dusky-footed woodrats, bushy-tailed woodrats, red tree voles (*Arborimus longicaudus*), and deer mice (*Peromyscus maniculatus*) comprise the majority of diets (Courtney *et al.* 2004, pp. 41–31 to 4–32; Forsman *et al.* 2004, p. 221). Northern spotted owls are also known to prey on insects, other terrestrial mammals, birds, and juveniles of larger mammals (e.g., mountain beaver (*Aplodontia rufa*) (Forsman *et al.* 2001, p. 146; 2004, p. 223).

Northern flying squirrels are positively associated with late-successional forests with high densities of large trees and snags (Holloway and Smith 2011, p. 671). Northern flying squirrels typically use cavities in large snags as den and natal sites, but may also use cavities in live trees, hollow branches of fallen trees, crevices in large stumps, stick nests of other species, and lichen and twig nests they construct (Carey 1995, p. 658), as well as mistletoe brooms when snags are not abundant (Lehmkuhl *et al.* 2006, p. 593). Fungi (mychorrhizal and epigeous types) are prominent in their diet; however, seeds, fruits, nuts, vegetation matter, insects, and lichens may also represent a significant proportion of their diet (summarized in Courtney *et al.* 2004, App. 4 p. 3–12). Northern flying squirrel densities tend to be higher in older forest stands with ericaceous shrubs (e.g., Pacific rhododendron (*Rhododendron macrophyllum*)) and an abundance of large snags (Carey 1995, p. 654), and higher tree canopy cover (Lehmkuhl *et al.* 2006, p. 591) likely because these forests produce a higher forage biomass. Wilson (2012, pp. i–ii) reported that dense mid-story canopy conditions can also be a limiting factor for flying squirrel abundance. Flying squirrel density tends to increase with stand age (Carey 1995, pp. 653–654; Carey 2000, p. 252), although managed and second-growth stands sometimes also show high densities of squirrels, especially when canopy cover is high (e.g., Rosenberg and Anthony 1992, p. 163; Lehmkuhl *et al.* 2006, pp. 589–591). The main factors that may limit northern flying squirrel densities are the availability of den structures and food, especially hypogeous (below ground) fungi or truffles (Gomez *et al.* 2005, pp. 1677–1678), as well as protective cover from predators (Wilson 2010, p. 115).

For northern spotted owls in Oregon, both dusky-footed and bushy-tailed woodrats are important prey items (Forsman *et al.* 2004, pp. 226–227), whereas in Washington owls rely primarily on the bushy-tailed woodrat (Forsman *et al.* 2001, p. 144). Habitats that support bushy-tailed woodrats usually include early-seral mixed-conifer/mixed-evergreen forests close to water (Carey *et al.* 1999, p. 77). Bushy-tailed woodrats reach high densities in both old forests with openings and closed-canopy young forests (Sakai and Noon 1993, pp. 376–378; Carey *et al.* 1999, p. 73), and use hardwood stands in mixed-evergreen forests (Carey *et al.* 1999, p. 73). Bushy-tailed woodrats are important prey species south of the Columbia River and may be more limited by abiotic features, such as the availability of suitable rocky areas for den sites (Smith 1997, p. 4) or the presence of streams (Carey *et al.* 1992, p. 234; 1999, p. 72). Dense woodrat populations in shrubby areas are likely a source of colonists to surrounding forested areas (Sakai and Noon 1997, p. 347); therefore, forested areas with nearby open, shrubby vegetation generally support high numbers of woodrats. The main factors that may limit woodrats are access to stable, brushy environments that provide food, cover from predation, materials for nest construction, dispersal ability, and appropriate climatic conditions (Carey *et al.* 1999, p. 78), and arboreal and terrestrial cover in the form of large snags, mistletoe, and soft logs (Lehmkuhl *et al.* 2006, p. 376).

Home Range and Habitat Use

Territorial northern spotted owls remain resident on their home range throughout the year; therefore, these homes ranges must provide all the habitat components needed for the survival and successful reproduction of a pair of owls. Northern spotted owls exhibit central-place foraging behavior (Rosenberg and McKelvey 1999, p. 1036), with much activity centered within a core area surrounding the nest tree during the breeding season. During fall and winter as well as in nonbreeding years, owls often roost and forage in areas of their home range more distant from the core. In nearly all studies of northern spotted owl habitat use, the amount of mature and old-growth forest was greater in core areas and home ranges than at random sites on the landscape (Courtney *et al.* 2004, pp. 5–6, 5–13; also see USFWS 2011, Appendix G for definitions of mature and old-growth forest), and forests were less fragmented within northern spotted owl home ranges (Hunter *et al.* 1995, p. 688). The amount of habitat at the core area scale shows the strongest relationships with home range

occupancy (Meyer *et al.* 1998, p. 34; Zabel *et al.* 2003, p. 1036), survival (Franklin *et al.* 2000, p. 567; Dugger *et al.* 2005, p. 873), and reproductive success (Ripple *et al.* 1997, pp. 155–156; Dugger *et al.* 2005, p. 871). A more complete description of the home range is presented in Population Spatial Requirements, below.

The size, configuration, and characteristics of vegetation patches within home ranges affect northern spotted owl survival and reproduction, a concept referred to as habitat fitness potential (Franklin *et al.* 2000, p. 542). Among studies that have estimated habitat fitness potential, the effects of forest fragmentation and heterogeneity vary geographically. In the California Klamath Province, locations for nesting and roosting tend to be centered in larger patches of old forest, but edges between forest types may provide increased prey abundance and availability (Franklin *et al.* 2000, p. 579). In the central Oregon Coast Range, northern spotted owls appear to benefit from a mixture of older forests with younger forest and nonforested areas in their home range (Olson *et al.* 2004, pp. 1049–1050), a pattern similar to that found in the California Klamath Province. Courtney *et al.* (2004, p. 5–23) suggest that although in general large patches of older forest appear to be necessary to maintain stable populations of northern spotted owls, home ranges composed predominantly of old forest may not be optimal for northern spotted owls in the California Klamath Province and Oregon Coast Ranges Province.

The northern spotted owl inhabits most of the major types of coniferous forests across its geographical range, including Sitka spruce (*Picea sitchensis*), western hemlock (*Tsuga heterophylla*), mixed conifer and mixed evergreen, grand fir (*Abies grandis*), Pacific silver fir (*A. amabilis*), Douglas-fir (*Pseudotsuga menziesii*), redwood (*Sequoia sempervirens*)/Douglas-fir (in coastal California and southwestern Oregon), white fir (*A. concolor*), Shasta red fir (*A. magnifica* var. *shastensis*), and the moist end of the ponderosa pine (*Pinus ponderosa*) zone (Forsman *et al.* 1984, pp. 15–16; Thomas *et al.* 1990, p. 145). Habitat for northern spotted owls has traditionally been described as consisting of four functional types: Nesting, roosting, foraging, and dispersal habitats. Recent studies continue to support the practical value of discussing northern spotted owl habitat usage by classifying it into these functional habitat types (Irwin *et al.* 2000, p. 183; Zabel *et al.* 2003, p. 1028; Buchanan 2004, p. 1334; Davis and Lint 2005, p. 21; Forsman *et al.* 2005, p. 372), and data from studies are available to describe areas used for these types of activities, so we retain it here to structure our discussion of the physical or biological features of habitat essential to the conservation of the northern spotted owl.

Recent habitat modeling efforts have also accounted for differences in habitat associations across regions, which have often been attributed to regional differences in forest environments and factors including available prey species (USFWS 2011, p. C–7). These recent advances allowed for modeling of northern spotted owl habitat by regions to account for: (1) The degree of similarity between nesting/roosting and foraging habitats based on prey availability; (2) latitudinal patterns of topology and climate; (3) regional patterns of topography, climate, and forest communities; and (4) geographical distribution of habitat elements that influence the range of conditions occupied by northern spotted owls (USFWS 2011, p. C–8). Detailed characterizations of each of these functional habitat types and their relative distribution are described in Physical or Biological Features, below.

Climate Change

There is growing evidence that recent climate change has impacted a wide range of ecological systems (Stenseth *et al.* 2002, entire; Walther *et al.* 2002, entire; Adahl *et al.* 2006, entire; Karl *et al.* 2009, entire; Moritz *et al.* 2012, entire; Westerling *et al.* 2011, p. S459; Marlon *et al.* 2012, p. E541). Climate change, combined with effects from past management practices, is exacerbating changes in forest ecosystem processes and dynamics to a greater degree than originally anticipated under the NWFP. Environmental variation affects all wildlife populations; however, climate change presents new challenges as systems may change beyond historical ranges of variability. In some areas, changes in weather and climate may result in major shifts in vegetation communities that can persist in particular regions.

Climate change will present unique challenges to the future of northern spotted owl populations and their habitats. Northern spotted owl distributions (Carroll 2010, entire) and population dynamics (Franklin *et al.* 2000, entire; Glenn *et al.* 2010, entire; *et al.* 2011a, entire; Glenn *et al.* 2011b, entire) may be directly influenced by changes in temperature and precipitation. In addition, changes in forest composition and structure as well as prey species distributions and abundance resulting from climate change may impact availability of habitat across the historical range of the subspecies. The Revised Recovery Plan for the Northern Spotted Owl provides a detailed discussion of the possible environmental impacts to the habitat of the northern spotted owl from the projected effects of climate change (USFWS 2011, pp. III–5 to III–11).

Because both northern spotted owl population dynamics and forest conditions are likely to be influenced by large-scale changes in climate in the future, we have attempted to account for these influences in our designation of critical habitat by recognizing that forest composition may change beyond the range of historical variation, and that climate changes may have unpredictable consequences for both Pacific Northwest forests and northern spotted owls. This critical habitat designation recognizes that forest management practices that promote ecosystem health under changing climate conditions will be important for northern spotted owl conservation.

III. Previous Federal Actions

The northern spotted owl was listed as a threatened species on June 26, 1990 (55 FR 26114); a description of the relevant previous Federal actions up to the time of listing can be found in that final rule. On January 15, 1992, we published a final rule designating 6,887,000 ac (2,787,000 ha) of Federal lands in Washington, Oregon, and California as critical habitat for the northern spotted owl (57 FR 1796). On January 13, 2003, we entered into a settlement agreement with the American Forest Resources Council, Western Council of Industrial Workers, Swanson Group Inc., and Rough & Ready Lumber Company, to conduct a 5-year status review of the northern spotted owl and consider potential revisions to its critical habitat (*Western Council of Industrial Workers (WCIW) v. Secretary of the Interior, Civ. No. 02–6100–AA (D. Or*). On April 21, 2003, we published a notice initiating the 5-year review of the northern spotted owl (68 FR 19569), and published a second information request for the 5-year review on July 25, 2003 (68 FR 44093). We completed the 5-year review on November 15, 2004, concluding that the northern spotted owl should remain listed as a threatened species under the Act (USFWS 2004, entire). On November 24, 2010, we published in the **Federal Register** a notice initiating a new 5-year review for the northern spotted owl (75 FR 71726); the information solicitation period for this review was reopened from April 20, 2011, through May 20, 2011 (76 FR

22139), and the completed review was signed on September 29, 2011, concluding that the northern spotted owl was appropriately listed as a threatened species.

In compliance with the settlement agreement in the *WCIW* case, as amended, we published a proposed revised critical habitat rule in the **Federal Register** on June 12, 2007 (72 FR 32450). On May 21, 2008, we published a notice announcing the availability of a Recovery Plan for the Northern Spotted Owl (73 FR 29471; May 21, 2008). We also announced the availability of a draft economic analysis on the proposed critical habitat designation and the reopening of the public comment period on the proposed revised critical habitat designation. The 2008 recovery plan formed the basis for the current designation of northern spotted owl critical habitat. We published a final rule revising the critical habitat designation in the **Federal Register** on August 13, 2008 (73 FR 47325).

Both the 2008 critical habitat designation and the 2008 recovery plan were challenged in court in *Carpenters' Industrial Council v. Salazar,* Case No. 1:08–cv–01409–EGS (D.DC). In addition, on December 15, 2008, the Inspector General of the Department of the Interior issued a report entitled ''Investigative Report of The Endangered Species Act and the Conflict between Science and Policy,'' which concluded that the integrity of the agency decision-making process for the northern spotted owl recovery plan was potentially jeopardized by improper political influence. As a result, the Federal Government filed a motion in the lawsuit for remand of the 2008 recovery plan and the critical habitat designation which was based on it. On September 1, 2010, the Court issued an opinion remanding the 2008 recovery plan to us for issuance of a revised plan within 9 months.

On September 15, 2010, we published a **Federal Register** notice (75 FR 56131) announcing the availability of the Draft Revised Recovery Plan for the Northern Spotted Owl, and opened a 60-day comment period through November 15, 2010. On November 12, 2010, we announced by way of press release an extension of the comment period until December 15, 2010. On November 30, 2010, we announced in the **Federal Register** the reopening of the public comment period until December 15, 2010 (75 FR 74073). At that time we also announced the availability of a synopsis of the population response modeling results for public review and comment. The supporting information regarding the modeling process was posted on our Web site (*http://www.fws.gov/oregonfwo/*). Of the approximately 11,700 comments received on the Draft Revised Recovery Plan, many requested the opportunity to review and comment on more detailed information on the habitat modeling process in Appendix C. On April 22, 2011, we reopened the comment period on Appendix C of the Draft Revised Recovery Plan (76 FR 22720); this comment period closed on May 23, 2011. On May 6, 2011, the Court granted our request for an extension of the due date for issuance of the final revised recovery plan until July 1, 2011. We published the notice of availability of the final Revised Recovery Plan for the Northern Spotted Owl in the **Federal Register** on July 1, 2011 (76 FR 38575).

On October 12, 2010, the Court remanded the 2008 critical habitat designation, which had been based on the 2008 Recovery Plan for the Northern Spotted Owl, and adopted the Service's proposed schedule to issue a new proposed revised critical habitat rule for public comment by November 15, 2011, and a final rule by November 15, 2012. The Court subsequently extended the date for delivery of the proposed rule to the **Federal Register** to February 28, 2012. A proposed revision to the designated critical habitat for the northern spotted owl was signed on February 28, 2012 and published in the **Federal Register** on March 8, 2012 (77 FR 14062), with a 3-month public comment period. On May 8, 2012, we announced an extension of the comment period through July 6, 2012 (77 FR 27010). A June 1, 2012 **Federal Register** notice announced the availability of the associated draft economic analysis and draft environmental assessment (conducted under NEPA), and invited the public to comment on these documents through July 6, 2012 (77 FR 32483). We held seven public information meetings and one public hearing. Two public information meetings were held each night in Redding, California, on June 4, 2012; in Tacoma, Washington, on June 12, 2012; and in Roseburg, Oregon, on June 27, 2012. One public information meeting was held in Portland, Oregon on June 20, 2012 and the public hearing was held in Portland, Oregon, on June 20, 2012. On July 20, 2012, the Service sent letters to all potentially affected Counties and State fish and wildlife agencies in Washington, Oregon and California advising them of the additional opportunity to comment until August 20, 2012, to ensure that they were able to thoroughly review and comment on the proposed rule as provided by Section 4(b)(5)(A)(ii) of the Act. In order to allow sufficient time for interagency review, the Court extended the time for delivery of the final rule to the **Federal Register** to November 21, 2012.

IV. Changes From the Proposed Rule

In preparing this final revised critical habitat designation for the northern spotted owl, we reviewed and considered comments from the public, peer reviewers, and other interested parties on the proposed revised designation of critical habitat published on March 8, 2012 (77 FR 14062). We also reviewed and considered comments on the draft environmental assessment and draft economic analysis. As a result of these comments and a reevaluation of the revised proposed critical habitat boundaries, we have made changes in this final designation, as follows:

(1) We responded to peer-review, public, stakeholder, and internal comments on a wide variety of topics to clarify and strengthen the supporting rationale of this final designation, clarify our meanings and descriptions, and to refine specific aspects of the rule to include emerging research or provide additional explanation. Included in these types of changes from the proposed to final rule are the following:

- Clarifications to the language to specify that northern spotted owl occupancy data are not needed or appropriate for an analysis of the effects of an action on northern spotted owl critical habitat.
- Clarifications to the language to more clearly describe the potential management of hazard trees in critical habitat along roadways.
- In the Special Management Considerations section, we reference Recovery Action 10 from the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), which focuses on retaining existing northern spotted owls on the landscape. We have edited those references to clarify that management of critical habitat and the section 7 evaluation under the Act that management should focus on the habitat's ability to support nesting northern spotted owls instead of focusing on individual northern spotted owls.
- To determine how to conduct those evaluations under section 7 of the Act, the proposed revised critical habitat recommended assessing the impacts of a timber management project in the context of 500 ac (200 ha) around where the impacts would occur. After numerous discussions with section 7 practitioners in different parts of the

range of the species, we are recommending that the effects determination for a section 7 consultation be conducted at a scale consistent with ''the localized biology of the life-history needs of the northern spotted owl (such as the stand scale, a 500-acre (200-ha) circle, or other appropriate, localized scale).'' Please see detailed discussion of the distinction between effects determination and the adverse modification standard in the section *Determinations of Adverse Effects and Application of the ''Adverse Modification'' Standard.*

• We have clarified that our discussion of ecological forestry and active management is intended for land managers to consider when developing management plans or planning projects, as in many areas this approach may be consistent with critical habitat for the northern spotted owl, but that such management is not mandated by the Service and is not required as the result of this rulemaking. We have also clarified this issue in the final rule language by stating that we have made the 16 U.S.C. 1532(5)(A)(i) determination that essential biological and physical features in occupied areas may require special management considerations or protection, but that the rule does not require land managers to implement, or preclude land managers from implementing, such measures.

• We have provided land managers with a discussion of relevant emerging science and greater detail regarding the appropriate application of active management and ecological forestry to benefit forest ecosystem restoration, as recommended in the Revised Recovery Plan for the Northern Spotted Owl. In addition, we received extensive comments regarding the appropriateness of developing diverse early-seral forest at the expense of older forest stands. We have clarified language regarding development of diverse, early-seral forest to indicate that: (1) We do not recommend these actions in older forest stands or areas that currently function as owl habitat; and (2) this type of management is most appropriate where more traditional forestry methods have typically been conducted on matrix lands. As stated in both the proposed rule and in this final rule, our first recommendation for northern spotted owl critical habitat is the conservation of old growth trees and forests on Federal lands wherever they are found, and to undertake appropriate restoration treatment in the threatened forest types.

• We have clarified the relationship between this revised designation of critical habitat for the northern spotted owl and the Northwest Forest Plan. Numerous commenters were concerned that this critical habitat would undermine the Standards and Guidelines of the Northwest Forest Plan, or enable timber harvest activities in Late-Successional Reserves that would not otherwise be permissible. We have added language to the preamble to clarify that the revised designation of critical habitat does not supersede the Standards and Guidelines of the Northwest Forest Plan. Our discussion of potential active management within critical habitat is intended to encourage land managers to consider the range of management flexibility already contained in the Northwest Forest Plan.

(2) In the proposed rule we requested specific information regarding the amount and distribution of northern spotted owl habitat that should be included in the designation. We refined the designation based on input from peer-review, public comment, and comments from Federal land management agencies, combined with further evaluation of modeled population response to the potential revisions of the critical habitat network, and including the following.

(A) Formal comments from the Forest Service requested that we consider large numbers of specific areas to be removed from, or added to, critical habitat, submitted to us in the form of GIS data. This proposal would have greatly reduced matrix lands in moist forest areas (Western Cascades, Oregon Coast Range, and North Coast Olympics) and eliminated Adaptive Management Areas and Experimental Forests from critical habitat. In addition, BLM requested removal of approximately 300,000 acres of selected BLM lands in western Oregon. We evaluated a new map of relative habitat suitability (Composite 8, as described in our Modeling Supplement, Dunk *et al.* 2012b) that incorporated all of these requested changes. Population modeling results for Composite 8 indicated that many of the lands proposed for removal were essential to conservation of the northern spotted owl because the rangewide population declined by 39 percent and population risk increased by 44 percent. To bring the spotted owl population results back up to levels comparable to proposed critical habitat, the final critical habitat designation includes areas recommended by those agencies for elimination (and that had been removed in our test of Composite 8) because we determined they are essential to the conservation of the species. To increase efficiency and ensure that the designation included only occupied habitat containing the features essential to conservation or habitat that is otherwise essential to the species' conservation, we further refined the boundaries of some subunits by moving the boundaries to include more high-value habitat while simultaneously and less lower-value habitat in the network. To the greatest degree possible, wherever possible we removed matrix lands and incorporated habitat in LSRs in this process.

(B) In response to peer review comments about connectivity and population issues we identified specific areas providing high-suitability habitat that were required to better achieve population objectives in specific lower-performing modeling regions. The additional areas consisted solely of Federal lands, primarily USFS LSR lands, that were essential to provide connectivity between populations in the Oregon Coast Ranges and adjacent regions with larger spotted owl populations, as pointed out in peer review and public comments, and supported by results of population modeling. In many cases, areas added were specifically identified by the USFS or BLM as lands that should be added to compensate for removal of other, lower value lands. To the degree possible, we attempted to situate additions within LSRs and balanced additions by removing lower-quality areas in matrix land allocations. In some cases, additions were made to balance areas removed in (A) above. No additional State or private lands were designated in this process, and all areas are within the critical habitat units as described in the proposed rule.

The changes described in (A) and (B) above had the desired effect of bringing population results back up to levels similar to proposed critical habitat, while simultaneously reducing the area of matrix and lower-quality habitat in the designation thus ensuring that only essential habitat is designated. Overall, about 318,296 acres of BLM and USFS lands were removed from critical habitat, 74 percent (236,887 acres) of which were matrix lands of relatively lower value to northern spotted owls.

(C) We identified and removed lands based on information we received during the public comment period indicating that they did not meet the definition of critical habitat. In general, lands removed had recently lost their ability to function as northern spotted owl habitat either through stand-replacing wildfire or through timber harvest conducted after 2006 (the date of our most recent comprehensive vegetation layer). When such lands were identified, we removed them from critical habitat because they were unlikely to support northern spotted owls, and did not contain the PCEs or could not be otherwise considered essential.

(D) We further refined the critical habitat boundaries to better conform to identifiable landscape features or administrative boundaries, and to improve consistency with our goal of prioritizing high value Federal lands to include in critical habitat while removing relatively lower value lands in all ownerships. The USFS provided a number of specific suggestions in their public comment for this type of refinement. Overall, these refinements resulted in a small net reduction of critical habitat area.

(E) Correcting ownership boundary errors identified in peer-review and public comment. When the underlying land ownership was corrected, we determined that some lands originally labeled as private lands were in fact Federal or State lands.

In the State of Washington, in response to public comment and upon

further review using the underlying aerial photo imagery from the 2011 National Agricultural Imagery Program (NAIP) and Ruraltech's 2007 forestland parcel data, we determined that the vast majority of Small Forest Landowner parcels we examined had either highly fragmented, little, or no northern spotted owl habitat currently present. Based on the combination of parcel size, current habitat conditions, and spatial distribution, we concluded that private lands identified as Small Forest Landowner parcels in the State of Washington do not provide the PCEs for northern spotted owls, nor are they essential to the conservation of the species; thus, these areas do not meet the definition of critical habitat, and we have removed them from the final designation of critical habitat.

Also in the State of Washington, we corrected ownership of Washington Department of Fish and Wildlife (WDFW) lands. In the proposed rule, we identified 1,752 ac (709 ha) as under the ownership of WDFW. In this rule, we have corrected this acreage to 8,328 ac (3,370 ha). This correction reflects a land transfer between WDFW and the Washington Department of Natural Resources, as well as a mistaken usage of a mineral rights GIS layer instead of a landownership layer.

Additional changes that were made were minor and included corrections of mapping errors, removing lower value areas that were inadvertently included, or correctly identifying administrative boundaries. Changes in total area are detailed in Table 1, below, and are shown by land ownership.

TABLE 1—LANDS IN THE PROPOSED REVISED CRITICAL HABITAT DETERMINED NOT TO CONTAIN THE PHYSICAL AND BIOLOGICAL FEATURES ESSENTIAL TO CONSERVATION OF THE NORTHERN SPOTTED OWL OR NOT OTHERWISE ESSENTIAL TO ITS CONSERVATION AND THEREFORE NOT INCLUDED IN FINAL CRITICAL HABITAT

State	Ownership	Acres	Hectares
Washington	USFS	11,864	4,793
Oregon	USFS	55,788	22,538
	BLM	62,862	25,396
	STATE	14,114	5,702
California	USFS	64,114	25,902
	BLM	17,152	6,929
Total		225,894	91,261

(3) We have exempted 14,313 ac (5,782 ha) of Department of Defense lands at Joint Base Lewis-McChord in Washington from critical habitat for the northern spotted owl, in accordance with section 4(a)(3) of the Act (see Exemptions). These lands comprised subunit NCO–3 in the proposed revision of critical habitat, and represented the only entirely unoccupied unit of critical habitat proposed for the northern spotted owl.

(4) In the proposed revised rule (77 FR 14062; March 8, 2012), we identified numerous areas under consideration for exclusion from the final designation, and solicited public comment on whether the benefits of exclusion of these lands would outweigh the benefits of inclusion, for example, based on active conservation agreements or conservation plans. We did a thorough evaluation of all the areas identified in the proposed rule, as well as others identified through our review and through information received from the public, and found that the benefits of exclusion for many of these areas outweighed the benefits of inclusion in critical habitat and that excluding these areas will not lead to the extinction of the species. Therefore, the Secretary is exercising his discretion to exclude specific areas covered under conservation agreements, programs, and partnerships under section 4(b)(2) of the Act (see Exclusions section of this document). The total area excluded from the final critical habitat designation under section 4(b)(2) of the Act are given in Table 2, below, again shown by land ownership.

TABLE 2—AREAS EXCLUDED FROM FINAL CRITICAL HABITAT UNDER SECTION 4(b)(2) OR EXEMPTED UNDER SECTION 4(a)(3) OF THE ACT

State (Ownership)	Proposed area (ac)	Proposed area (ha)	Final area (ac)	Final area (ha)	Excluded or exempted (ac)	Excluded or exempted (ha)
Washington:						
USFS	3,601,564	1,455,032	2,909,739	1,177,528	680,197	274,800
NPS	835,510	337,546	0	0	835,510	337,546
Other Federal (Joint Base Lewis-McChord; 4(a)(3) exemption)	14,313	5,782	0	0	14,313	5,782
STATE	226,708	91,590	8,328	3,370	218,380	88,225
PRIVATE	178,310	72,037	0	0	178,310	72,037
Oregon: *						
USFS	3,555,630	1,436,475	3,114,637	1,260,448	458,965	185,422
BLM	1,297,529	524,202	1,230,417	497,932	25,785	10,417
NPS	35,161	14,205	0	0	35,161	14,205
STATE	228,733	92,408	212,798	86,116	0	0
California:						
USFS	2,367,916	956,638	1,933,411	782,423	389,387	157,312
BLM	186,082	75,177	98,195	39,738	70,735	28,577
NPS	127,913	51,677	0	0	127,913	51,677
STATE	215,333	86,995	70,444	28,508	144,889	58,487

TABLE 2—AREAS EXCLUDED FROM FINAL CRITICAL HABITAT UNDER SECTION 4(b)(2) OR EXEMPTED UNDER SECTION 4(a)(3) OF THE ACT—Continued

State (Ownership)	Proposed area (ac)	Proposed area (ha)	Final area (ac)	Final area (ha)	Excluded or exempted (ac)	Excluded or exempted (ha)
PRIVATE	1,091,747	441,066	0	0	1,091,747	441,066
Grand Totals	13,962,449	5,640,829	9,577,969	3,876,064	4,271,291	1,725,553

(* Please note that no private lands in Oregon were proposed or included in this final designation.)

Note the difference in area between the proposed and final rules will not align exactly with the sum total of areas removed because they did not meet the definition of critical habitat and areas excluded or exempted from the final designation. Some minor discrepancies in area are due to mapping errors in the proposed designation have been corrected here, and may not be readily apparent through simple addition or subtraction of the total areas identified under various land categories. For example, the proposed rule mistakenly identified 16,031 ac (6,487 ha) of lands under the ownership of SDS and Broughton Lumber Companies in Washington as under consideration for exclusion. The accurate area included within the proposed critical habitat was, in fact, 2,035 ac (824 ha), and it is that area, which was excluded from this final designation, reflected in this final rule. The difference of nearly 14,000 ac (5,655 ha) will not be reflected in the difference between areas proposed and areas excluded in the final rule, as it was not really in the proposed critical habitat to begin with (and thus, was not excluded).

The number of subunits in the final critical habitat designation have changed as a result of exclusions under section 4(b)(2) or exemptions under section 4(a)(3). There were 11 critical habitat units and 63 subunits in the proposed rule. Eleven critical habitat units and 60 subunits comprise the final designation. In the North Coast Olympics, subunit NCO–3, composed entirely of Department of Defense lands at Joint-Base Lewis McChord, was exempted from the final designation under section 4(a)(3) of the Act (see Exemptions). In the Redwood Coast Region, subunits RDC–3 and RDC–4 were made up of private lands excluded under section 4(b)(2) of the Act (see Exclusions).

(5) Not all areas identified for potential exclusion in the proposed revised rule were excluded from the final designation. Based on the best available scientific information, we have found that the benefits of excluding other areas proposed or considered for exclusion do not outweigh the benefits of including them in the designation for the reasons discussed below. Therefore, the Secretary has determined not to exercise his discretion to exclude these lands. These areas are identified in Table 3 and are discussed further, below.

TABLE 3—LANDS THAT WERE PROPOSED FOR EXCLUSION, OR OTHERWISE CONSIDERED FOR EXCLUSION, WHICH ARE RETAINED IN THE FINAL CRITICAL HABITAT DESIGNATION FOR THE NORTHERN SPOTTED OWL

Type	State	Landowner	Acres	Hectares
State Lands	WA	Washington Department of Fish and Wildlife Lands [1]	8,328	3,370
State Lands	OR	Oregon Department of Forestry	212,798	86,116
State Lands	CA	California State Forests	49,760	20,137
	CA	Local Government Lands [2]	20,684	8,371
Total			291,570	117,994

(a) State, County, and Municipal Lands Not Excluded.

California

We retained a relatively limited area of State, County, and municipally owned or managed lands in California. Retained areas include lands managed as State Forests, County Parks, and a Municipal Water District. No habitat conservation plans (HCPs) or sage harbor agreements (SHAs) are currently in place on these lands. Most of these lands are in areas that have repeatedly been identified as critical to maintaining linkages among northern spotted owl populations in California. These State and County lands play an essential conservation role in this area of limited Federal ownership. Retaining these lands in the critical habitat designation promotes movement of northern spotted owls, and maintains the potential for genetic interchange. Including these lands would increase the awareness of State, County and local agencies about the status of and threats to spotted owls, the conservation actions needed for recovery, and the essential conservation role this habitat plays. It also increases the potential for educating visitors to State Forests and County Parks and Open Space areas about northern spotted owl conservation needs. Excluding these lands would have little impact on regulatory burdens because (a) current management of these lands is generally consistent with maintenance of habitat values, limiting the potential for adverse effects to critical habitat, and (b) management activities typically do not involve a Federal nexus. Therefore, the Secretary has chosen not to exclude the following California State, County, or municipal lands from the final designation of critical habitat for the northern spotted owl:

California Demonstration State Forests—Two California State Forests are included in the final critical habitat designation: (1) Jackson Demonstration State Forest (DSF), within subunit 2 in the Redwood Coast CHU in Mendocino County, California; and (2) Las Posadas DSF within subunit 6 of the Interior Coastal California CHU in Napa County, California. The California Department of Forestry and Fire Protection (CALFIRE) requested that the Jackson DSF be

excluded from the final critical habitat designation for the northern spotted owl.

CALFIRE developed the Las Posadas DSF Management Plan (California Department of Forestry and Fire Protection, 1992) for the Las Posadas DSF and characterizes current management on the forest as ''custodial.'' Goals for fish and wildlife under the plan include maintenance of the ''* * * Forest's status as one of the last relatively undisturbed fish and wildlife habitats in Napa County.'' However, the management plan is quite dated, having been approved in 1992. There is acknowledgment of the presence of northern spotted owl activity sites in the management plan, but no specific provisions for owl management or conservation actions in the plan. There have been no publicly-available amendments or updates to the plan since its enactment in 1992 and the timeframe in which any revisions to the plan may take place is uncertain. The designation of critical habitat on these lands would perform an important educational function in highlighting their essential role in owl conservation as the State updates its plan and conducts management activities. Habitat within the plan area is not typical forested habitat often associated with the northern spotted owl but includes oak woodlands and grasslands in this southern part of the species range and represents a unique ecological setting for the species; the educational benefit of including this area in critical habitat is therefore high, as landowners may not be aware that the northern spotted owl inhabits this atypical habitat type. After reviewing the information available, we find that the benefits of including these areas as critical habitat will assist in maintaining linkages and movement among and between northern spotted owl populations, and heightening the awareness and educating visitors of the conservation role this habitat plays for recovery of the northern spotted owl. As a result we are not excluding the areas designated as critical habitat within the Las Posadas DSF.

CALFIRE has also developed a management plan for the Jackson DSF (Jackson Demonstration State Forest Management Plan (dated January 2008) and CALFIRE has requested that the area be excluded from the final designation. In their request for exclusion CALFIRE stated that the designation of the Jackson DSF as critical habitat was unnecessary given: (1) Extensive conservation planning and environmental assessment has already been completed for the area; (2) the designation would potentially have negative impacts on the mission of the Jackson DSF on implementing restoration and research projects; (3) that the draft economic analysis for the proposed critical habitat concluded that the designation would not affect timber harvest on State lands; and (4) designation does not provide meaningful wildlife benefits any different from those already in place.

The Service responds, as follows, to the four elements in CALFIRE'S request for exclusion. (1) While there are efforts by CALFIRE in the development of a forest management plan and environmental assessment for the Jackson DSF, the plan does not specifically provide for northern spotted owl conservation. We believe that the Jackson DSF Management Plan (CALFIRE, 2008) could provide potential benefits to the northern spotted owl, in that there is a high likelihood that land allocations stated in the plan, along with the long-term desired conditions for forest composition will improve habitat over time. However, we find that: (a) Existing management direction in the Plan relating to the northern spotted owl is vague; (b) the stated conservation policy for the owl is limited to a take-avoidance strategy; and (c) while CALFIRE collects monitoring data on northern spotted owl activity sites on a continuous basis, there is no apparent strategy for evaluating that information or applying it to the benefit of the species. The only overt policy statement in the 2008 Plan regarding the northern spotted owl states that ''* * * forest management objectives * * * are to maintain or increase the number and productivity of nesting owl pairs through forest management practices that enhance nesting/roosting opportunities and availability of a suitable prey base.'' The terms ''maintain'' and ''increase'' are not supported with measurable standards or targets; and there are no remedial measures or mechanisms in the 2008 Plan that are triggered by a decrease in activity sites or demographic productivity. The northern spotted owl conservation strategy in the 2008 Plan is predicated on take-avoidance (CALFIRE 2008, pp. 109 and 267). Take avoidance alone is not a sufficient conservation strategy and it will not necessarily satisfy CALFIRE's direction to maintain or increase owl activity sites or demographic performance. If there are local variations in the ''true'' optimal forest conditions that support owl occupancy, strict adherence to the take-avoidance provisions may not be satisfactory and occupancy rates may decrease, and there are no corrective mechanisms in the 2008 Plan to account for this possibility. This dual problem of the suitability and occupancy of activity sites is further complicated by barred owl intrusion, and likewise is not addressed by total reliance on a take-avoidance strategy. In addition, in the monitoring chapter for the 2008 Plan we find that there is continuous monitoring of northern spotted owl activity sites (CALFIRE 2008, p. 149), but it is not spelled out in detail. (For example, it does not include the detail and adaptability (i.e., adaptive management provisions) as are specified for instream conditions and fisheries (CALFIRE 2008, pp. 153–154). In addition, the 2008 Plan does not appear to contain guidance on how to process, evaluate, and interpret the continuous data that is currently being collected on northern spotted owl activity sites, or on how to apply that information to agency decision-making in the event that activity sites and demographic performance are not maintained or increased under the existing management direction. In summary, although the 2008 Jackson DSF Management Plan can potentially produce positive long-term outcomes for the northern spotted owl, it contains an incomplete conservation plan for the species.

(2) We do not agree with CALFIRE's contention that the designation would potentially have negative impacts on its ability to implement restoration and research projects. The fact that a Federal agency (i.e., U.S. Forest Service) is a research cooperator does not, by itself, create a section 7 nexus. The Service contacted the senior Forest Service scientist connected with the research program at Jackson DSF who described the Forest Service research activities as simply a scientific examination of the State's proposed actions. At this time, we see no Federal regulatory mechanism in connection with the Jackson DSF's existing cooperative research program that would trigger consultation under section 7 of the Act. Therefore, we believe any regulatory burden from designation would be minimal.

(3) The Service agrees with CALFIRE's observation, in their July 6, 2012 correspondence, that the economic analysis rightly concluded that critical habitat designation would have no effect on Jackson DSF harvest levels. The only potential effect on harvest schedules would occur if Federal permits or grants-of-funds were connected to the harvest activity.

(4) We disagree with CALFIRE's position that ''designation would

provide no meaningful wildlife benefits from those already in place.'' Our response to item 1, above, indicates that there are potentially meaningful informational benefits that may assist implementation of the existing Jackson DSF Management Plan. We believe designating these lands as critical habitat would serve a very important informational function as the management plan is implemented; it would highlight the fact that this habitat is essential to the conservation of the northern spotted owl.

While acknowledging that the 2008 Management Plan contains many features that have the potential to benefit the northern spotted owl over the long term, and also recognizing that there several remediable omissions in that Plan, the Secretary has elected not to exclude Jackson Demonstration State Forest from critical habitat designation under section 4(b)(2) of the Act because we believe that the educational and informational benefits of inclusion outweigh the benefits of exclusion.

Mount Tamalpais Municipal Watershed of the Marin Municipal Water District—We are not excluding the Mount Tamalpais Watershed (Watershed) from critical habitat designation. The Watershed (18,500 ac (7,487 ha)) is administered by the Marin Municipal Water District (MMWD) in Marin County, California. The Watershed is flanked on all sides by public parks, county-administered open space areas, grazing land, and residential areas within the triangle formed by U.S. Highway 101, California State Route 1 and Sir Francis Drake Boulevard. The MMWD currently does not operate under a conservation plan such as an HCP or SHA.

A key management consideration for the MMWD is the practical need to limit sediment delivery thereby extending the service life of the five reservoirs within the Watershed (Kent, Alpine, Bon Tempe, Lagunitas, and Phoenix Lakes). To that end, the policy of the MMWD is to maintain land in a natural condition and limit human activities to those that have the least impact on the Watershed. Within specified constraints, permitted public activities include hiking, bicycling, horseback riding, fishing and picnicking. Camping, swimming and boating are prohibited. There is limited public motor vehicle access into the Watershed on Panoramic Highway, Ridgecrest Boulevard and the Fairfax-Bolinas Road. These roads mostly access scenic vistas and day use areas around the reservoirs. The remainder of the road network in the Watershed is dedicated for firefighter access and administrative use, and is closed to public motor vehicles. The MMWD has produced several current management plans addressing specific subject areas, including public access, vegetation management, road and trail management, and long term fire and fuels management. Several elements in those plans are compatible with long-term northern spotted owl conservation. However, there is no explicit discussion about long-term owl management in any of the MMWD's planning documents. The upcoming Vegetation Management Plan (projected in 2013) may provide additional information that is relevant to northern spotted owl habitat management. We are not aware of any substantial benefits to excluding these areas from critical habitat and find that there would be significant educational benefits to including them in the designation in that it would highlight the significance this area has for northern spotted owl conservation in future planning efforts.

Marin County Parks and Open Space Department—We have included in the designation six Open Space Preserves (OSPs) totaling 3,626 ac (1,467 ha) administered by the Marin County (California) Parks and Open Space Department (Department). We have designated three contiguous OSPs adjacent to the Mount Tamalpais Watershed and south of the communities of Lagunitas and Fairfax including Gary Giacomini (1,476 ac (597 ha)), White Hill (390 ac (158 ha)), and Cascade Falls (498 ac (202 ha)). We have also designated three contiguous OSPs adjacent the Watershed and west of the community of Corte Madera including Baltimore Canyon (193 ac (78 ha)), Blithedale Summit (899 ac (364 ha), and Camino Alto (170 ac (69 ha). The Parks Department currently does not operate under a conservation plan such as an HCP or SHA.

Park management emphasizes non-motorized public use. Five of the six OSPs are served only by fire roads that are closed to public motor vehicle access. The exception is the Camino Alto OSP which is flanked on the east by a public street. Several land management elements in the park system strategic plan (Marin County Parks and Open Space Department, 2008) are compatible with northern spotted owl. However, there is no explicit discussion about long term owl management in this planning document. We are not aware of any substantial benefits to excluding these areas from critical habitat and find that there would be significant educational benefits to including them in the designation.

Sonoma County Regional Parks Department—Lands within Hood Mountain Regional Park, administered by the Sonoma County (California) Regional Parks Department (SCRPD), are included in the designation in subunit 6 of the Interior California Coast CHU. The proposed critical habitat designation includes all, or portions of, four assessor's parcels totaling 460 ac (186 ha) within the park boundary. The SCRPD does not operate under an HCP or SHA.

Hood Mountain Regional Park is minimally roaded; the Sonoma County General Plan of 2008 indicates a modest program of trail construction and management within the countywide regional parks system. Public information materials, along with maps showing the local road network, and the types and locations of facilities within Hood Mountain Regional Park, indicate that the SCRPD is emphasizing non-motorized recreation and protection of undeveloped land. Through public information sources in Sonoma County, we located a mission statement for the SCRPD but were unable to find any planning or guidance documents to indicate how the regional parks system would be managed over the long term. The absence of planning direction and the reasons for inclusion are similar to those for the Marin Municipal Water District and for the Marin County Parks and Open Space Department. We are not aware of any substantial benefits to excluding these areas from critical habitat and find that there would be significant educational benefits to including them in the designation.

Oregon

In Oregon, we considered excluding 228,733 ac (92,565 ha) of State lands managed by the Oregon Department of Forestry (ODF). These lands contain both demographically productive sites for northern spotted owls and provide connectivity linkages among northern spotted owl populations in the Oregon Coast and North Coast-Olympic Modeling Regions. These lands are not currently managed under any sort of conservation plan or agreement with the Service, but are managed by ODF for multiple benefits including commodity production.

The State of Oregon has indicated that the designation of their lands as critical habitat would have ''virtually no impact—positive or negative * * *'' on either the management of their lands or their ability to pursue HCPs, SHAs or other conservation agreements (ODF *in litt.*). This is because there is rarely a Federal nexus that would trigger Service regulatory authority, such as the section

7 consultation process and the adverse modification analysis. Thus, there would be little negative impact of including State lands in the critical habitat designation.

Inclusion of these lands in the critical habitat designation highlights their essential conservation role and provides opportunities for educating visitors to these areas, nearby landowners, and ODF about the potential conservation contribution of these lands to northern spotted owls. If ODF were to pursue some sort of conservation agreement, this critical habitat designation would provide a blueprint not only for the lands that would be essential to include in such an effort but also the types of management that would be appropriate there. If ODF does not pursue such an effort this designation clearly indicates the value of these lands for the conservation of the northern spotted owl. We believe the value of the information included in the designation would provide an opportunity for management direction that focuses on benefits to the species.

Because we are unaware of any negative impacts of including these ODF lands, the benefits of exclusion do not outweigh the benefits of inclusion for these lands, and the Secretary has chosen not to exercise his discretion to exclude these State of Oregon lands from the final designation.

Washington

In Washington we proposed or considered excluding 226,869 ac (91,811 ha) of State lands managed by the Washington Department of Natural Resources (225,013 ac; 91,059 ha), Washington State Parks (104 ac; 42 ha), and Washington Department of Fish and Wildlife (8,328 ac; 3,370 ha). We excluded the lands managed by the Washington Department of Natural Resources from the final designation based on their HCP, and excluded 104 ac (42 ha) of State Parks and Department of Fish and Wildlife Lands (see Exclusions). We retained 8,328 ac (3,370 ha) of State-owned lands managed by the State Department of Fish and Wildlife for wildlife habitat in the final designation. No conservation agreements are currently in place on these lands, but some could be covered by an HCP which is currently under development. Most of these lands are located in the central Cascades in an area that has repeatedly been identified as critical to maintaining linkages among spotted owl populations in Washington. These State lands play an essential conservation role in this area of limited or checkerboard Federal ownership. Retaining these lands in the critical habitat designation promotes movement of northern spotted owls between the northern and southern Cascades Range, as well as between the western and eastern slopes of the Cascades. Including these State lands would increase the awareness of State agencies about the essential conservation role these lands play and the conservation actions needed for recovery. Excluding these lands would impose little regulatory burden because (a) management of these lands is consistent with maintenance of habitat values, limiting the potential for adverse effects to critical habitat, and (b) management activities typically do not involve a Federal nexus. Therefore, the Secretary has chosen not to exercise his discretion to exclude lands managed by the Washington Department of Fish and Wildlife from the final designation of critical habitat for the northern spotted owl.

Summary of Changes From the Proposed Rule

The areas identified in this final rule constitute a revision from the areas we designated as critical habitat for the northern spotted owl in 2008 (August 13, 2008; 73 FR 47326), which was a revision of the areas we initially designated as critical habitat for the northern spotted owl in 1992 (January 15, 1992; 57 FR 1796; see Changes from Previously Designated Critical Habitat, below). This final rule supersedes and replaces both of these earlier designations. The changes to the proposed revised critical habitat designation identified above result in a final designation of 9,577,969 ac (3,876,064 ha), a decrease of 4,197,484 ac (1,689,072 ha) from the 13,962,449 ac (5,649,660 ha) identified as meeting the definition of critical habitat in the March 8, 2012 (77 FR 14062) proposed rule (Table 4, below).

TABLE 4—DIFFERENCES BETWEEN PROPOSED AND FINAL REVISED CRITICAL HABITAT. TOTALS MANY NOT SUM DUE TO ROUNDING (ROUNDED TO NEAREST 100 UNITS). SMALL DIFFERENCES BETWEEN THE PROPOSED AND FINAL REVISED CRITICAL HABITAT THAT ARE NOT NOTED AS ADDITIONS OR DELETIONS ARE THE RESULT OF CORRECTIONS OF THE GIS MAP AND ROUNDING ERROR

Critical habitat unit	Proposed acres	Proposed hectares	Final acres	Final hectares
East Cascades North	1,919,469	775,465	1,345,523	544,514
East Cascades South	526,810	212,831	368,381	149,078
Inner California Coast Ranges	1,276,450	515,686	941,568	381,039
Klamath East	1,111,679	449,118	1,052,731	426,025
Klamath West	1,291,606	521,809	1,197,389	484,565
North Coast Olympic	1,595,821	644,712	824,500	333,663
Oregon Coast Ranges	891,154	360,026	859,864	347,975
Redwood Coast	1,550,747	626,502	180,855	73,189
West Cascades Central	1,353,045	546,630	909,687	368,136
West Cascades North	820,832	331,616	542,274	219,450
West Cascades South	1,624,836	656,434	1,355,198	548,429
Total	13,962,449	5,640,829	9,577,969	3,876,064

V. Changes From Previously Designated Critical Habitat

In 2008, we designated 5,312,300 ac (2,149,800 ha) of Federal lands in California, Oregon, and Washington as critical habitat for the northern spotted owl (73 FR 47326; August 13, 2008). In this revision, we are designating 9,577,969 ac (3,876,064 ha) as critical habitat for the northern spotted owl. We have revised the designation of critical habitat for the northern spotted owl to be consistent with the most current assessment of the conservation needs of the species, as described in the 2011 Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Appendix B). In this final designation, 4,085,808

ac (1,653,468 ha) are the same as in the 2008 designation. Of the current designation, 5,679,162 ac (2,298,275 ha) are lands not formerly designated in 2008, and 1,229,119 ac (497,405 ha) of lands that were included in the former designation are not included here, for reasons detailed below.

This revision of critical habitat represents an increase in the total land area identified from previous designations in 1992 and 2008. This increase in area is due, in part, to: (a) The unanticipated steep decline of the northern spotted owl and the impact of the barred owl, requiring larger areas of habitat to maintain sustainable spotted owl populations in the face of competition with the barred owl (e.g., Dugger *et al.* 2011, p. 2467); (b) the recommendation from the scientific community that the conservation of more occupied and high-quality habitat is essential to the conservation of the species (Forsman *et al.* 2011, p. 77); (c) the need to provide for redundancy in northern spotted owl populations, by maintaining sufficient suitable habitat for northern spotted owls on a landscape level in areas prone to frequent natural disturbances, such as the drier, fire-prone regions of its range (in other words, ''back-up'' areas of habitat so that owls have someplace to go if their habitat burns or trees die due to insect infestation, etc.) (Noss *et al.* 2006, p. 484; Thomas *et al.* 2006, p. 285; Kennedy and Wimberly 2009, p. 565); and (d) in contrast to the previous critical habitat designation, the inclusion of some State lands in areas where Federal lands are not sufficient to meet the conservation needs of the northern spotted owl.

The new delineation of areas determined to provide the physical or biological features essential for the conservation of the northern spotted owl, or otherwise determined to be essential for the conservation of the species, was based, in part, on an improved understanding of the forest characteristics and spatial patterns that influence habitat usage by northern spotted owls which were incorporated into the latest population evaluation and mapping technology. The modeling process we used to evaluate alternative critical habitat scenarios differed fundamentally from the conservation planning approach used to inform the 1992 and 2008 designations of critical habitat for the northern spotted owl. These past designations relied on *a priori* (predefined) rule sets derived from the best scientific information and expert judgment available at that time regarding the size of reserves or habitat conservation blocks, target number of spotted owl pairs per reserve or block, and targeted spacing between reserves or blocks (USFWS 2011, p. C–4), which we then assessed and refined based on local conditions. This revised designation reflects our use of a series of spatially explicit modeling processes to determine those specific areas where biological features are essential to the conservation of the northern spotted owl, and in the case of unoccupied habitat, to determine the areas that are otherwise essential to the conservation of the owl, as described in Criteria Used to Identify Critical Habitat. These models enabled us to compare potential critical habitat scenarios in a repeatable and scientifically accepted manner (USFWS 2011, p. C–4), using current tools that capitalize on new spatial information and algorithms (rule sets to solve problems) for identifying the most efficient habitat network containing what is essential for conservation.

The areas designated are lands that were occupied at the time of listing and that currently provide suitable nesting, roosting, foraging, or dispersal habitat for northern spotted owls, or that are otherwise essential to the conservation of the species. However, as noted above, not every site of known owl occupancy, either at present or at the time of listing, is included in the designation. We did not include owl sites if they were isolated from other known occurrences or in areas of marginal habitat quality such that they were unlikely to make a significant contribution to the conservation of the species, and therefore were not considered to provide the essential features.

The critical habitat network development and evaluation strategy we used attempted to maximize the efficiency of the network by prioritizing Federal lands. Utilization of new scientific information and advanced modeling techniques accounts for many of the changes in the revised critical habitat; in particular, the location of areas essential to northern spotted owls may have shifted from previous designations based on the best information available regarding the spatial distribution of high-value habitat. These advances include improvements in remotely-sensed vegetation data, use of models that better identify spatial configurations of habitat features important to owls, and assessment of relative population performance of northern spotted owls under different critical habitat designations. In addition, negative effects of barred owls on northern spotted owl populations were incorporated into the modeling process.

Late-successional reserves (LSRs) were not prioritized in this approach based solely on their status as a reserved land allocation, but were included in the 2012 designation only where the habitat quality was high enough to meet the selection criteria. In contrast, the 2008 critical habitat identified lands in part based on status as LSRs. However, LSRs were not originally designed under the NWFP solely to meet the needs of the northern spotted owl, but may include areas designated for other late-successional forest species. Therefore, not all LSRs contain habitat of sufficient quality to be included in the critical habitat network for the northern spotted owl. Connected to the decision to designate lands in part because of their status as LSRs, we did not include NWFP matrix on Forest Service lands in 2008. In this designation we have included NWFP matrix lands where they contain high quality habitat essential to the species' conservation. As described in the section Changes from the Proposed Rule, we tested a habitat network that did not include many of these high-value matrix lands; doing so led to a significant increase in the risk of extinction for the species, therefore these lands are retained in this final designation.

Table 5 shows a comparison of areas included in the 2008 designation and those included in this revision to critical habitat. The process we used to determine occupied areas containing essential features and unoccupied areas essential to the conservation of the species is described in Criteria Used to Identify Critical Habitat.

TABLE 5—COMPARISON OF AREA INCLUDED IN 2008 CRITICAL HABITAT AND 2012 CRITICAL HABITAT BY REGION. THE 11 REGIONS ARE DESCRIBED IN DETAIL IN THE PROPOSED REVISED CRITICAL HABITAT DESIGNATION SECTION

Modeling region	2012 Critical habitat		2008 Final critical habitat	
	acres	hectares	acres	hectares
North Coast Olympics	824,500	333,663	485,039	196,289

TABLE 5—COMPARISON OF AREA INCLUDED IN 2008 CRITICAL HABITAT AND 2012 CRITICAL HABITAT BY REGION. THE 11 REGIONS ARE DESCRIBED IN DETAIL IN THE PROPOSED REVISED CRITICAL HABITAT DESIGNATION SECTION—Continued

Modeling region	2012 Critical habitat		2008 Final critical habitat	
	acres	hectares	acres	hectares
Oregon Coast	859,864	347,975	507,082	205,209
Redwood Coast	180,855	73,189	70,153	28,390
West Cascades North	542,274	219,450	390,232	157,921
West Cascades Central	909,687	368,136	546,333	221,093
West Cascades South	1,355,198	548,429	700,421	283,450
East Cascades North	1,345,523	544,514	687,702	278,303
East Cascades South	368,381	149,078	207,291	83,888
Klamath East	1,052,731	426,025	667,795	270,247
Klamath West	1,197,389	484,565	667,795	270,247
Inner California Coast Ranges	941,568	381,039	535,863	216,856
Grand total	9,577,969	3,876,064	5,312,327	2,149,823

The reduction in the number of critical habitat units from 33 in 2008 to 11 in 2012 is a reflection, in part, of our decision to aggregate habitat by regions. The 2008 designation included 33 critical habitat units; the 2012 revision includes 11 critical habitat units with 60 subunits.

Our determination of PCEs in this revised designation incorporates new information resulting from research conducted since the last revision in 2008. This new information, along with relevant older studies, allowed us to include a higher level of specificity in the PCEs in this revision. This final rule also includes two changes in overall organization. The 2008 revised designation considered nesting and roosting habitat as separate PCEs. In this designation, we have combined these habitat types, because northern spotted owls generally use the same habitat for both nesting and roosting; they are not separate habitat types, and function differs only based on whether a nest structure is present. At the scale of a rangewide designation of critical habitat, nesting and roosting habitats cannot be systematically distinguished, and, therefore, we combined them in our analysis and resulting rulemaking. For project planning and management of northern spotted owls at the local scale, the distinction between nesting and roosting habitat remains useful, especially in portions of the subspecies' range where nesting structures are conspicuous (e.g., mistletoe brooms). The second organizational change was to subdivide the range of the northern spotted owl into four separate regions, and to describe PCEs for foraging habitat separately for each of these to provide more appropriate region-specific information.

VI. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features;

(a) Essential to the conservation of the species; and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies 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) of the Act 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. For these areas, critical habitat designations identify, 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 or biological features within an area, we focus on the principal biological or physical constituent elements (PCEs—primary constituent elements such as roost sites, nesting grounds, rainfall, canopy cover, soil type) that 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 that was not occupied at the time of listing but is essential to the conservation of the species 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 (50 CFR 424.12(e)).

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 northern spotted owls 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 on taking any individual of the species, including taking caused by actions that affect habitat. 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.

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 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.

For the northern spotted owl, the physical or biological features essential to the conservation of the species are forested areas that are used or likely to be used for nesting, roosting, foraging, or dispersing. The specific characteristics or components that comprise these features include, for example, specific ranges of forest stand density and tree size distribution; coarse woody debris; and specific resources, such as food (prey and suitable prey habitat), nest sites, cover, and other physiological requirements of northern spotted owls and considered essential for the conservation of the species. Below, we describe the life-history needs of the species and the broader physical or biological features essential to the conservation of the northern spotted owl, which informed our identification of the primary constituent elements (PCEs). The following information is based on studies of the habitat, ecology, and life history of the species, as described in the final listing rule for the northern spotted owl, published in the **Federal Register** on June 26, 1990 (55 FR 26114); the Revised Recovery Plan for the Northern Spotted Owl released on June 30, 2011 (USFWS 2011); the Background section of this document; and the following information.

Although the northern spotted owl is typically considered a habitat and prey specialist, it uses a relatively broad array of forest types for nesting, roosting, foraging, and dispersal. The diversity of forest types used is a reflection of the large geographical range of this subspecies, and the strong gradation in annual precipitation and temperature associated with both coastal mountain ranges and the Cascade Range. While the northern spotted owl is unquestionably associated with old-growth forests, habitat selection and population performance involves many additional features (Loehle *et al.* 2011, p. 20). This description of physical or biological features summarizes both variation in habitat use and particular features or portions of the overall gradient of variation that northern spotted owls preferentially select, and that we, therefore, consider essential to their conservation. We begin by considering the broad-scale patterns of climate, elevation, topography, and forest community type that act to influence northern spotted owl distributions and space for population growth and dispersal. We then discuss the abundance and pattern of habitats used for nesting, roosting, and foraging at the landscape scale that influence the availability and occupancy of breeding sites and the survival and fecundity of northern spotted owls. Thus, we begin by considering factors that operate at broader spatial scales and proceed to factors that influence habitat quality at the forest stand scale. When we discuss the physical or biological features, we focus on features that are common range wide, but also summarize specific

features or patterns of habitat selection that characterize particular regions.

Physical Influences Related to Features Essential to the Northern Spotted Owl

Climate, elevation, and topography are features of the physical environment that influence the capacity of a landscape to support habitat with high value for northern spotted owls and the type of habitat needed by the species. The distribution and amount of habitat on the landscape reflects interactions among these physical elements. Several studies have found that physical aspects of the environment, such as topographic position, aspect, and elevation, influence the northern spotted owl's selection of habitat (e.g., Clark 2007, pp. 97–111; Stalberg *et al.* 2009, p. 80). These features are also factors in determining the type of habitats essential to northern spotted owl conservation.

Climate—Population processes for northern spotted owls are affected by both large-scale fluctuations in climate conditions and by local weather variation (Glenn 2009, pp. 246–248). The influence of weather and climate on northern spotted owl populations has been documented in northern California (Franklin *et al.* 2000, pp. 559–583), Oregon (Olson *et al.* 2004, pp. 1047–1052; Dugger *et al.* 2005, pp. 871–877; Glenn *et al.* 2010, pp. 2546–2551), and Washington (Glenn *et al.* 2010, pp. 2546–2551). Climate and weather effects on northern spotted owls are mediated by vegetation conditions, and the combination of climate and vegetation variables improves models designed to predict the distribution of northern spotted owls (e.g., Carroll 2010, pp. 1434–1437).

Climate niche models for the northern spotted owl identified winter precipitation as the most important climate variable influencing ability to predict the distribution of northern spotted owl habitat (Carroll 2010, p. 1434). This finding is consistent with previous demographic studies that suggest there are negative effects of winter and spring precipitation on survival, recruitment, and dispersal (Franklin *et al.* 2000; pp. 559–583). Niche modeling suggested that precipitation variables, both in winter and in summer, were more influential than winter and summer temperatures (Carroll 2010, p. 1434–1436).

Wet, cold weather during the winter or nesting season, particularly the early nesting season, has been shown to negatively affect northern spotted owl reproduction (Olson *et al.* 2004, p. 1039; Dugger *et al.* 2005, p. 863; Glenn *et al.* 2011b, p. 1279), survival (Franklin *et al.* 2000, p. 539; Olson *et al.* 2004, p. 1039; Glenn *et al.* 2011a, p. 159), and recruitment (Franklin *et al.* 2000, p. 559; Glenn *et al.* 2010, p. 2546). Cold, wet weather may reduce reproduction or survival during the breeding season, due to declines or decreased activity in small mammal populations, so that less food is available during this period when metabolic demands are high (Glenn *et al.* 2011b, pp. 1290–1294). Wet, cold springs or intense storms during this time may increase the risk of starvation in adult birds (Franklin *et al.* 2000, pp. 559–590). Cold, wet weather may also limit abundance of prey (Lehmkuhl *et al.* 2006, pp. 589–595), and reduce the male northern spotted owl's ability to bring food to incubating females or nestlings (Franklin *et al.* 2000, pp. 559–590). Cold, wet nesting seasons have been shown to increase the mortality of nestlings due to chilling (Franklin *et al.* 2000, pp. 559–590), and reduce the number of young fledged per pair per year (Franklin *et al.* 2000, p. 559, Olson *et al.* 2004, p. 1047; Glenn *et al.* 2011b, p. 1279). Wet, cold weather may decrease survival of dispersing juveniles during their first winter, thereby reducing recruitment (Franklin *et al.* 2000, pp. 559–590).

Habitat quality may offset the negative effects of climate extremes. Franklin *et al.* (2000, pp. 582–583) argued that northern spotted owl populations are regulated or limited by both habitat quality and environmental factors, such as weather. Abundance and availability of prey may ultimately limit northern spotted owl populations, and abundance of prey is strongly associated with habitat conditions. As habitat quality decreases, other factors, such as weather, have a stronger influence on demographic performance. In essence, the presence of high-quality habitat appears to buffer the negative effects of cold, wet springs and winters on survival of northern spotted owls, as well as ameliorate the effects of heat. High-quality northern spotted owl habitat was defined in a northern California study area as a mature or old-growth core within a mosaic of old and younger forest (Franklin *et al.* 2000, p. 559). The high-quality habitat can help maintain a stable prey base, thereby reducing the cost of foraging during the early breeding season, when energetic needs are high (Carey *et al.* 1992, pp. 223–250; Franklin *et al.* 2000, p. 559). In addition, mature and old forest with high canopy cover typically remains cooler during summer months than younger stands.

Drought or hot temperatures during the previous summer have also been associated with reduced northern spotted owl recruitment and survival (Glenn *et al.* 2010, p. 2546). Drier, warmer summers and drought conditions during the growing season strongly influence primary production in forests, food availability, and the population sizes of small mammals (Glenn *et al.* 2010, p. 2546). Northern flying squirrels (one of the northern spotted owl's primary prey), for example, forage primarily on ectomycorrhizal fungi (truffles), many of which grow better under moist conditions (Lehmkuhl *et al.* 2004, pp. 58–60). Drier, warmer summers, or the high-intensity fires, which such conditions support, may change the range or availability of these fungi, affecting northern flying squirrels and the northern spotted owls that prey on them. Periods of drought are associated with declines in annual survival rates for other raptors, due to a presumed decrease in prey availability (Glenn *et al.* 2010, pp. 2546–2551).

Mexican northern spotted owls (*Strix occidentalis lucida*) and California northern spotted owls (*S. o. occidentalis*) have a narrow temperature range in which body temperature can be maintained without additional metabolic energy expenditure (Ganey *et al.* 1993, pp. 653–654; Weathers *et al.* 2001, pp. 682–686). Others (e.g., Franklin *et al.* 2000, entire) have assumed the northern spotted owl to be similar in this regard. While winter temperatures are relatively mild across much of the northern spotted owl's range, heat stress has been identified as a potential stressor at temperatures exceeding 30 °C (86 °F; Weathers *et al.* 2001, p. 678). The northern spotted owl's selection for areas with older-forest characteristics has been hypothesized to be related, in part, to its needing cooler areas in summer to avoid heat stress (Barrows and Barrows 1978, entire).

Elevation and Topography—Elevation and corresponding changes in temperature or moisture regimes constrain the development of vegetation communities selected by northern spotted owls, and may exceed the bounds of physiological tolerance of northern spotted owls or their prey as well. Several studies have noted the avoidance or absence of northern spotted owls above location-specific elevational limits (Blakesley *et al.* 1992, pp. 390–391; Hershey *et al.* 1998, p. 1406; LaHaye and Gutiérrez 1999, pp. 326, 328). In some locations, elevational limits occur despite the presence of forests that appear to have the structural characteristics typically associated with northern spotted owl habitat. Where

forest structure is not the apparent cause of elevational limits, the mechanistic bases of these limits are unknown, but they could be related to prey availability, presence of competitors, or extremes of temperature or precipitation. Habitat for northern spotted owls can occur from sea level to the lower elevation limit of subalpine vegetation types. This upper elevation limit varies with latitude from about 3,000 feet (ft) (900 meters (m)) above sea level in coastal Washington and Oregon (Davis and Lint 2005, p. 32) to about 6,000 ft (1,800 m) above sea level near the southern edge of the range (derived from Davis and Lint 2005, p. 32).

Topography also influences the distribution of northern spotted owl habitat and patterns of habitat selection. The effects of topography are strongest in drier forests, where aspect and insolation (amount of solar radiation received in an area) contribute to moisture stress that can limit forest density and tree growth. In drier forests east of the Cascades and in the Klamath region, suitable habitat can be concentrated at intermediate topographic positions, on north-facing aspects, and in concave landforms that retain moisture. This leads to a distribution of suitable habitat characterized by ribbon-like bands and discrete patches. Ribbons occur along drainages and valley bottoms, along the north faces of ridges that trend from east to west, and at intermediate topographic positions between drier pine-dominated forests at lower elevations, and subalpine forest types at higher elevations. Discrete patches also occur on top of higher plateaus. Northern spotted owl populations inhabiting drier forests have higher fecundity and lower survival rates than owls in other regions (Hicks *et al.* 2003, pp. 61–62; Anthony *et al.* 2006, pp. 28, 30). The naturally fragmented distribution of suitable habitat in drier forests, and increased predation risk associated with traversing this landscape, may be one of many features that contributed to the evolution of these life-history characteristics.

Slope may also influence the distribution of suitable habitat. Intermediate slopes have been associated with northern spotted owl sites in some studies (e.g., Gremel 2005, p. 37; Gaines *et al.* 2010, pp. 2048–2050; USFWS 2011, Appendix C), but the mechanisms underlying this association are unclear, potentially including a variety of features from soil depth to competition with barred owls.

Disturbance Regimes—Natural disturbances and anthropogenic (human-caused) activities continuously shape the amount and distribution of northern spotted owl habitat on the landscape. In moist forests west of the Cascades in Washington and Oregon, and in the Redwood region in California, anthropogenic activities have a dominant influence on distribution patterns of remaining habitat, with natural disturbances typically playing a secondary role. In contrast, drier forests east of the Cascades and in the Klamath region have dynamic disturbance regimes that continue to exert a strong influence on northern spotted owl habitat. Climate change may modify disturbance regimes across the range of the northern spotted owl, resulting in substantial changes to the frequency and extent of habitat disruption by natural events.

In drier forests, low- and mixed-severity fires historically contributed to a high level of spatial and temporal variability in landscape patterns of disturbed and recovering vegetation. However, anthropogenic activities have so altered these historical patterns and composition of vegetation, fuels, and associated disturbance regimes, that contemporary landscapes no longer function as they did historically (Hessburg *et al.* 2000a, pp. 77–78; Hessburg and Agee 2003, pp. 44–51; Hessburg *et al.* 2005, pp. 122–127, 134–136; Skinner *et al.* 2006, pp. 176–179; Skinner and Taylor 2006, pp. 201–203).

Fire exclusion, combined with the removal of fire-tolerant structures (e.g., large, fire-tolerant tree species such as ponderosa pine, western larch (*Larix occidentalis*), and Douglas-fir), have reduced the resiliency of the landscape to fire and other disturbances, (Agee 1993, pp. 280–319; Hessburg *et al.* 2000a, pp. 71–80; Hessburg and Agee 2003, pp. 44–46). Understory vegetation in these forests has shifted in response to fire exclusion from grasses and shrubs to shade-tolerant conifers, reducing fire tolerance of these forests, and increasing drought stress on dominant tree species.

Anthropogenic activities have also fundamentally changed the spatial distribution of fire-intolerant stands among the fire-tolerant stands, changing the pattern of fire activity across the landscape. Past management has altered the natural disturbance regime, homogenized the formerly patchy vegetative network, and reduced the complexity that was more prevalent during the presettlement era (Skinner 1995, pp. 224–226; Hessburg and Agee 2003, pp. 44–45; Hessburg *et al.* 2007, p. 21; Kennedy and Wimberly 2009, pp. 564–565). This alteration in the disturbance regime further affects forest structure and composition. Patches of fire-intolerant vegetation that had been spatially separated have become more contiguous and are more prone to conducting fire, insects, and diseases across larger swaths of the landscape (Hessburg *et al.* 2005, pp. 71–74, 77–78). This homogenized landscape may be altering the size and intensity of current disturbances and further altering landscape functionality (e.g., Everett *et al.* 2000, pp. 221–222).

The intensity and spatial extent of natural disturbances that affect the amount, distribution, and quality of northern spotted owl habitat in dry forests are also influenced by local topographic features, elevation, and climate (Swanson *et al.* 1988, entire). At local scales, these factors can be used to identify areas that are insulated from recent or existing disturbance, and consequently tend to persist without disturbance for longer periods (Camp *et al.* 1997, entire). These disturbance refugia are locations where northern spotted owl habitat has a higher likelihood of developing and persisting in drier forests. As a result of these unevenly distributed disturbance regimes, especially in the drier forests within its range, habitat for the northern spotted owl naturally occurs in a patchy mosaic in various stages of suitability in these regions. Sufficient area to provide for these habitat dynamics and to allow for the maintenance of adequate quantities of suitable habitat on the landscape at any one point in time is, therefore, essential to the conservation of the northern spotted owl in the dry forest regions.

Pattern and Distribution of Habitat—Historically, forest types occupied by the northern spotted owl were fairly continuous, particularly in the wetter parts of its range in coastal northern California and most of western Oregon and Washington. Suitable forest types in the drier parts of the range (interior northern California, Klamath region, interior southern Oregon, and east of the Cascade crest in Oregon and Washington) occur in a mosaic pattern interspersed with infrequently used vegetation types, such as open forests, shrubby areas, and grasslands. As described above, natural disturbance processes in these drier regions likely contributed to a pattern in which patches of habitat in various stages of suitability shift positions on the landscape through time. In the Klamath Mountains Provinces of Oregon and California, and to a lesser extent in the Coast and Cascade Provinces of California, large areas of serpentine soils exist that are typically not capable of supporting northern spotted owl habitat (Davis and Lint 2005, pp. 31–33).

Biological Influences Related to Features Essential to the Northern Spotted Owl

Forest Community Type (Composition)—Across their geographical range, northern spotted owl use of habitat spans several scales, with increasing levels of habitat selection specificity at each scale. We refer to these scales as the ''landscape,'' ''home range,'' and ''core area'' scales. Nest stands within core areas are even more narrowly selected (see Functional Categories of Northern Spotted Owl Habitat, in the Background section, above).

Landscapes supporting populations of northern spotted owls are the broadest scale we considered, encompassing areas sufficient to support numerous reproductive pairs (roughly 20,000 to 200,000 ac (8,100 to 81,000 ha). At the landscape scale, the northern spotted owl inhabits most of the major types of coniferous forests across its geographical range, including Sitka spruce, western hemlock, mixed conifer and mixed evergreen, grand fir, Pacific silver fir, Douglas-fir, redwood/Douglas-fir (in coastal California and southwestern Oregon), white fir, Shasta red fir, and the moist end of the ponderosa pine zone (Forsman *et al.* 1984, pp. 8–9; Franklin and Dyrness 1988, entire; Thomas *et al.* 1990, p. 145). These forest types may be in early-, mid-, or late-seral stages, and must occur in concert with at least one of the physical or biological features characteristic of breeding and nonbreeding (dispersal) habitat, described below.

Landscape-level patterns in tree species composition and topography can influence the distribution and density of northern spotted owls. These differences in northern spotted owl distribution occur even when different forest types have similar structural attributes, suggesting that northern spotted owls may prefer specific plant associations or tree species. Some forest types, such as pine-dominated and subalpine forests, are infrequently used, regardless of their structural attributes. In areas east of the Cascade Crest, northern spotted owls select forests with high proportions of Douglas-fir trees. The effects of tree species composition on habitat selection also extend to hardwoods within conifer-dominated forests (e.g., Meyer *et al.* 1998, p. 35). For example, our habitat modeling indicated that habitat value in the central Western Cascades was negatively related to proportion of hardwoods present. At the home range and core area scales, locations occupied by northern spotted owls consistently have greater amounts of mature and old-growth forest compared to random locations or unused areas. The proportion of older or structurally complex forest within the home range varies greatly by geographical region, but typically falls between 30 and 78 percent (Courtney *et al.* 2004, p. 5–6). In studies where circles of different sizes were compared, differences between northern spotted owl sites and random locations diminished as circles of increasing size were evaluated (Courtney *et al.* 2004, p. 5–7), suggesting habitat selection is stronger at the core area scale than at the home range and landscape scales.

Population Spatial Requirements—We have described a range of climatic, elevational, topographic, and compositional factors, and associated disturbance dynamics typical of different regions, that constrain the amount and distribution of northern spotted owl habitat across landscapes. Within this context, areas that contain the physical or biological features described below must provide habitat in an amount and distribution sufficient to support persistent populations, including metapopulations of reproductive pairs, and opportunities for nonbreeding and dispersing owls to move among populations to be considered essential to the conservation of the northern spotted owl.

Northern spotted owls maintain large home ranges that vary in size across nearly an order of magnitude across the species' range, from about 1,400 to 14,000 ac (570 to 5,700 ha), depending on geographic latitude and prey resources (see *Home Range Requirements,* below). Overlap occurs among adjoining territories, but the large size of territories nonetheless means that populations of northern spotted owls require landscapes with large areas of habitat suitable for nesting, roosting, and foraging. For example, in the northern parts of the subspecies' range where territories are largest, a population of 20 resident pairs would require at least 100,000 ac (about 40,500 ha) of habitat that is relatively densely distributed and of high quality.

As described in the Background section above, several studies have examined patterns of northern spotted owl habitat selection at the territory scale and the consequences on fitness of habitat configuration within a territory. We do not know if the features that contribute to enhancing northern spotted owl occupancy and reproductive success at the territory scale can be scaled up to predict what landscape-scale patterns of habitat are most conducive to stable or increasing northern spotted owl populations. Studies that use populations as units of analysis in order to investigate the effects of the landscape-scale configuration of habitat on the performance of northern spotted owl populations have only begun recently. Past models of northern spotted owl population dynamics have included predictions about the effects of habitat configuration on population performance, but these predictions have not been tested or validated by empirical studies (Franklin and Gutiérrez 2002; p. 215). Recent demographic analyses suggested that recruitment was positively related to the proportion of study areas covered by suitable habitat (see Forsman *et al.* 2011, pp. 59–62), but this covariate was not associated with other aspects of demographic performance, and few other covariates were investigated.

When the northern spotted owl was listed as threatened in 1990 (55 FR 26114; June 26, 1990), habitat loss and fragmentation of old-growth forest were identified as major factors contributing to declines in northern spotted owl populations. As older forests were reduced to smaller and more isolated patches, the ability of northern spotted owls to successfully disperse and establish territories was likely reduced (Lamberson *et al.* 1992, pp. 506, 508, 510–511). Lamberson *et al.* (1992, pp. 509–511) identified an apparent sharp threshold in the amount of habitat below which northern spotted owl population viability plummeted. Lamberson *et al.* (1994, pp. 185–186, 192–194) concluded that size, spacing, and shape of reserved areas all had strong influence on population persistence, and reserves that could support a minimum of 20 northern spotted owl territories were more likely to maintain northern spotted owl populations than smaller reserves. They also found that juvenile dispersal was facilitated in areas large enough to support at least 20 northern spotted owl territories.

In addition to area size, spacing between reserves had a strong influence on successful dispersal (Lamberson *et al.* 1992, pp. 508, 510–511). Forsman *et al.* (2002, pp. 15–16) reported dispersal distances of 1,475 northern spotted owls in Oregon and Washington for 1985 to 1996. Median maximum dispersal distance (the straight-line distance between the natal site and the farthest location) for radio-marked juvenile male northern spotted owls was 12.7 miles (mi) (20.3 kilometers (km)), and that of female northern spotted owls was 17.2 mi (27.5 km) (Forsman *et al.* 2002: Table

2). Dispersal data and other studies on the amount and configuration of habitat necessary to sustain northern spotted owls provided the foundation for developing previous northern spotted owl habitat reserve systems. Given the range-wide declining trends in northern spotted owl populations, as well as declining trends in the recruitment of new individuals into territorial populations (Forsman *et al.* 2011, pp. 59–66, Table 22), we have determined that, to be essential, physical or biological features must be positioned on the landscape to enable populations to persist and to allow individual owls to disperse among populations.

In contrast to earlier designations of critical habitat, we did not develop an *a priori* rule set to identify those areas that provide the physical or biological features essential to the conservation of the owl, using factors such as minimum size of habitat blocks, targeted numbers of owl pairs, or maximum distance between blocks of habitat. Instead, we determined the spatial extent and placement of the areas providing the physical or biological features that are essential to the conservation of the owl based on the relative demographic performance of the habitat models tested. This process is summarized in the section Criteria Used to Identify Critical Habitat, presented later in this document, and is presented in detail in our supporting documentation (Dunk *et al.* 2012b, entire). This supporting documentation, which describes in detail the modeling process we used, is available at our Web site. We refer to this document in the Summary of Comments and Recommendations section, below, as our ''Modeling Supplement'' (Dunk *et al.* 2012b).

Home Range Requirements—Most adult northern spotted owls remain on their home range throughout the year; therefore, their home range must provide all the habitat components, including prey, needed for the survival and successful reproduction of a territorial pair. The home range of a northern spotted owl is relatively large, but varies in size across the range of the subspecies (Courtney *et al.* 2004, p. 5–24; 55 FR 26117; June 26, 1990). Home range sizes are largest in Washington (Olympic Peninsula: 9,231 ac (3,736 ha) (Forsman *et al.* 2005, pp. 371–372), and generally decrease along a north-south gradient to approximately 1,430 ac (580 ha) in the Klamath region of northwestern California and southern Oregon (Zabel *et al.* 1995, p. 436). Northern spotted owl home ranges are generally larger where northern flying squirrels are the predominant prey and smaller where woodrats are the predominant prey (Zabel *et al.* 1995, p. 436). Home range size also increases with increasing forest fragmentation (Carey *et al.* 1992, p. 235; Franklin and Gutiérrez 2002, p. 212; Glenn *et al.* 2004, p. 45) and decreasing proportions of nesting habitat on the landscape (Carey *et al.* 1992, p. 235; Forsman *et al.* 2005, p. 374), suggesting that northern spotted owls increase the size of their home ranges to encompass adequate amounts of suitable forest types (Forsman *et al.* 2005, p. 374).

Meta-analysis of features associated with occupancy at the territory-scale indicated that northern spotted owls consistently occupy areas having larger patches of older forests that were more numerous and closer together than random sites (Franklin and Gutiérrez 2002; p. 212). In the Klamath and Redwood regions owls also consistently occupy sites with higher forest heterogeneity than random sites. Occupied sites in the Klamath region, in particular, show a high degree of vegetative heterogeneity, with more variable patch sizes and more perimeter edge than in other regions (Franklin and Gutiérrez 2002; p. 212). In the Klamath region, ecotones, or edges between older forests and other seral stages, may contribute to improved access to prey (Franklin and Gutiérrez 2002, p. 215). Several studies in the Klamath region and the Redwood region have found that variables describing the relationship between habitat core area and edge length improve the ability of models to predict northern spotted owl occupancy (e.g., Folliard *et al.* 2000, pp. 79–81; Zabel *et al* 2003, pp. 1936–1938). In contrast, northern spotted owl sites in the Oregon Coast Range had a more even distribution of cover types than random locations, and nest stands had a higher ratio of core to edge and more complex stand shapes than non-nest stands (Courtney *et al.* 2004, p. 5–9).

A home range provides the habitat components essential for the survival and successful reproduction of a resident breeding pair of northern spotted owls. The exact amount, quality, and configuration of these habitat types required for survival and successful reproduction varies according to local conditions and factors, such as the degree of habitat fragmentation, proportion of available nesting habitat, and primary prey species (Courtney *et al.* 2004, p. 5–2).

Core Area Requirements—Northern spotted owls often use habitat within their home ranges disproportionally, and exhibit central-place foraging behavior (Rosenberg and McKelvey 1999, p. 1028), with much activity centered within a core area surrounding the nest tree during the breeding season. During fall and winter, as well as in nonbreeding years, owls often roost and forage in areas of their home range more distant from the core. The size of core areas varies considerably across the subspecies' geographical range following a pattern similar to that of home range size (Bingham and Noon 1997, p. 133), varying from over 4,057 ac (1,642 ha) in the northernmost (flying squirrel prey) provinces (Forsman *et al.* 2005, pp. 370, 375) to less than 500 ac (202 ha) in the southernmost (dusky-footed woodrat prey) provinces (Pious 1995, pp. 9–10, Table 2; Zabel *et al.* 2003, pp. 1036–1038). Owls often switch nest trees and use multiple core areas over time, possibly in response to local prey depletion or loss of a particular nest tree.

Core areas contain greater proportions of mature or old forest than random or nonuse areas (Courtney *et al.* 2004, p. 5–13), and the amount of high-quality habitat at the core area scale shows the strongest relationships with occupancy (Meyer *et al.* 1998, p. 34; Zabel *et al.* 2003, pp. 1027, 1036), survival (Franklin *et al.* 2000, p. 567; Dugger *et al.* 2005, p. 873), and reproductive success (Ripple *et al.* 1997, pp. 155 to 156; Dugger *et al.* 2005, p. 871). In some areas, edges between forest types within northern spotted owl home ranges may provide increased prey abundance and availability (Franklin *et al.* 2000, p. 579). For successful reproduction, core areas need to contain one or more forest stands that have both the structural attributes and the location relative to other features in the home range that allow them to fulfill essential nesting, roosting, and foraging functions (Carey and Peeler 1995, pp. 233–236; Rosenberg and McKelvey 1999, pp. 1035–1037).

Areas to Support Dispersal and Nonbreeding Owls—Northern spotted owls regularly disperse through highly fragmented forested landscapes that are typical of the mountain ranges in western Washington and Oregon, and have dispersed from the Coastal Mountains to the Cascades Mountains in the broad forested regions between the Willamette, Umpqua, and Rogue Valleys of Oregon (Forsman *et al.* 2002, p. 22). Corridors of forest through fragmented landscapes serve primarily to support relatively rapid movement through such areas, rather than colonization or residency of nonbreeding owls.

During the transience (movement) phase, dispersers used mature and old-growth forest slightly more than its availability; during the colonization phase, mature and old-growth forest was

used at nearly twice its availability (Miller *et al.* 1997, p. 144). Closed pole-sapling-sawtimber habitat was used roughly in proportion to availability in both phases and may represent the minimum condition for movement. Open sapling and clearcuts were used less than expected based on availability during colonization (Miller *et al.* 1997, p. 145). In comparison, nondispersing subadults or nonbreeding adults that are residents require habitats that are more similar to the nesting, roosting, and foraging habitats utilized by breeding pairs. This suggests that juveniles and transient dispersers either have a less developed ability to avoid areas where starvation or predation are more likely, or they can use a greater variety of forested habitats than nondispersing adults, or both.

We currently do not have sufficient information to permit formal modeling of dispersal habitat and the influence of dispersal habitat condition on dispersal success (USFWS 2011, p. C–15). We expect, based on the studies discussed above, that dispersal success is highest when dispersers move through forests that have the characteristics of nesting-roosting and foraging habitats. Northern spotted owls can also disperse successfully through forests with less complex structure, but risk of starvation and predation likely increase with increasing divergence from the characteristics of suitable (nesting, roosting, foraging) habitat. The suitability of habitat to contribute to successful dispersal of northern spotted owls is likely related to the degree to which it ameliorates heat stress, provides abundant and accessible prey, limits predation risk, and resembles habitat in natal territories (Carey 1985, pp. 105–107; Buchanan 2004, pp. 1335–1341).

Dispersal habitat is habitat that both juvenile and adult northern spotted owls must use when looking to establish a new territory. Although optimal dispersal habitat would be the same as suitable nesting, roosting, or foraging habitat (mature and old-growth stands), dispersing owls will use younger forest for dispersal, and the Interagency Scientific Committee (Thomas *et al.* 1990) suggested the 50–11–40 rule for maintaining baseline forest conditions between blocks of old forest to enhance dispersal. Forests composed of at least 50 percent of trees with 11 inches (in) (28 centimeters (cm)) diameter at breast height (dbh) or greater, and with roughly a minimum 40 percent canopy cover, were considered to meet this baseline condition for northern spotted owl dispersal. Dispersal habitat can occur between larger blocks of nesting, foraging, and roosting habitat or within blocks of nesting, roosting, and foraging habitat. Dispersal habitat is essential to maintaining stable populations by promoting rapid filling of territorial vacancies when resident northern spotted owls die or leave their territories, and to providing adequate gene flow across the range of the species.

Regional Variation in Habitat Use—Differences in patterns of habitat associations across the range of the northern spotted owl suggest four different broad zones of habitat use, which we characterize as the (1) West Cascades/Coast Ranges of Oregon and Washington, (2) East Cascades, (3) Klamath and Northern California Interior Coast Ranges, and (4) Redwood Coast (Figure 1. We configured these zones based on a qualitative assessment of similarity among ecological conditions and habitat associations within the 11 different regions analyzed, as these 4 zones efficiently capture the range in variation of some of the physical or biological features essential to the conservation of the northern spotted owl. We summarize the physical or biological features for each of these four zones, emphasizing zone-specific features that are distinctive within the context of general patterns that apply across the entire range of the northern spotted owl.

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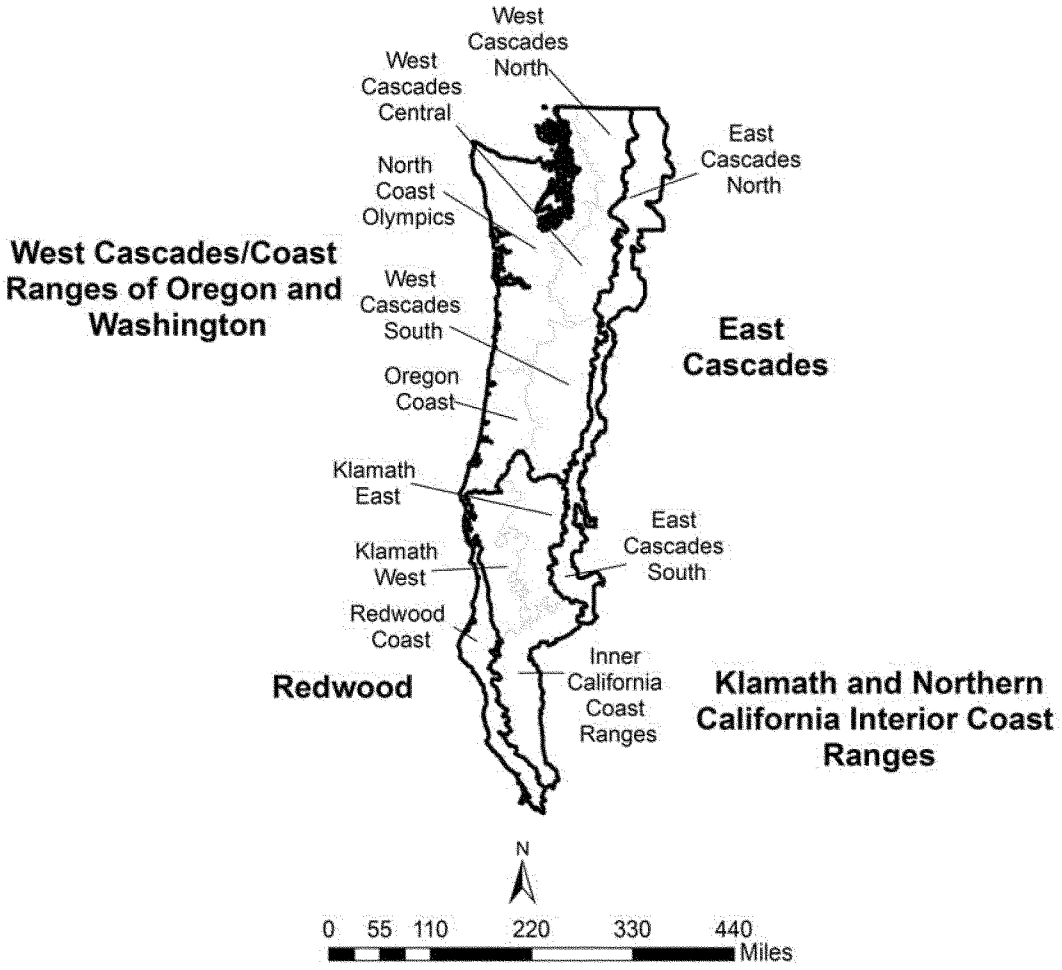
Figure 1. Eleven regions and four zones of habitat associations of northern spotted owls in Washington, Oregon, and California.



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West Cascades/Coast Ranges of Oregon and Washington

This zone includes five regions west of the Cascade crest in Washington and Oregon (Western Cascades North, Central and South; North Coast Ranges and Olympic Peninsula; and Oregon Coast Ranges; USFWS 2011, p. C–13). Climate in this zone is characterized by high rainfall and cool to moderate temperatures. Variation in elevation between valley bottoms and ridges is relatively low in the Coast Ranges, creating conditions favorable for development of contiguous forests. In contrast, the Olympic and Cascade ranges have greater topographic variation with many high-elevation areas supporting permanent snowfields and glaciers. Douglas-fir and western hemlock dominate forests used by northern spotted owls in this zone. Root diseases and wind-throw are important natural disturbance mechanisms that form gaps in forested areas. Flying squirrels are the dominant prey, with voles and mice also representing important items in the northern spotted owl's diet.

Our habitat modeling indicated that vegetation structure had a dominant influence on owl population performance, with habitat pattern and topography also contributing. High canopy cover, high density of large trees, high numbers of subcanopy vegetation layers, and low to moderate slope positions were all important features.

Nesting habitat in this zone is mostly limited to areas with large trees with defects such as mistletoe brooms, cavities, or broken tops. The subset of foraging habitat that is not nesting/roosting habitat generally had slightly lower values than nesting habitat for canopy cover, tree size and density, and canopy layering. Prey species (primarily northern flying squirrel) in this zone are associated with mature to late-successional forests, resulting in small differences between nesting, roosting, and foraging habitat.

East Cascades

This zone includes the Eastern Cascades North and Eastern Cascades South regions (USFWS 2011, p. C–13). This zone is characterized by a continental climate (cold, snowy winters and dry summers) and a high frequency of natural disturbances due to fires and outbreaks of forest insects and pathogens. Flying squirrels are the dominant prey species, but the diet of northern spotted owls in this zone also includes relatively large proportions of bushy-tailed woodrats, snowshoe hare, pika, and mice (Forsman *et al.* 2001, pp. 144–145).

Our modeling indicates that habitat associations in this zone do not show a pattern of dominant influence by one or a few variables (USFWS 2011, Appendix C). Instead, habitat association models for this zone

included a large number of variables, each making a relatively modest contribution (20 percent or less) to the predictive ability of the model. The features that were most useful in predicting habitat quality were vegetation structure and composition, and topography, especially slope position in the north. Other efforts to model habitat associations in this zone have yielded similar results (e.g., Gaines *et al.* 2010, pp. 2048–2050; Loehle *et al.* 2011, pp. 25–28).

Relative to other portions of the subspecies' range, nesting and roosting habitat in this zone includes relatively younger and smaller trees, likely reflecting the common usage of dwarf mistletoe brooms (dense growths) as nesting platforms (especially in the north). Forest composition that includes high proportions of Douglas-fir is also associated with this nesting structure. Additional foraging habitat in this zone generally resembles nesting and roosting habitat, with reduced canopy cover and tree size, and reduced canopy layering. High prey diversity suggests relatively diverse foraging habitats are used. Topographic position was an important variable, particularly in the north, possibly reflecting competition from barred owls (Singleton *et al.* 2010, pp. 289, 292). Barred owls, which have been present for over 30 years in northern portions of this zone, preferentially occupy valley-bottom habitats, possibly compelling northern spotted owls to establish territories on less productive, mid-slope locations (Singleton *et al.* 2010, pp. 289, 292).

Klamath and Northern California Interior Coast Ranges

This zone includes the Klamath West, Klamath East, and Interior California Coast regions (USFWS 2011, p. C–13). This region in southwestern Oregon and northwestern California is characterized by very high climatic and vegetative diversity resulting from steep gradients of elevation, dissected topography, and large differences in moisture from west to east. Summer temperatures are high, and northern spotted owls occur at elevations up to 5,800 ft (1,768 m). Western portions of this zone support a diverse mix of mesic forest communities interspersed with drier forest types. Forests of mixed conifers and evergreen hardwoods are typical of the zone. Eastern portions of this zone have a Mediterranean climate with increased occurrence of ponderosa pine. Douglas-fir dwarf mistletoe (*Arceuthobium douglasii*) is rarely used for nesting platforms in the western part of the northern spotted owl's range, but is commonly used in the east. The prey base for northern spotted owls in this zone is correspondingly diverse, but dominated by dusky-footed woodrats, bushy-tailed woodrats, and flying squirrels. Northern spotted owls have been well studied in the western Klamath portion of this zone (Forsman *et al.* 2004, p. 217), but relatively little is known about northern spotted owl habitat use in the eastern portion and the California Interior Coast Range portion of the zone. Our habitat association models for this zone suggest that vegetation structure and topographic features are nearly equally important in influencing owl population performance, particularly in the Klamath. High canopy cover, high levels of canopy layering, and the presence of very large dominant trees were all important features of nesting and roosting habitat. Compared to other zones, additional foraging habitat for this zone showed greater divergence from nesting habitat, with much lower canopy cover and tree size. Low to intermediate slope positions were strongly favored. In the eastern Klamath, presence of Douglas-fir was an important compositional variable in our habitat model (USFWS 2011, Appendix C).

Redwood Coast

This zone is confined to the northern California coast, and is represented by the Redwood Coast region (USFWS 2011, p. C–13). It is characterized by a maritime climate with moderate temperatures and generally mesic conditions. Near the coast, frequent fog delivers consistent moisture during the summer. Terrain is typically low-lying (0 to 3,000 ft (0 to 900 m)). Forest communities are dominated by redwood, Douglas-fir–tanoak (*Lithocarpus densiflorus*) forest, coast live oak (*Quercus agrifolia*), and tanoak series. Dusky footed woodrats are the dominant prey items for northern spotted owls in this zone.

Habitat association models for this zone diverged strongly from models for other zones. Topographic variables (slope position and curvature) had a dominant influence with vegetation structure having a secondary role. Low position on slopes was strongly favored, along with concave landforms.

Several studies of northern spotted owl habitat relationships suggest that stump-sprouting and rapid growth of redwood trees, combined with high availability of woodrats in patchy, intensively managed forests, enables northern spotted owls to occupy a wide range of vegetation conditions within the redwood zone. Rapid growth rates enable young stands to develop structural characteristics typical of older stands in other regions. Thus, relatively small patches of large remnant trees can also provide nesting habitat structure in this zone.

Physical or Biological Features and Primary Constituent Elements

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the northern spotted owl in areas occupied at the time of listing, focusing on the features' primary constituent elements. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species. The physical or biological features essential to the conservation of the northern spotted owl are forested lands that can be used for nesting, roosting, foraging, or dispersing. We have further determined that these physical or biological features may require special management considerations or protection, as described in the section *Special Management Considerations or Protection,* below. For the northern spotted owl, the primary constituent elements are the specific characteristics that make areas suitable for nesting, roosting, foraging and dispersal habitat. To be essential to the conservation of the northern spotted owl, these features need to be distributed in a spatial configuration that is conducive to persistence of populations, survival and reproductive success of resident pairs, and survival of dispersing individuals until they can recruit into a breeding population.

Models developed for the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Appendix C) to assess habitat suitability for the northern spotted owl across the range of the species and applied here to help identify potential critical habitat were based on habitat conditions within 500-acre (200-ha) core areas. Because core areas support a mix of nesting, roosting, and foraging habitats, their characteristics provide a basis for identification and quantification of PCEs.

Physical or Biological Features by Life-History Function

Each of the essential features—in this case, forested lands that provide the functional categories of northern spotted owl habitat—comprises a complex interplay of structural elements, such as tree size and species, stand density, canopy diversity, and decadence.

Northern spotted owls have been shown to exhibit strong associations with specific PCEs; however, the range of combinations of PCEs that may constitute habitat (particularly foraging habitat) is broad. In addition, the relative importance of specific habitat elements (and subsequently their relevance as PCEs) is strongly influenced by physical factors, such as elevation and slope position, and the degree to which physical factors influence the role of individual PCEs varies geographically. In addition to forest type, the key elements of habitats with the physical or biological features essential for the conservation of the northern spotted owl may be organized as follows:

Nesting and Roosting Habitat

Nesting and roosting habitat provides structural features for nesting, protection from adverse weather conditions, and cover to reduce predation risks for adults and young. Because nesting habitat provides resources critical for nest site selection and breeding, its characteristics tend to be conservative; stand structures at nest sites tend to vary little across the northern spotted owl's range. Nesting stands typically include a moderate to high canopy cover (60 to over 80 percent); a multilayered, multispecies canopy with large (greater than 30 in (76 cm) dbh) overstory trees; a high incidence of large trees with various deformities (e.g., large cavities, broken tops, mistletoe infections, and other evidence of decadence); large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly (Thomas *et al.* 1990, p. 164; 57 FR 1798, January 15, 1992). These findings were recently reinforced in rangewide models developed by Davis and Dugger (2011, Table 3–1, p. 39), who found that stands used for nesting (moderate to high suitability) exhibited high canopy cover of conifers (65 to 89 percent), large trees (mean diameter from 20 to 36 in (51 to 91 cm)), with a forest density of 6 to 19 large trees (greater than 30 in dbh) per acre (15 to 47 large trees (greater than 76 cm dbh) per hectare), and high diameter diversity.

Recent studies have found that northern spotted owl nest stands tend to have greater tree basal area, number of canopy layers, density of broken-top trees, number or basal area of snags, and volume of logs (Courtney *et al.* 2004, pp. 5–16 to 5–19, 5–23) than non-nest stands. In some forest types, northern spotted owls nest in younger forest stands that contain structural characteristics of older forests (legacy features from previous stands before disturbance). In the portions of the northern spotted owl's range where Douglas-fir dwarf mistletoe occurs, infected trees provide an important source of nesting platforms (Buchanan *et al.* 1993, pp. 4–5). Nesting northern spotted owls consistently occupy stands having a high degree of canopy cover that may provide thermoregulatory benefits (Weathers *et al.* 2001, p. 686), allowing northern spotted owls a wider range of choices for locating thermally neutral roosts near the nest site. A high degree of canopy cover may also conceal northern spotted owls, reducing potential predation. Studies of roosting locations found that northern spotted owls tended to use stands with greater vertical canopy layering (Mills *et al.* 1993, pp. 318–319), canopy cover (King 1993, p. 45), snag diameter (Mills *et al.* 1993, pp. 318–319), diameter of large trees (Herter *et al.* 2002, pp. 437, 441), and amounts of large woody debris (Chow 2001, p. 24; reviewed in Courtney *et al.* 2004, pp. 5–14 to 5–16, 5–23). Northern spotted owls use the same habitat for both nesting and roosting; the characteristics of roosting habitat differ from those of nesting habitat only in that roosting habitat need not contain the specific structural features used for nesting (Thomas *et al.* 1990, p. 62). Aside from the presence of the nest structure, nesting and roosting habitat are generally inseparable.

Habitat modeling developed for the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Appendix C) and used as one means of helping us identify potential critical habitat for the northern spotted owl supports previous descriptions of nesting habitat (57 FR 1796, January 15, 1992; 73 FR 47326, August 13, 2008), and suggests a high degree of similarity among the 11 ecological regions across the range of the species. Across regions, moderate to high suitability nesting habitat was characterized as having high canopy cover (65 to over 80 percent) and high basal area (240 ft^2/ac; (55 m^2/ha), mean dbh of conifers at least 16.5 to 24 in (42 to 60 cm), and a significant component of larger trees (greater than 30 in (75 cm)).

Foraging Habitat

Habitats used for foraging by northern spotted owls vary widely across the northern spotted owl's range, in accordance with ecological conditions and disturbance regimes that influence vegetation structure and prey species distributions. In general, northern spotted owls select old forests for foraging in greater proportion than their availability at the landscape scale (Carey *et al.* 1992, pp. 236–237; Carey and Peeler 1995, p. 235; Forsman *et al.* 2005, pp. 372–373), but will forage in younger stands and brushy openings with high prey densities and access to prey (Carey *et al.* 1992, p. 247; Rosenberg and Anthony 1992, p. 165; Thome *et al.* 1999, pp. 56–57; Irwin *et al.* 2012, pp. 208–210). Throughout much of the owl's range, the same habitat that provides for nesting and roosting also provides for foraging, although northern spotted owls have greater flexibility in utilizing a variety of habitats for foraging than they do for nesting and roosting. That is, habitats that meet the species' needs for nesting and roosting generally also provide for foraging (and dispersal) requirements of the owl. However, in some areas owls may use other types of habitats for foraging, in addition to those used for nesting and roosting; thus, habitat that supports foraging (or dispersal) does not always support the other PCEs, and does not necessarily provide for nesting or roosting. Variation in the potential use of various foraging habitats throughout the range of the northern spotted owl is described here.

West Cascades/Coast Ranges of Oregon and Washington

In the West Cascades/Coast Ranges of Oregon and Washington, high-quality foraging habitat is also nesting/roosting habitat. Foraging activity is positively associated with tree height diversity (North *et al.* 1999, p. 524), canopy cover (Irwin *et al.* 2000, p. 180; Courtney *et al.* 2004, p. 5–15), snag volume, density of snags greater than 20 in (50 cm) dbh (North *et al.* 1999, p. 524; Irwin *et al.* 2000, pp. 179–180; Courtney *et al.* 2004, p. 5–15), density of trees greater than or equal to 31 in (80 cm) dbh (North *et al.* 1999, p. 524) density of trees 20 to 31 in (51 to 80 cm) dbh (Irwin *et al.* 2000, pp. 179–180), and volume of woody debris (Irwin *et al.* 2000, pp. 179–180).

While the majority of studies reported strong associations with old-forest characteristics, younger forests with some structural characteristics (legacy features) of old forests (Carey *et al.* 1992, pp. 245 to 247; Irwin *et al.* 2000, pp. 178 to 179), hardwood forest patches, and edges between old forest and hardwoods (Glenn *et al.* 2004, pp. 47–48) are also used by foraging northern spotted owls.

East Cascades

Foraging habitats used by northern spotted owls in the East Cascades of Oregon, Washington, and California were similar to those used in the Western Cascades, but can also encompass forest stands that exhibit

somewhat lower mean tree sizes (quadratic mean diameter 16 to 22 in (40 to 55 cm) (Irwin *et al.* 2012, p. 207). However, foraging activity was still positively associated with densities of large trees (greater than 26 in (66 cm)) and increasing basal area (Irwin *et al.* 2012, p. 206). Stands dominated by Douglas-fir and white fir/Douglas-fir, or grand fir/Douglas-fir were preferred in some regions, whereas stands dominated by ponderosa pine were generally avoided (Irwin *et al.* 2012, p. 207).

Klamath and Northern California Interior Coast Ranges

Because diets of northern spotted owls in the Klamath and Northern California Interior Coast Ranges consist predominantly of both northern flying squirrels and dusky-footed woodrats, habitats used for foraging northern spotted owls are much more variable than in northern portions of the species' range. As in other regions, foraging northern spotted owls select stands with mature and old-forest characteristics such as increasing mean stand diameter and densities of trees greater than 26 in (66 cm) dbh (Irwin *et al.* 2012, p. 206) and a dominant canopy of large conifer trees greater than 21 in (52.5 cm) dbh (Solis and Gutierrez 1990, p. 747), high canopy cover (87 percent at frequently used sites; Solis and Gutierrez 1990, p. 747, Table 3), and multiple canopy layers (Solis and Gutierrez 1990, pp. 744–747; Anthony and Wagner 1999, pp. 14, 17). However, other habitat elements are disproportionately used, particularly forest patches within riparian zones of low-order streams (Solis and Gutierrez 1990, p. 747; Irwin *et al.* 2012, p. 208) and edges between conifer and hardwood forest stands (Zabel *et al.* 1995, pp. 436–437; Ward *et al.* 1998, pp. 86, 88–89). Foraging use is positively influenced by conifer species, including incense-cedar (*Calocedrus decurrens*), sugar pine (*P. lambertiana*), Douglas-fir, and hardwoods such as bigleaf maple (*Acer macrophyllum*), California black oak (*Q. kelloggii*), live oaks, and Pacific madrone (*Arbutus menziesii*) as well as shrubs (Sisco 1990, p. 20; Irwin *et al.* 2012, pp. 206–207, 209–210), presumably because they produce mast important for prey species. Within a mosaic of mature and older forest habitat, brushy openings and dense young stands or low-density forest patches also receive some use (Sisco 1990, pp. 9, 12, 14, 16; Zabel *et al.* 1993, p. 19; Irwin *et al.* 2012, pp. 209–210).

Redwood Coast

The preponderance of information regarding habitats used for foraging by northern spotted owls in the Redwood Coast zone comes from intensively managed industrial forests. In these environments, which comprise the majority of the redwood region, interspersion of foraging habitat and prey-producing habitat appears to be an important element of habitat suitability. Foraging habitat is used by owls to access prey and is characterized by a wide range of tree sizes and ages. Foraging activity by owls is positively associated with density of small to medium sized trees (10 to 22 in (25 to 56 cm)) and trees greater than 26 in (66 cm) in diameter (Irwin *et al.* 2007b, p. 19) or greater than 41 years of age (MacDonald *et al.* 2006, p. 381). Foraging was also positively associated with hardwood species, particularly tanoak (MacDonald *et al.* 2006, pp. 380–382; Irwin *et al.* 2007a, pp. 1188–1189). Prey-producing habitats occur within early-seral habitats 6 to 20 years old (Hamm and Diller 2009, p. 100, Table 2), typically resulting from clearcuts or other intensive harvest methods. Habitat elements within these openings include dense shrub and hardwood cover, and woody debris.

Nonbreeding and Dispersal Habitat

Although the term ''dispersal'' frequently refers to post-fledgling movements of juveniles, for the purposes of this rule we are using the term to include all movement during both the transience and colonization phase, and to encompass important concepts of linkage and connectivity among owl subpopulations. Population growth can only occur if there is adequate habitat in an appropriate configuration to allow for the dispersal of owls across the landscape. Although habitat that allows for dispersal may currently be marginal or unsuitable for nesting, roosting, or foraging, it provides an important linkage function among blocks of nesting habitat both locally and over the owl's range that is essential to its conservation. However, as noted above, we expect dispersal success is highest when dispersers move through forests that have the characteristics of nesting-roosting and foraging habitats. Although northern spotted owls may be able to move through forests with less complex structure, survivorship is likely decreased. Dispersal habitat, at a minimum, consists of stands with adequate tree size and canopy cover to provide protection from avian predators and at least minimal foraging opportunities; there may be variations over the owl's range (e.g., drier site in the east Cascades or northern California). This may include younger and less diverse forest stands than foraging habitat, such as even-aged, pole-sized stands, but such stands should contain some roosting structures and foraging habitat to allow for temporary resting and feeding during the transience phase.

Habitat supporting nonbreeding northern spotted owls, or the colonization phase of dispersal, is generally equivalent to nesting, roosting, and foraging habitat and is described above, although it may be in smaller amounts than that needed to support nesting pairs.

Primary Constituent Elements for the Northern Spotted Owl

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the northern spotted owl are as follows; note that PCE 1 must occur in concert with PCE 2, 3, or 4:

(1) Forest types that may be in early-, mid-, or late-seral stages and that support the northern spotted owl across its geographical range; these forest types are primarily:

(a) Sitka spruce,

(b) Western hemlock,

(c) Mixed conifer and mixed evergreen,

(d) Grand fir,

(e) Pacific silver fir,

(f) Douglas-fir,

(g) White fir,

(h) Shasta red fir,

(i) Redwood/Douglas-fir (in coastal California and southwestern Oregon), and

(j) The moist end of the ponderosa pine coniferous forests zones at elevations up to approximately 3,000 ft (900 m) near the northern edge of the range and up to approximately 6,000 ft (1,800 m) at the southern edge.

(2) Habitat that provides for nesting and roosting. In many cases the same habitat also provides for foraging (PCE (3)). Nesting and roosting habitat provides structural features for nesting, protection from adverse weather conditions, and cover to reduce predation risks for adults and young. This PCE is found throughout the geographical range of the northern spotted owl, because stand structures at nest sites tend to vary little across the northern spotted owl's range. These habitats must provide:

(a) Sufficient foraging habitat to meet the home range needs of territorial pairs

of northern spotted owls throughout the year.

(b) Stands for nesting and roosting that are generally characterized by:

(i) Moderate to high canopy cover (60 to over 80 percent);

(ii) Multilayered, multispecies canopies with large (20–30 in (51–76 cm) or greater dbh) overstory trees;

(iii) High basal area (greater than 240 ft^2/ac (55 m^2/ha));

(iv) High diversity of different diameters of trees;

(v) High incidence of large live trees with various deformities (e.g., large cavities, broken tops, mistletoe infections, and other evidence of decadence);

(vi) Large snags and large accumulations of fallen trees and other woody debris on the ground; and

(vii) Sufficient open space below the canopy for northern spotted owls to fly.

(3) Habitat that provides for foraging, which varies widely across the northern spotted owl's range, in accordance with ecological conditions and disturbance regimes that influence vegetation structure and prey species distributions. Across most of the owl's range, nesting and roosting habitat is also foraging habitat, but in some regions northern spotted owls may additionally use other habitat types for foraging as well. The foraging habitat PCEs for the four ecological zones within the geographical range of the northern spotted owl are generally the following:

(a) West Cascades/Coast Ranges of Oregon and Washington

(i) Stands of nesting and roosting habitat; additionally, owls may use younger forests with some structural characteristics (legacy features) of old forests, hardwood forest patches, and edges between old forest and hardwoods;

(ii) Moderate to high canopy cover (60 to over 80 percent);

(iii) A diversity of tree diameters and heights;

(iv) Increasing density of trees greater than or equal to 31 in (80 cm) dbh increases foraging habitat quality (especially above 12 trees per ac (30 trees per ha));

(v) Increasing density of trees 20 to 31 in (51 to 80 cm) dbh increases foraging habitat quality (especially above 24 trees per ac (60 trees per ha));

(vi) Increasing snag basal area, snag volume (the product of snag diameter, height, estimated top diameter, and including a taper function (North *et al.* 1999, p. 523)), and density of snags greater than 20 in (50 cm) dbh all contribute to increasing foraging habitat quality, especially above 4 snags per ac (10 snags per ha);

(vii) Large accumulations of fallen trees and other woody debris on the ground; and

(viii) Sufficient open space below the canopy for northern spotted owls to fly.

(b) East Cascades

(i) Stands of nesting and roosting habitat;

(ii) Stands composed of Douglas-fir and white fir/Douglas-fir mix;

(iii) Mean tree size greater than 16.5 in (42 cm) quadratic mean diameter;

(iv) Increasing density of large trees (greater than 26 in (66 cm)) and increasing basal area (the total area covered by trees measured at breast height) increases foraging habitat quality;

(v) Large accumulations of fallen trees and other woody debris on the ground; and

(vi) Sufficient open space below the canopy for northern spotted owls to fly.

(c) Klamath and Northern California Interior Coast Ranges

(i) Stands of nesting and roosting habitat; in addition, other forest types with mature and old-forest characteristics;

(ii) Presence of the conifer species, incense-cedar, sugar pine, Douglas-fir, and hardwood species such as bigleaf maple, black oak, live oaks, and madrone, as well as shrubs;

(iii) Forest patches within riparian zones of low-order streams and edges between conifer and hardwood forest stands;

(iv) Brushy openings and dense young stands or low-density forest patches within a mosaic of mature and older forest habitat;

(v) High canopy cover (87 percent at frequently used sites);

(vi) Multiple canopy layers;

(vii) Mean stand diameter greater than 21 in (52.5 cm);

(viii) Increasing mean stand diameter and densities of trees greater than 26 in (66 cm) increases foraging habitat quality;

(ix) Large accumulations of fallen trees and other woody debris on the ground; and

(x) Sufficient open space below the canopy for northern spotted owls to fly.

(d) Redwood Coast

(i) Nesting and roosting habitat; in addition, stands composed of hardwood tree species, particularly tanoak;

(ii) Early-seral habitats 6 to 20 years old with dense shrub and hardwood cover and abundant woody debris; these habitats produce prey, and must occur in conjunction with nesting, roosting, or foraging habitat;

(iii) Increasing density of small-to-medium sized trees (10 to 22 in (25 to 56 cm)) increases foraging habitat quality;

(iv) Trees greater than 26 in (66 cm) in diameter or greater than 41 years of age; and

(v) Sufficient open space below the canopy for northern spotted owls to fly.

(4) Habitat to support the transience and colonization phases of dispersal, which in all cases would optimally be composed of nesting, roosting, or foraging habitat (PCEs (2) or (3)), but which may also be composed of other forest types that occur between larger blocks of nesting, roosting, and foraging habitat. In cases where nesting, roosting, or foraging habitats are insufficient to provide for dispersing or nonbreeding owls, the specific dispersal habitat PCEs for the northern spotted owl may be provided by the following:

(a) Habitat supporting the transience phase of dispersal, which includes:

(i) Stands with adequate tree size and canopy cover to provide protection from avian predators and minimal foraging opportunities; in general this may include, but is not limited to, trees with at least 11 in (28 cm) dbh and a minimum 40 percent canopy cover; and

(ii) Younger and less diverse forest stands than foraging habitat, such as even-aged, pole-sized stands, if such stands contain some roosting structures and foraging habitat to allow for temporary resting and feeding during the transience phase.

(b) Habitat supporting the colonization phase of dispersal, which is generally equivalent to nesting, roosting, and foraging habitat as described in PCEs (2) and (3), but may be smaller in area than that needed to support nesting pairs.

This revised designation describes the physical or biological features and their primary constituent elements essential to support the life-history functions of the northern spotted owl. We have determined that all of the units and subunits designated in this rule were occupied by the northern spotted owl at the time of listing, and that (depending on the scale at which occupancy is considered) some smaller areas within the subunits may have been unoccupied at the time of listing. To address any uncertainty regarding occupancy, we have also evaluated all of the areas identified here as critical habitat under the standard of section 3(5)(a)(ii) of the Act, and determined that they are essential to the conservation of the species, as described in Criteria Used to Identify Critical Habitat, below. The criteria section also describes our evaluation of the configuration of the

physical or biological features on the landscape to determine where those features are essential to the conservation of the northern spotted owl. We have further determined that the physical or biological features essential to the conservation of the northern spotted owl require special management considerations or protection, as described below.

In areas occupied at the time of listing, not all of the revised critical habitat will contain all of the PCEs, because not all life-history functions require all of the PCEs. Some subunits contain all PCEs and support multiple life processes, while some subunits may contain only those PCEs necessary to support the species' particular use of that habitat. However, all of the areas occupied at the time of listing and designated as critical habitat support at least the first PCE described (forest-type), in conjunction with at least one other PCE. Thus PCE (1) must always occur in concert with at least one additional PCE (PCE 2, 3, or 4).

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. The term critical habitat is defined in section 3(5)(A) of the Act, in part, as the specific areas within the geographical areas occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and ''which may require special management considerations or protection.'' Accordingly, in identifying critical habitat in areas occupied at the time of listing, we determine whether the features essential to the conservation of the species on those areas may require any special management actions or protection. Here we present a discussion of the special management considerations or protections that may be required throughout the critical habitat for the northern spotted owl. In addition, for the benefit of land managers, we provide management suggestions consistent with the recommendations of the Revised Recovery Plan for consideration.

An effective critical habitat strategy needs to conserve extant, high-quality northern spotted owl habitat in order to reverse declining population trends and address the threat from barred owls. The northern spotted owl was initially listed as a threatened species due largely to both historical and ongoing habitat loss and degradation. The recovery of the northern spotted owl therefore requires both protection of habitat and management where necessary to provide sufficient high-quality habitat to allow for population growth and to provide a buffer against threats such as competition with the barred owl. Recovery Criterion 3 in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) is the ''Continued Maintenance and Recruitment of Northern Spotted Owl Habitat,'' which is further described as the achievement of a stable or increasing trend in northern spotted owl nesting, roosting, and foraging habitat throughout the range of the species. Meeting this recovery criterion will require special management considerations or protection of the physical or biological features essential to the conservation of the northern spotted owl in all of the critical habitat units and subunits, as described here. Special management includes both passive and active management.

The 2011 Revised Recovery Plan for the Northern Spotted Owl describes the three main threats to the northern spotted owl as competition from barred owls, past habitat loss, and current habitat loss (USFWS 2011, p. III–42). As the barred owl is present throughout the range of the northern spotted owl, special management considerations or protections may be required in all of the critical habitat units and subunits to ensure the northern spotted owl has sufficient habitat available to withstand competitive pressure from the barred owl (Dugger *et al.* 2011, pp. 2459, 2467). In particular, studies by Dugger *et al.* (2011, p. 2459) and Wiens (2012, entire) indicated that northern spotted owl demographic performance is better when additional high-quality habitat is available in areas where barred owls are present.

Scientific peer reviewers of the 2011 Revised Recovery Plan for the Northern Spotted Owl (USFSW 2011, entire) and Forsman *et al.* (2011, p. 77) recommended that we address currently observed downward demographic trends in northern spotted owl populations by protecting currently occupied sites, as well as historically occupied sites, and by maintaining and restoring older and more structurally complex multilayered conifer forests on all lands (USFWS 2011, pp. III–42 to III–43). The types of management or protections that may be required to achieve these goals and maintain the physical or biological features essential to the conservation of the owl in occupied areas vary across the range of the species. Some areas of northern spotted owl habitat, particularly in wetter forest types, are unlikely to be enhanced by active management activities, but instead need protection of the essential features; whereas other forest areas would likely benefit from more proactive forestry management. For example, in drier, more fire-prone regions of the owl's range, habitat conditions will likely be more dynamic, and more active management may be required to reduce the risk to the essential physical or biological features from fire, insects, disease, and climate change, as well as to promote regeneration following disturbance.

While we recommend conservation of high-quality and occupied northern spotted owl habitat, long-term northern spotted owl recovery could benefit from forest management where the basic goals are to restore or maintain ecological processes and resilience, as discussed in detail in the Revised Recovery Plan (USFWS 2011, pp. III–11 to III–39). Special management considerations or protections may be required throughout the critical habitat to achieve these goals and benefit the conservation of the owl. The natural ecological processes and landscape that once provided large areas of relatively contiguous northern spotted owl habitat (especially on the west side of the Cascade Range) have been altered by a history of anthropogenic activities, such as timber harvest, road construction, development, agricultural conversion, and fire suppression. The resilience of these systems is now additionally challenged by the effects of climate change. As recommended in the Revised Recovery Plan for the Northern Spotted Owl, active forest management may be required throughout the range of the owl with the goal of maintaining or restoring forest ecosystem structure, composition, and processes so they are sustainable and resilient under current and future climate conditions, to provide for the long-term conservation of the species (USFWS 2011, p. III–13). For example, in some areas, past management practices have decreased age-class diversity and altered the structure of forest patches; in these areas, management, such as targeted vegetation treatments, could simultaneously reduce fuel loads and increase canopy and age-class diversity (Miller *et al.* 2009, p. 30; Stephens *et al.* 2009, p. 316–318; Stephens *et al.* 2012b, p. 554; Fontaine and Kennedy 2012, p. 1559; Chmura *et al.* 2011, p. 1134; USFWS 2011, p. III–18).

In moist forests that are currently providing mature and late-successional

forest that functions as habitat for northern spotted owls, active management is generally unnecessary to conserve older growth forests (Johnson and Franklin 2009, p. 3). Within younger, homogeneous stands, active management that retains larger and older trees but reduces density of smaller trees may be useful to accelerate development of within-stand structural diversity. Management insights, such as those provided by Aubry *et al.* (2009, entire), Johnson and Franklin (2009, entire), Johnson and Franklin (2012 entire), Kerr 2012, entire), and Spies *et al.* (2010, entire), provide examples of how such actions could occur in a manner consistent with northern spotted owl conservation in moist forests.

In dry forest regions, where natural disturbance regimes and vegetation structure, composition, and distribution have been substantially altered since Euro-American settlement, vegetation and fuels management (through influencing fire behavior, severity, and distribution) may be required to retain and recruit northern spotted owl habitat on the landscape (Buchanan 2009, pp. 114–115; Healey *et al.* 2008, pp. 1117–1118; Roloff *et al.* 2012, pp. 8–9; Ager *et al.* 2007, pp. 53–55; Ager *et al.* 2012, pp. 279–282; Franklin *et al.* 2009, p. 46; Kennedy and Wimberly 2009, pp. 564–565), to conserve other biodiversity (Perry *et al.* 2011, p. 715), and to restore more natural vegetation and disturbance regimes and heterogeneity (e.g., Stephens *et al.* 2012b, pp. 557–558). Special management considerations may be required to maintain adequate northern spotted owl habitat in the near term, not only to allow northern spotted owls to persist in the face of threats from barred owl expansion and habitat modifications from fire and other disturbances, but also to restore landscapes to a more resilient state in the face of alterations projected to occur with ongoing climate change (USFWS 2011, p. III–32).

If land managers are actively managing forests, we recommend that these activities be focused on lower quality owl habitat (lower relative habitat sustainability (RHS)); that these activities focus on ecological restoration, or apply principles of ecological forestry; and, where possible, evaluate the effects of these treatments on northern spotted owls and other species of concern using an active adaptive forest management framework.

We recognize that the only regulatory effect of the designation of critical habitat is that section 7(a)(2) of the Act applies, and that it does not require active management or mandate any specific type of management; it only requires that Federal agencies ensure that their actions are not likely to destroy or adversely modify critical habitat, as those terms are used in section 7. However, because the Act requires us to make a determination that the physical and biological features essential to conservation of the species may also need special management considerations or protection, we are taking this opportunity to describe, for consideration by land managers, specific management approaches and types of forest where land managers should consider applying them in order to maintain sufficient suitable habitat across the range of the owl. We have determined that the physical and biological features in habitat occupied by the species at the time it was listed, as represented by the primary constituent elements, may require special management considerations or protection as required by 16 U.S.C. 1532(5)(A). However, nothing in this rule requires land managers to implement, or precludes land managers from implementing, special management or protection measures.

Because these will vary geographically, here we provide a more detailed discussion of the types of management considerations or protections that may be required to preserve or enhance the essential physical or biological features for the northern spotted owl in the West Cascades/Coast Ranges of Oregon and Washington, East Cascades, Klamath and Northern California Interior Coast Ranges, and the Redwood Coast.

West Cascades/Coast Ranges of Oregon and Washington

Special management considerations or protection may be required in areas of moist forests to conserve or protect older stands that contain the conditions to support northern spotted owl occupancy (RA10: USFWS 2011, p. 43) or contain high-value northern spotted owl habitat (RA32: USFWS 2011, p. 67). Silvicultural treatments are generally not needed to maintain existing old-growth forests and high-quality habitat on moist sites (Wimberly *et al.* 2004, p. 155; Johnson and Franklin 2009, pp. 3, 39). In contrast to dry forests, short-term fire risk is generally lower in the moist forests that not only dominate on the west side of the Cascade Range, but also occur east of the Cascades as a higher-elevation band or as peninsulas or inclusions in mesic forests. Disturbance-based management for forests and northern spotted owls in moist forest areas should be different from that applied in dry forests. Efforts to alter either fuel loading or potential fire behavior in these sites could have undesirable ecological consequences as well (Johnson and Franklin 2009, p. 39; Mitchell *et al.* 2009, pp. 653–654; USFWS 2011, p. III–17). Furthermore, commercial thinning has been shown to have negative consequences for northern spotted owls (Forsman *et al.* 1984, Meiman *et al.* 2003) and their prey (Waters *et al.* 1994, Luoma *et al.* 2003, Wilson 2010). Active management may be more appropriate in younger plantations that are not currently on a trajectory to develop old-growth structure. These stands typically do not provide high-quality northern spotted owl habitat, although they may occasionally be used for foraging and dispersal.

In general, to advance long-term northern spotted owl recovery and ecosystem restoration in moist forests in the face of climate change and past management practices, special management considerations or protections may be required that follow these principles as recommended in the 2011 Revised Recovery Plan (USFWS 2011, p. III–18):

(1) Conserve older stands that contain the conditions to support northern spotted owl occupancy or high-value northern spotted owl habitat as described in Recovery Actions 10 and 32 (USFWS 2011, pp. III–43, III–67). On Federal lands this recommendation applies to all land-use allocations (see also Thomas *et al.* 2006, pp. 284–285).

(2) Management emphasis needs to be placed on meeting northern spotted owl recovery goals and long-term ecosystem restoration and conservation. When there is a conflict between these goals, actions that would disturb or remove the essential physical or biological features of northern spotted owl critical habitat need to be minimized and reconciled with long-term ecosystem restoration goals.

(3) Continue to manage for large, continuous blocks of late-successional forest.

(4) In areas that are not currently late-seral forest or high-value habitat and where more traditional forest management might be conducted (e.g. matrix), these activities should consider applying ecological forestry prescriptions. Some examples that could be utilized include Franklin *et al.* (2002, pp. 417–421; 2007, entire), Kerr (2012), Drever *et al.* (2006, entire), Johnson and Franklin (2009, pp. 39–41), Swanson *et al.* (2010, entire), and others cited in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, pp. III–14, III–17 to III–19).

These special management considerations or protections apply to Units 1, 2, 4, 5 and 6 of the revised critical habitat.

East Cascades

Special management considerations or protection may be required in the East Cascades to address the effects of past activities associated with Euro-American settlement, such as timber harvest, livestock grazing, fire suppression, and fire exclusion, that have substantially altered the inland northwest, modifying the patterns of vegetation and fuels, and subsequent disturbance regimes to the degree that contemporary landscapes no longer function as they did historically (Hessburg *et al.* 2000a, pp. 74–81; Hessburg and Agee 2003, pp. 44–46; Hessburg *et al.* 2005, pp. 134–135; Skinner *et al.* 2006, pp. 178–179; Skinner and Taylor 2006, pp. 201–203; Miller *et al.* 2009, p. 30; Stephens *et al.* 2009, pp. 316–318; Stephens *et al.* 2012b, p. 554; Fontaine and Kennedy 2012, p. 1559; Chmura *et al.* 2011, p. 1134). This has affected not only the existing forest and disturbance regimes, but the quality, amount, and distribution of northern spotted owl habitat on the landscape (Buchanan 2009, pp. 114–115; Healey *et al.* 2008, pp. 1117–1118; Roloff *et al.* 2012, pp. 8–9; Ager *et al.* 2007, pp. 53–55; Ager *et al.* 2012, pp. 279–282; Franklin *et al.* 2009, p. 46; Kennedy and Wimberly 2009, pp. 564–565). In order to preserve the essential physical or biological features, these dynamic, disturbance-prone forests should be managed in a way that promotes northern spotted owl conservation, responds to climate change, and restores dry forest ecological structure, composition and processes, including wildfire and other disturbances (USFWS 2011, p. III–20). The following restoration principles apply to the management that may be required in this dry forest region (USFWS 2011, pp. III–34 to III–35):

(1) Conserve older stands that contain the conditions to support northern spotted owl occupancy or high-value northern spotted owl habitat as described in Recovery Actions 10 and 32 (USFWS 2011, pp. III–43, III–67). On Federal lands this recommendation applies to all land-use allocations (see also Thomas *et al.* 2006, pp. 284–285).

(2) Emphasize vegetation management treatments outside of northern spotted owl territories or highly suitable habitat;

(3) Design and implement restoration treatments at the landscape level;

(4) Retain and restore key structural components, including large and old trees, large snags, and downed logs;

(5) Retain and restore heterogeneity within stands;

(6) Retain and restore heterogeneity among stands;

(7) Manage roads to address fire risk; and

(8) Consider vegetation management objectives when managing wildfires, where appropriate.

The above principles will result in treatments that have a variety of effects on northern spotted owl habitat in the short and long term. For example, some restoration treatments may have an immediate neutral or beneficial effect on existing northern spotted owl habitat (e.g., roads management, some prescribed fire prescriptions). Other treatments, however, may involve reductions in stand densities, canopy cover, or ladder fuels (understory vegetation that has the potential to carry up into a crown fire)—and thus affect the physical or biological features needed by the species. At the stand scale, this can result in a level of conflict between conserving existing northern spotted owl habitat and restoring dry-forest ecosystems. Resolution of such conflicts can be enhanced by considering the range of forest conditions that comprise suitable owl habitat and tailoring management accordingly.

Land managers should change from the practice of implementing many small, uncoordinated and independent fuel-reduction and restoration treatments. Instead, coordinated and strategic efforts that link individual projects to the larger objectives of restoring landscapes while conserving and recovering northern spotted owl habitat are needed (sensu Sisk *et al.* 2005, entire; Prather *et al.* 2008, entire; Gaines *et al.* 2010, entire). Some examples of this type of planning in the east Cascades that may be emulated or referenced include the Okanagon-Wenatchee National Forest (USDA 2010, entire), The Nature Conservancy (Davis *et al.* 2012, entire), and the Deschutes National Forest (Smith *et al.* 2011, entire).

The special management considerations or protections identified here apply to Units 7 and 8 of the revised critical habitat.

Klamath and Northern California Interior Coast Ranges

The special management considerations or protections that may be required in the Klamath and Northern California Interior Coast Ranges represent a mix of the requirements needed to maintain or enhance the essential physical or biological features in mesic and dry forest types. This region in southwestern Oregon and northwestern California is characterized by very high climatic and vegetative diversity resulting from steep gradients of elevation, dissected topography, and large differences in moisture from west to east. Summer temperatures are high, and northern spotted owls occur at elevations up to 1,768 m (5,800 ft). Western portions of this zone support a diverse mix of mesic forest communities interspersed with drier forest types. Forests of mixed conifers and evergreen hardwoods are typical of the zone. Eastern portions of this zone have a Mediterranean climate with increased occurrence of ponderosa pine. Douglas-fir dwarf mistletoe is rarely used for nesting platforms in the west, but commonly used in the east. The prey base for northern spotted owls in this zone is correspondingly diverse, but is dominated by dusky-footed woodrats, bushy-tailed woodrats, and flying squirrels. Northern spotted owls have been well studied in the western portion of this zone (Forsman *et al.* 2005, p. 219), but relatively little is known about northern spotted owl habitat use in the eastern portion and the California Interior Coast Range portion of the zone.

High canopy cover, high levels of canopy layering, and the presence of very large dominant trees were all important features of nesting and roosting habitat. Compared to other zones, models of foraging habitat for this zone showed greater divergence from nesting habitat. Low to intermediate slope positions were strongly favored. In the eastern Klamath, presence of Douglas-fir was an important compositional variable. Habitat associations in the Klamath zone are diverse and unique, reflecting the climate, topography, and vegetation of this area. Nesting and roosting habitat somewhat resembles that of other zones, with a greater emphasis on topography that provides some relief from high temperatures while foraging habitat in this zone includes more open forests. Consequently, management actions consistent with maintaining and developing northern spotted owl habitat need to consider local conditions. In some areas, appropriate management will be more consistent with dry forest management strategies, while in other areas wet forest management strategies will be more appropriate.

This region contains habitat characteristics of both moist and dry forests interspersed across a highly diverse landscape (Halofsky *et al.* 2011, p. 1). The special management recommendations from the moist and dry forest sections, above, apply to the

management actions or protections that may be required in the Klamath and Northern California Interior Coast Ranges. Similar to the discussion in moist forests concerning conservation of small patches of early-seral habitat, Perry *et al.* (2011, p. 715) noted that replacement of early successional shrub-hardwood communities by closed forests in the absence of fire significantly impacts landscape diversity. Restoration of appropriate fire regimes and use of targeted silvicultural intervention may be effective where the goal is to restore or maintain this diversity (Halofsky *et al.* 2011, p. 15). An example of this type of planning in this area that may be emulated or referenced is the Ashland Forest Resiliency Project (USDA 2009, entire).

The special management considerations or protections identified here apply to Units 9, 10, and 11 of the revised critical habitat.

Redwood Coast

Special management considerations or protection may be needed in the Redwood Coast Zone to maintain or enhance the essential physical or biological features for the owl. Although the Redwood Coast zone of coastal northern California is considered part of the wet/moist forest region within the range of the northern spotted owl, there are distinct differences in northern spotted owl habitat use and diet within this zone. The long growing season in this region, combined with redwood's ability to resprout from stumps, allows redwood stands to attain suitable stand structure for nesting in a relatively short period of time (40–60 years) if legacy structures are present. Late-successional forest is an important component of nesting and roosting habitat in the Redwood Zone, and demographic productivity on northern spotted owl breeding sites has been positively correlated with the density of legacy trees in proximity to owl nest sites (Thome *et al.* 1999, p. 57). Forest management in this region should conserve older stands that contain the conditions to support northern spotted owl occupancy or high-value northern spotted owl habitat as described in Recovery Actions 10 and 32 (USFWS 2011, pp. III–43, III–67). On Federal lands this recommendation applies to all land-use allocations (see also Thomas *et al.* 2006, pp. 284–285). In this region, some degree of fine-scale fragmentation in redwood forests appears to benefit northern spotted owls. Forest openings aged 5 to 20 years (e.g., harvest units or burns), with dense shrub and hardwood cover, and abundant food sources, can provide high-quality habitat for the northern spotted owl's primary prey, the dusky-footed woodrat. Woodrat populations within recent openings probably peak by about stand age 10. Food sources and understory cover decline steadily through about stand age 20, when the woodrat population-source diminishes. In northern spotted owl territories within the Redwood Zone, active management that creates small openings in proximity to nesting, roosting, or foraging habitat may enhance northern spotted owl foraging opportunities.

The special management considerations or protections identified here apply to Unit 3 of the revised critical habitat.

Summary of Special Management Considerations or Protection

We find that each of the areas occupied at the time of listing that we are designating as critical habitat contains features essential to the conservation of the species that may require special management considerations or protection to ensure the conservation of the northern spotted owl. These special management considerations or protection may be required to preserve and enhance the essential features needed to achieve the conservation of the northern spotted owl. Additional information on management activities compatible with northern spotted owl conservation can be found within the Section 7 Consultation section of this preamble.

VII. Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We have reviewed the available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulations at 50 CFR 424.12(e), based on this review, we have identified the specific areas within the geographical area occupied by the species at the time it was listed on which are found those physical or biological features essential to the conservation of the species, and which may require special management considerations or protection. In addition, we considered whether any additional areas outside those occupied at the time of listing are essential for the conservation of the species.

Occupied Areas

For the purpose of developing and evaluating this revised critical habitat designation for the northern spotted owl, we identified ''geographical area occupied by the species'' at the time it was listed consistent with the species' distribution, population ecology, and use of space. We based our identification of occupied geographical areas on: (1) The distribution of verified northern spotted owl locations at the time of listing and (2) scientific information regarding northern spotted owl population structure and habitat associations.

We determined the geographical area occupied by the species at the time of listing based in part on a habitat suitability model incorporating the distribution of approximately 4,000 known northern spotted owl territories across the geographical range of the species (USFWS 2011, Appendix C). We used this model rather than just relying on surveyed sites at that time because large areas within the species' geographical range had not been surveyed; therefore the distribution of northern spotted owl populations was incompletely known at the time the species was listed, and remains so today. For this reason, designating critical habitat based solely on the locations of territories identified through surveys would exclude a substantial proportion of the area that would have been occupied by the species at the time of listing, and that provides the physical or biological features essential to the conservation of the species. To address this, we used our descriptions of the physical and biological features to develop a habitat suitability model that enabled us to map the distribution of relative habitat suitability and reliably identify areas that would have supported northern spotted owl territories at the time of listing, based on habitat value (USFWS 2011, Appendix C). Our habitat suitability model was based on GNN (Gradient Nearest Neighbor) vegetation data from 1996, and the locations of approximately 4,000 known owl pairs documented within 3 years of the date of the GNN vegetation data (USFWS 2011, p. C–20). Because our evaluations of model performance demonstrated that the models had good predictive ability (USFWS 2011, Appendix C, p. C–38–42) we used the relative habitat suitability models to predict the distribution of areas that would have supported occupancy by spotted owls at the time of listing.

Because the best available habitat and owl location data and information corresponded to 1996, we made an explicit assumption that the 1996-based habitat suitability model would reliably predict the distribution of spotted owls at the time of listing (1990). This assumption was based on: (1) Our

expectation that patterns of habitat selection by spotted owls would not change over a 6-year period; (2) the high degree of site fidelity exhibited by territorial spotted owls over many years; and (3) the fact that the amount and distribution of older forest habitat, which takes many decades to develop and is a primary component of northern spotted owl habitat, would not have increased significantly in the period between listing and 1996. Therefore, we concluded that the 1996 GNN layer is a reasonable representation of the habitat that would have been occupied by northern spotted owls at the time of listing.

We tested this assumption by analyzing the relationship between our 1996 habitat suitability map and the distribution of 3,723 spotted owl sites known to be occupied at the time of listing (1987–1996). This time period reasonably represents the time of listing because northern spotted owls are relatively long-lived and exhibit a high degree of fidelity to territory core areas; their territory locations are, therefore, relatively stable through time, unless substantial changes occur to territory habitat. For this reason, we consider it highly likely that locations occupied between 1987 and 1990, and 1990 and 1996 were also occupied at the time of listing in 1990. We found that over 85 percent of the proposed critical habitat area was within the estimated home ranges of known spotted owl sites, strongly supporting our assumption that the model reliably predicted areas were occupied at the time of listing.

However, restricting a definition of occupancy to areas known to be used by resident territorial owls overlooks a large segment of the owl population that is not generally reflected in standard survey methodologies, as described below. Northern spotted owl populations consist of the territorial, resident owls, for which we have documentation of occupancy throughout much of the owl's range, described above, but also include nonterritorial adult ''floaters'' and dispersing subadult owls. Both dispersing subadults and nonterritorial floaters are consistently present on the landscape and require suitable habitat to support dispersal and survival until they recruit into the breeding population; this habitat requirement is in addition to that already utilized by resident territorial owls. Nonterritorial owls are difficult to detect in surveys because most surveys rely on territorial defense behavior of resident owls (responding to artificial owl calls) to determine their presence. Because they are difficult to detect, the number and distribution of nonterritorial and dispersing owls is poorly known for any given northern spotted owl population. However, they constitute essential elements of northern spotted owl populations, and can reliably be assumed to occur in suitable habitat within the same landscapes occupied by territorial owls. As stated, the great majority (85 percent) of the area within the identified critical habitat is covered by the home ranges of known owl territories at the time of listing. Because it is well established that dispersing subadults and non-territorial northern spotted owls regularly occupy high-quality habitat in the vicinity of other territorial northern spotted owls, and because our relative habitat suitability models exhibited high accuracy at predicting the probability of presence by owls, we conclude that these areas of high-quality habitat were occupied by the species at the time of listing.

Therefore, based on the best available scientific information regarding population structure of northern spotted owls, ''occupied at the time of listing'' encompasses (1) home ranges of resident, territorial northern spotted owls known from surveys to be present at the time of listing, (2) home ranges of territorial owls that would have been present at the time of listing based on a model developed specifically to predict owl presence based on relative habitat suitability, and (3) areas used by nonterritorial and dispersing owls that were likely to be present within the matrix of territories in a given landscape known to be occupied by resident owl pairs.

Having determined our working definition of the term ''occupied,'' in this instance, we then characterized ''specific areas'' as used in the definition of critical habitat in section 3(5)(A) of the Act, to conform with known patterns of space-use and distribution exhibited by northern spotted owls. Northern spotted owls are wide-ranging organisms that maintain large home ranges and disperse relatively long distances. Home ranges are used regularly by territorial owls for foraging, raising young, and other activities, and are actively defended by the resident pair year-round; as such, we consider these home ranges to be continually occupied by the species. Although much activity is centered on core areas within the home ranges, northern spotted owls are dependent upon the entirety of the home range for prey resources and use it on a regular basis throughout the year. As described earlier, territorial northern spotted owls cover home ranges from roughly 1,400 ac (570 ha) at the southern end of their range (Zabel *et al.* 1995, p. 436) up to over 14,000 ac (5,700 ha) (USDI 1992, p. 23; USFWS 1994 in litt., p. 1) in the northern portion of the species' range. These large home ranges may overlap with those of neighboring northern spotted owls, such that large landscapes may be fully occupied by population clusters in areas where suitable habitat is well distributed. Some demographic study areas still exhibit this pattern over large landscapes today, although overlapping home ranges were more the case when the northern spotted owl was first listed, prior to extensive colonization of the species' range by the barred owl.

To conservatively evaluate the proportion of each subunit that was composed of areas known to be occupied by northern spotted owls at the time of listing, we calculated the area within estimated home ranges (USFWS 2011, p. C–63 Table C–24) for all verified northern spotted owl locations known at the time of listing, as described above. Overall, 85 percent of the area designated is within estimated home ranges of verified territorial northern spotted owls located through surveys at the time of listing; this area is entirely representative of verified owl locations, and does not include habitat occupied based on habitat suitability or nonresident owls. Twenty-two (37 percent) of the 60 subunits have at least 90 percent of their area within verified known home ranges; 41 (68 percent) have at least 70 percent. As explained above, given that these areas represent occupancy by verified resident owls only, and considering the suitable habitat available at the time of listing in these same landscapes, we conclude that the remainder of these areas was occupied by other resident owls that simply were not within surveyed areas, nonterritorial adult owls (floaters), or dispersing subadults.

To help us identify and map potential critical habitat for the owl, we used a three-step modeling framework developed as part of the Revised Recovery Plan that integrates a northern spotted owl habitat model, a habitat conservation planning model, and a population simulation model. The details of this modeling framework are presented in Appendix C of the Revised Recovery Plan (USFWS 2011), and a detailed technical description of the modeling and habitat network evaluation process we used in this revised designation of critical habitat is provided in Dunk *et al.* (2012b, entire). Both of these supporting documents are available at *http://www.regulations.gov* (see **ADDRESSES**), or by contacting the

Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

The overall approach for critical habitat modeling consisted of three main steps (USFWS 2011, Appendix C, p. C–3) to help refine, select, and evaluate a series of alternative critical habitat networks for the northern spotted owl. Each of these steps helped us to identify a critical habitat network that meets the statutory definition of critical habitat, namely, the distribution of the physical or biological features needed by the species across its geographical range occupied at the time of listing, and the identification of a landscape configuration where these features, as well as any necessary unoccupied areas, are essential to the conservation of the species. These steps are summarized here, and then each is described in further detail.

Step 1: At the outset, the attributes of forest composition and structure and characteristics of the physical environment associated with nesting, roosting, and foraging habitat—physical or biological features used by the species—were identified based on published research, input from individual experts, and analysis of northern spotted owl location and habitat data from nearly 4,000 known owl pairs (USFWS 2011, pp. C–20 to C–28). We then used these physical or biological features of nesting, roosting, and foraging habitats to create a rangewide map of relative habitat suitability using the model MaxEnt (Phillips *et al.* 2006, entire; Phillips and Dudik 2008, entire), based on the habitat selection exhibited by these known owl pairs. In addition to providing a map of relative habitat suitability, this process allowed us to evaluate an area's suitability and determine whether the presence of the species was likely based on an assessment of known species-habitat relationships.

Step 2: We developed northern spotted owl habitat networks based on the relative habitat suitability map using the Zonation conservation planning model (Moilanen and Kujala 2008, entire). The Zonation model used a hierarchical prioritization of the landscape based on relative habitat suitability and other user-specified criteria (e.g., land ownership) to develop the most efficient solutions for incorporating high-value habitat. Zonation analyses were conducted separately for each region to ensure that reserves would be well-distributed across the range of the owl. Zonation also allowed for consideration of land ownership in development of reserve designs.

Step 3: In the last step, we determined where the physical or biological features, as well as unoccupied areas, are essential to the conservation of the species. To do this we used a spatially explicit northern spotted owl population model (HexSim) (Schumaker 2008, entire) to predict relative responses of northern spotted owl populations to different habitat network designs, and evaluated these responses against the recovery objectives and criteria for the northern spotted owl using a rule set based on those criteria. Simulations from these models are not meant to be estimates of what will occur in the future, but rather provide information on trends predicted to occur under different network designs; this allowed us to compare the relative performance of various critical habitat scenarios.

In Step 1 of the modeling framework, we used published research, input from individual experts, and analysis of northern spotted owl location and habitat data to develop models of relative habitat suitability for northern spotted owls. These relative habitat suitability models identify areas with habitat that provides the combination of variables (forest composition and structure, and abiotic factors such as elevation, precipitation, and temperature) with a high predictive probability of supporting northern spotted owls, based on data gathered from known owl sites. Based on the physical or biological features of nesting, roosting, and foraging habitats known to be utilized by resident owls, we used these models to identify areas containing those physical or biological features required by the owl, and to map their distribution across the range of the owl (USFWS 2011, pp. C–27 to C–42, C–62). Because the models are based in large part on data from nearly 4,000 owl sites (USFWS 2011, p. C–62), model outputs highlight surveyed and verified owl home ranges. However, they also identify areas with habitat that supported territorial and non-territorial owls at the time of listing, based on habitat suitability, and areas that may have been unoccupied at the time of listing, but that may be essential for the conservation of the species based on their relative habitat suitability as well as the habitat characteristics needed for population growth or dispersal (see below). To ensure that the variety of physical or biological features used by northern spotted owls across their range is represented in the models, we applied separate habitat models for each of 11 ecological regions, based on differences in forest environments, northern spotted owl habitat use and prey distribution, and variation in ecological conditions (USFWS 2011, C–7 to C–13).

In Step 2 of the modeling framework, we used a habitat conservation planning model (Zonation) (Moilanen *et al.* 2005, entire; Moilanen and Kujala 2008, entire) to develop a northern spotted owl conservation planning model. We used this in the critical habitat process to aggregate areas of greatest relative habitat suitability (areas occupied at the time of listing that provide the physical or biological features, or areas of habitat that may have been unoccupied at the time of listing, but have the potential to play an essential conservation role, for example, in providing connectivity between isolated populations) from Step 1 into discrete units. This process provided a series of maps representing a range of alternative critical habitat networks, each containing a different amount and distribution of northern spotted owl habitat quality (representing differing amounts and configurations of the primary constituent elements). The Zonation model seeks to provide the most efficient design (most habitat value on smallest land area) and allowed us to maximize reliance on public lands to provide what is essential to northern spotted owl conservation.

In Step 3 of the modeling framework, we developed a northern spotted owl population simulation model that allowed us to simulate the relative population responses of northern spotted owls to various habitat conservation network scenarios (HexSim) (Schumaker 2011, entire). In developing this rule, we used this northern spotted owl population simulation model to compare alternative critical habitat networks and evaluate each design's ability to meet the recovery goals and criteria for the northern spotted owl (described further below, and in detail in Dunk *et al.* 2012b). This step of the process enabled us to determine the amount and configuration of physical or biological features on the landscape that are essential to the conservation of the owl, as well as to determine those unoccupied areas essential for the conservation of the species. By evaluating northern spotted owl population metrics, such as relative population size, population trend, and extinction risk that resulted from each scenario evaluated, we are designating the most efficient habitat network necessary to conserve the northern spotted owl (efficient, as noted above, in terms of balancing greatest conservation value for the owl in proportion to acres designated). This network has the potential to support an increasing or

stable population trend of northern spotted owls, exhibits relatively low extinction risk, both rangewide and at the recovery unit scale (recovery units, as identified in the Revised Recovery Plan for the Northern Spotted Owl, are defined by physiographic provinces (USFWS 2011, pp. III–1 to III–2)), and achieves adequate connectivity among recovery units, while prioritizing reliance on public lands.

We determined what is essential to recovery of the northern spotted owl by evaluating the performance of each potential critical habitat scenario considered against the recovery needs of the owl. In contrast with earlier conservation modeling efforts for the northern spotted owl, the modeling framework we utilized does not rely on *a priori* (predefined) rule sets for features such as size of habitat blocks, number of owl pairs per block, or distance between blocks (USFWS 2011, p. C–4) to determine what is essential for the conservation of the species. Instead, we evaluated northern spotted owl population metrics such as relative population size and trend to determine what is essential to owl conservation, both in terms of where and how much of the physical or biological features are essential and how much unoccupied habitat is essential to meet the recovery objectives for the owl, as defined in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, p. ix) and detailed in our supporting documentation (Dunk *et al.* 2012b, entire).

To accomplish this, we developed a rule set for the identification of critical habitat based on the ability of that habitat to meet the recovery objectives and criteria set forth in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, p. ix). The recovery objectives for the northern spotted owl are:

(1) Northern spotted owl populations are sufficiently large and distributed such that the species no longer requires listing under the Act;

(2) Adequate habitat is available for northern spotted owls and will continue to exist to allow the species to persist without the protection of the Act; and

(3) The effects of threats have been reduced or eliminated such that northern spotted owl populations are stable or increasing and northern spotted owls are unlikely to become threatened again in the foreseeable future.

The recovery criteria for the northern spotted owl (aside from the requirement for post-delisting monitoring) are:

Recovery Criterion 1—Stable Population Trend: The overall population trend of northern spotted owls throughout the range is stable or increasing over 10 years, as measured by a statistically reliable monitoring effort.

Recovery Criterion 2—Adequate Population Distribution: Northern spotted owl subpopulations within each province (i.e., recovery unit), excluding the Willamette Valley Province, achieve viability, as informed by the HexSim population model or some other appropriate quantitative measure.

Recovery Criterion 3—Continued Maintenance and Recruitment of Northern Spotted Owl Habitat: The future range-wide trend in northern spotted owl nesting/roosting and foraging habitat is stable or increasing throughout the range, from the date of Revised Recovery Plan approval, as measured by effectiveness monitoring efforts or other reliable habitat monitoring programs.

We used the following rule set to compare and evaluate the potential of various habitat scenarios to meet these recovery objectives and criteria, and thus determine what is essential to the conservation of the northern spotted owl:

(1) Ensure sufficient habitat to support population viability across the range of the species.

(a) Habitat can support an increasing or stable population trend, as measured by a population growth rate of 1.0 or greater.

(b) Habitat will be sufficient to insure a low risk of extinction.

(2) Support demographically stable populations in each recovery unit.

(a) Habitat can support an increasing or stable population trend in each recovery unit.

(b) Habitat will be sufficient to insure a low risk of extinction in each recovery unit.

(c) Conserve or enhance connectivity within and among recovery units.

(d) Conserve genetic diversity.

(e) Ensure sufficient spatial redundancy in critical habitat within each recovery unit.

(i) Accommodate habitat disturbance due to fire, insects, disease, and catastrophic events.

(3) Ensure distribution of northern spotted owl populations across representative habitats.

(a) Maintain distribution across the full ecological gradient of the historical range.

(4) Acknowledge uncertainty associated with both future habitat conditions and northern spotted owl population performance—including influence of barred owls, climate change, fire/disturbance risk, and demographic stochasticity—in assessment of critical habitat design.

These critical habitat objectives of supporting population viability and demographically stable populations are intended to be met in concert with the implementation of recovery actions to address other nonhabitat-based threats to the owl.

We applied this rule set to the outcome of HexSim modeling simulations on the various habitat scenarios considered (see Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and Dunk *et al.* 2012b, entire, for all details). Each HexSim simulation began with a population of 10,000 females (all population metrics are in numbers of females), consisted of 100 replicates and 350 time steps for each habitat scenario considered, and included the introduction of environmental stochasticity. We then evaluated the relative performance of each habitat scenario using numerous metrics to assess the ability of that scenario to meet the specified recovery goals for the northern spotted owl, as laid out in our rule set for identifying critical habitat; these metrics were evaluated at the scale of each region, as well as collectively rangewide. Our metrics of population performance resulting from each habitat scenario considered included:

- The percentage of simulations during which the rangewide population fell below 1,250 individuals.
- The percentage of simulations during which the rangewide population fell below 1,000 individuals.
- The percentage of simulations during which the rangewide population fell below 750 individuals.
- The percentage of simulations during which the population fell below 250 in each region (using 250 as a quasi-extinction threshold).
- The percentage of simulations during which the population fell below 100 in each region (using 100 as a quasi-extinction threshold).
- The percentage of simulations that went to extinction (population = 0) in each region.
- The mean population size from time step 150 to time step 350 in each region.
- The mean population size at the last time step in each region.
- The mean population size at the last time step rangewide.

Measures of extinction risk are used as an indirect measure of sufficient population abundance, as well as viability.

These metrics were used to comparatively evaluate the ability of

each scenario under consideration to determine what is essential for the conservation of the species as informed by our rule set. We selected habitat scenarios for further evaluation if they outperformed the other scenarios under consideration in terms of being better able to meet the population abundance, viability, and trend criteria both across regions and rangewide. In all cases, we attempted to identify the most efficient (smallest) total area that would meet the population goals essential to recovery. Our final critical habitat designation is based on the habitat network that best met all of these criteria, and then was further refined, as described below.

We also focused on public lands to the maximum extent possible (see Dunk *et al.* 2012b, entire, for specific details). In this step, we compared scenarios that did not discriminate between various land ownerships, and those that prioritized publicly owned lands. As Federal agencies have a mandate under section 7(a)(1) of the Act to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of listed species, we looked first to Federal lands for critical habitat. However, in some areas of limited Federal ownership, State and private lands may provide areas determined to be essential to the northern spotted owl by contributing to demographic support and connectivity to facilitate dispersal and colonization. In all cases, if the scenarios under consideration provided equal contribution to recovery, as measured by the population metrics described above, we chose the scenario that prioritized inclusion of federally owned lands. State and private lands were included only if they were necessary to achieve conservation of the species, and were determined to provide either occupied areas that support the PCEs or unoccupied areas essential for the conservation of the owl. We also considered Indian lands in our evaluations; if habitat scenarios performed equally well with or without Indian lands, we did not include them (see Indian Lands, below).

To determine which of the numerous potential arrays of habitat we considered contained only those areas that are essential to the conservation of the northern spotted owl, we evaluated each of them according to the rule set and criteria detailed above. Briefly summarizing, all of the habitat networks we assessed contained varying amounts of the physical or biological features needed by the northern spotted owl in varying amounts and spatial arrangements across the range of the species. Our first consideration in determining which of these scenarios contained the physical or biological features in the quantity and configuration essential to the conservation of the species (i.e., the physical and biological features essential to the conservation of the species) was our evaluation of how well the network performed in terms of contributing toward the recovery criteria for the northern spotted owl; we used the recovery criteria as our standard for the conservation of the species.

To ensure that we designated only what is essential to the species' conservation, our secondary consideration was efficiency. For our purposes, we evaluated efficiency both in terms of number of acres and landownership. Some of the networks we evaluated were smaller than this final designation, or did not include any State or private lands; however, such networks failed to meet the recovery criteria required to achieve the conservation of the species, and therefore could not be considered to provide the quantity and configuration of the physical or biological features essential to the conservation of the species. Other potential designations were significantly larger than this final designation and while they were also capable of meeting the recovery criteria, they did not provide proportionately greater conservation value relative to the additional area (as measured, for example, in relative projected numbers of owls). We concluded that such networks therefore included large areas of habitat that may contribute to recovery, but that are not necessary to achieve the recovery criteria for the northern spotted owl, therefore these superfluous areas could not be considered essential to the conservation of the species.

Finally, our assessment of potential habitat networks, based not only on the population models but additionally refined by expert opinion, as described below, indicated that critical habitat limited to areas presently occupied by the northern spotted owl would not be sufficient to achieve the recovery criteria for the species, as such a designation would lead to inadequate population distribution and inadequate population connectivity (50 CFR 424.12(e)). Modeling led us to a similar conclusion regarding areas that were occupied at the time of listing; networks limited to such areas were not capable of meeting the recovery criteria for the species, and the models assisted us in identifying those additional specific areas of habitat unoccupied at the time of listing that are essential in terms of achieving the conservation of the species. Another element of an essential network was therefore the identification of sufficient areas of suitable habitat or potentially suitable habitat not presently occupied by the northern spotted owl, or that was not occupied at the time of listing, to achieve the conservation of the species, in conjunction with occupied habitat.

Our final designation is the critical habitat network that includes the quantity and spatial configuration of habitat that meets the requirement that it contain occupied areas with the essential physical and biological features or unoccupied areas that are themselves essential for conservation of the species by achieving the recovery criteria for the northern spotted owl while avoiding the designation of areas of habitat that do not make an essential contribution to the conservation of the species. This essential habitat network is composed predominantly of areas occupied at the time of listing and that contain the essential physical or biological features, in conjunction with some areas that may have been unoccupied at the time of listing, to collectively comprise the habitat configuration and quantity that most efficiently meets the recovery criteria for the species. All areas in this final critical habitat designation, whether considered occupied at the time of listing or unoccupied at the time of listing, are therefore considered essential to the conservation of the species. The specific modeling outcomes and our evaluation of each potential critical habitat network are presented in detail in Dunk *et al.* 2012b.

It is important to recognize that although the application of this modeling framework provided the foundation for identifying those areas that meet the definition of critical habitat for the northern spotted owl, the models do not simply produce a map of critical habitat. Working from the model results, we then further refined the model-based map units, after considering land ownership patterns, interagency coordination, and best professional judgment, with the objective of increasing the efficiency and effectiveness of the critical habitat designation, as well as making corrections based on ground truthing and local knowledge. The process generally consisted of modifying boundaries to better conform to existing administrative and landscape features, removing small areas of relatively lower-suitability habitat, and incorporating additional areas that may have been unoccupied at the time of listing, but were determined to be essential for population connectivity,

for population growth, or to accommodate maintenance of suitable habitat on the landscape for owls in the face of natural disturbance regimes (e.g., fire) or competition with the barred owl, while retaining the overall configuration of the model-based maps. In addition, as part of this refinement process, expert knowledge helped us to identify essential areas such as the unique oak woodland ecotype used by northern spotted owls at the southernmost extent of the species' range in Napa, Sonoma, and Marin Counties, California. We used the population simulation model to evaluate whether this revised critical habitat network continued to provide what is essential to the conservation of the northern spotted owl, and used this same process to evaluate changes made between the proposed and final rule (see Changes from Proposed Rule for details).

Summary of How We Determined Where Physical and Biological Features and Unoccupied Areas Are Essential to Conservation of the Species

The decision of where the requisite physical and biological features and unoccupied areas are essential to the northern spotted owl was made by identifying those areas in the range of the owl that are necessary to achieving a relatively high likelihood of meeting the recovery objectives described in the Revised Recovery Plan (USFWS 2011, p. ix), while at the same time minimizing the inclusion of areas that are relatively less important or not necessary to spotted owl recovery. Striking this balance required by the Act—designating only those areas that contain the essential features or are themselves essential for conservation of the species and not unnecessarily designating the entire geographical area that is or can be occupied by the species—was accomplished using the best available information: a combination of scientific modeling, expert scientific opinion of agency biologists and peer reviewers, and careful consideration of public comment.

We made sure that this final critical habitat designation includes only what is essential to the species' conservation by evaluating a variety of potential critical habitat networks and assessing their relative probability of meeting recovery objectives and, secondarily, their relative ''efficiency'' in meeting these objectives. The various scenarios were designed to bracket a variety of conditions and included different aggregations of total habitat area, landscape juxtaposition, and forest conditions. Some were smaller or larger in total size than this final designation, and some did or did not include Federal matrix lands, State lands, or private lands. The process of comparing alternative networks and population results is described in detail in the Modeling Supplement (Dunk *et al.* 2012b). When compared to other possible network scenarios, we conclude the final identification of critical habitat either contains essential physical and biological features or is otherwise essential because it has the highest likelihood of meeting recovery objectives in the most efficient manner for the following reasons.

(1) It ensures that northern spotted owl populations are sufficiently large to exhibit low extinction risk at the rangewide scale. Under the final designation, modeled rangewide populations have less than a 10 percent probability of declining to fewer than 1,000 females, and a 3 percent probability of declining to fewer than 750 females. Modeled population size and extinction risk results for the designation are within the top 10 percent of all alternative networks, yet the designation is much smaller than other top-ranking alternatives.

(2) It ensures that northern spotted owl populations are well-distributed across the geographic range of the species by selecting a habitat network that supports population sizes with low extinction risk within each of 11 modeling regions. Modeling region-specific population sizes in the final designation are in the top 10 percent of all alternative networks.

(3) It ensures that adequate amounts of current and future habitat is available for spotted owls to persist and recover by designating a habitat network consisting of approximately 50 percent of the available high-suitability spotted owl habitat rangewide. An additional 21 percent of high-quality habitat is encompassed within Congressionally Reserved lands that are not designated, but will retain their value for spotted owls. This high-quality habitat, in addition to areas required for population connectivity, is necessary to support rangewide populations with low extinction risk at both rangewide and regional scales.

(4) Compared to previous spotted owl conservation strategies, it provides increased redundancy in habitat to help buffer potential adverse impacts due to climate change and other stochastic (i.e., unpredictable) events by enlarging the total area of the final designation within the fire-prone portions of the northern spotted owl's range. This means that the final designation supports larger populations in some modeling regions than would be minimally required to achieve low extinction risk. Although it is impossible to predict with precision how much redundancy may be required to deal with future changes in forest conditions, this is essential to ameliorating the potential impacts of fire, insects, and forest disease on spotted owls.

(5) The balancing of population objectives and parsimony resulted in a final designation that encompasses 50 percent of the total available high-suitability habitat rangewide and less than nine percent of low-quality habitat, and supported population size and extinction risk within the top 10 percent of all alternatives. Other larger alternatives had similar or slightly better population characteristics, but contained much larger proportions of lower-suitability habitat. The small amount of low-quality habitat contained in the final designation is essential because it provides for population growth and connectivity both within regional populations and between populations; however, we determined that additional lower-suitability habitat was not necessary to the conservation of the species.

We considered but rejected potential critical habitat networks that provided less total area, that did not include Federal matrix lands, or that did not include some State or private lands where Federal lands were lacking, because these networks had a significantly lower likelihood of meeting recovery objectives as measured by demographic modeling results and expert scientific opinion. For example, modeled rangewide population sizes in this final designation were 1.7 times larger than under the proposed rule's Possible Outcome 4, which did not include any State or private lands, and nearly twice the size of populations under 2008 critical habitat. This larger population size is essential because it results in low extinction risk. Likewise, we considered but rejected several potential networks that included significantly more total area than the final designation. These potential networks had a high probability of meeting recovery objectives as measured by model results and expert opinion, but they did not confer much of a net increase in the likelihood of meeting recovery objectives beyond what is provided by the final designation. This lack of parsimony, combined with a lack of a proportional increase in measurable demographic performance, justified the rejection of these larger potential networks when compared to the final designation.

This methodological approach was generally supported by the scientific peer reviewers. One peer reviewer felt the proposed critical habitat identified too much total area, and another peer reviewer felt that more land area should be included, but most peer reviewers felt the total area and the juxtaposition of land areas seemed reasonable and scientifically justified given the current status of the owl and the recovery objectives. Most of these experts also concluded that the use of the modeling process was justified for informing the final decision.

In sum, we believe this final designation of critical habitat for the northern spotted owl meets the intent of the Act by identifying those areas containing essential features or are otherwise essential in a way that has a very high probability of providing for the conservation of the species, while minimizing the potential for unnecessarily including areas of low conservation value to the species.

Unoccupied Areas

Based on the northern spotted owl's wide-ranging use of the landscape, and the distribution of known owl sites at the time of listing across the units and subunits designated as critical habitat in this rule, we find that all units and all subunits meet the Act's definition of being within the geographical area occupied by the species at the time of listing.

As noted above in *Occupied Areas,* within the units and subunits designated as critical habitat, each consists predominantly of habitat occupied by the species at the time of listing. However, parts of most units and subunits contain a forested mosaic that includes younger forests that may not have been occupied at the time of listing; we evaluated such areas of younger forest as unoccupied at the time of listing. Unoccupied areas must meet the standard of section 3(5)(a)(ii) of the Act: They must be determined to be essential for the conservation of the species. In addition, there are some areas we have concluded were highly likely occupied at the time of listing, based on the presence of suitable habitat and our predictive models, but acknowledge there is some element of uncertainty to recognizing these areas as occupied under the statutory definition due to the lack of survey information. Therefore, we also evaluated all areas that we concluded were likely occupied but which lack survey information applying the standard of section 3(5)(A)(ii) of the Act, and have determined that all such areas included in this designation are essential for the conservation of the species. Finally, as noted earlier, as a result of our application of the modeling framework and refinement process described above, in which we evaluated various habitat scenarios to identify the network that is essential to the conservation of the species by providing the quantity and configuration of habitat essential for the conservation of the species, we have additionally determined that all areas identified here as critical habitat, whether occupied at the time of listing or unoccupied at the time of listing, are essential for the conservation of the species and therefore meet the definition of critical habitat under section 3(5)(A)(ii) of the Act.

Thus, even if not occupied at the time of listing, all units and subunits designated as critical habitat are essential for the conservation of the species because, in addition to nesting, roosting, foraging, and dispersal habitat, they provide connectivity between occupied areas, room for population growth, and the ability to provide sufficient suitable habitat on the landscape for owls in the face of natural disturbance regimes (e.g., fire).

In general, northern spotted owls require large areas of habitat due to their expansive home range requirements and the need for connectivity between subpopulations to maintain genetic diversity and support stable, viable populations over the long term. The northern spotted owl was initially listed in large part due to past habitat loss and degradation. In addition, recent work has confirmed that northern spotted owls require additional areas of habitat to persist in the face of competition with barred owls (Dugger *et al.* 2011, p. 2467). Given the effects of past habitat loss and the increased habitat area needed to offset competition from the barred owl, our assessment indicates that large areas of contiguous areas of nesting, roosting, and foraging habitat are essential to sustaining viable northern spotted owl populations and meeting recovery goals.

In addition, because past habitat loss and degradation was identified as a major threat to the northern spotted owl at the time of listing and because this threat currently continues, conservation and recovery of the species is dependent in part on development of additional habitat to allow for population growth and recovery. Therefore, portions of the habitat mosaic in some subunits designated as critical habitat within the geographical area occupied by the species at the time of listing consist of younger or partially harvested forest. These are essential for the conservation of the species because they are capable of developing the PCEs that support nesting, roosting, or foraging by northern spotted owls that will be necessary for population growth. Typically the result of past timber harvest or wildfire, these areas of younger forest contain the elements conducive to fully developing the physical or biological features essential to the conservation of the owl (they are of suitable elevation, climate, and forest community type). They may, however, be lacking some element of the physical or biological features, such as large trees or dense canopies that are associated with nesting habitat. In particular, of 60 subunits designated, 4 (NCO–4, NCO–5, and ORC–1) contain proportionally greater areas of younger forests that are essential for the conservation of the species, because they can develop additional habitat necessary to support viable northern spotted owl populations in the future. These subunits are located within Southwestern Washington and Oregon Coast Ranges Areas of Special Concern (Thomas *et al.* 1990, pp. 66–69), areas described as exhibiting a scarcity of suitable habitat due to extensive timber harvest. The recovery goal of achieving viable populations distributed across the range of the owl cannot be achieved without these areas; therefore, we have determined them to be essential for the conservation of the species.

Finally, there are portions of two subunits that function primarily for connectivity between populations. Although portions of these subunits may not have been occupied at the time of listing, these areas contain the dispersal and foraging habitat to support movement between adjacent subunits and are therefore essential to provide population connectivity. Many of these areas are also anticipated to develop into habitat capable of supporting nesting pairs in the future. In 1990, the Interagency Scientific Committee (ISC) (Thomas *et al.* 1990, entire) identified ''Areas of Special Concern'' in the Draft Strategy for the Conservation of the Northern Spotted Owl. The ISC defined Areas of Special Concern as lands where past natural occurrences and human actions had adversely affected habitat more than in the remainder of the physiographic province under consideration (Thomas *et al.* 1990, p. 66). Within the Areas of Special Concern described by the ISC (Thomas *et al.* 1990, pp. 66–69), we identified areas that were strategically located between subunits that would otherwise be demographically isolated. Of 60 subunits designated, two (ORC–4 and ECS–3) are identified as functioning

primarily for population connectivity with less than 70 percent of the subunit covered by survey-located owl sites.

Our evaluation of the various habitat scenarios considered in the modeling process described above enabled us to determine the amount and configuration of habitat essential for the conservation of the owl, based on the relative ability of that habitat network to meet the recovery criteria of stable or increasing populations and adequate distribution of viable populations. Although this evaluation was primarily based on areas we know to have been occupied at the time of listing, our evaluation of the distribution and configuration of the physical and biological features essential to the conservation of the owl additionally identified areas that may not have been occupied at the time of listing, if those areas were essential to meeting the recovery goals for the species. We have determined these areas to be essential for the conservation of the species, to provide for dispersal and connectivity between currently occupied areas, allow space for population growth, and provide habitat replacement in the event of disturbances, such as wildfires and competition with barred owls. Our evaluation of alternative habitat networks, described above, indicates that the specific areas identified in this designation are necessary to achieve the amount and configuration of habitat that meets the recovery criteria for the species. Because these areas do so efficiently (without designating more areas than are needed, or designating areas that would not make a significant contribution to conservation value), we have determined that these areas are essential for the conservation of the species. As described above, we have determined that a critical habitat designation that does not include these areas, even if they may not be occupied, would be inadequate to ensure the conservation of the species. The resulting revised critical habitat represents the amount and spatial distribution of habitats that we have determined to be essential for the conservation of the northern spotted owl.

This designation is an improvement over the previous designation in that it anticipates that in geographical regions with drier forests and more dynamic natural disturbance regimes, land managers will consider taking a landscape approach to managing critical habitat. This landscape approach would recognize that large areas are essential in these regions to accommodate disturbance-driven shifts in the physical or biological features essential for the conservation of the northern spotted owl, and that restorative management actions may be needed across these landscapes to help manage for resilience in such a dynamic ecosystem. These large landscapes, although essential to provide for the conservation of the northern spotted owl, do include within their boundaries several particular types of areas that are not included in critical habitat, because they cannot support northern spotted owl habitat. The following types of areas are not critical habitat for the northern spotted owl, and are not included in the revised designation:

- Meadows and grasslands. These include dry, upland prairies and savannas found in the valleys and foothills of western Washington, Oregon, and northwest California; subalpine meadows; and grass and forb dominated cliffs, bluffs and grass balds found throughout these same areas. Dominated by native grasses and diverse forbs, they may include a minor savanna component of Oregon white oak, Douglas-fir, or Ponderosa pine.
- Oak and aspen (*Populus* spp.) woodlands. Oak woodlands are characterized by an open canopy dominated by Oregon white oak but may also include ponderosa pine, California black oak, Douglas-fir, or canyon live oak. The understory is relatively open with shrubs, grasses and wildflowers. Oak woodlands are typically found in drier landscapes and on south-facing slopes. Note this exception for oak woodlands does not include tanoak (*Notholithocarpus densiflorus*) stands, closed-canopy live oak (*Quercus agrifolia*) woodlands and open-canopied valley oak (*Quercus lobata*) and mixed-oak woodlands in subunits ICC–6 and RDC–5 in Napa, Sonoma, and Marin Counties, California. Aspen woodlands are dominated by aspen trees with a forb, grass or shrub understory and are typically found on mountain slopes, rock outcrops and talus slopes, canyon walls, and some seeps and stream corridors. This forest type also can occur in riparian areas or in moist microsites within drier landscapes.
- Manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located.

When determining critical habitat boundaries, we made every effort to avoid including these areas because they lack physical or biological features for the northern spotted owl. Due to the limitations of mapping at such fine scales, however, we were often not able to segregate these areas from areas shown as critical habitat on critical habitat maps suitable in scale for publication within the Code of Federal Regulations. Thus, we have included regulatory text clarifying that these areas are not included in the designation even if within the mapped boundaries of critical habitat, as a Federal action involving these lands would not trigger section 7 consultation with respect to effects to critical habitat unless the specific action would affect the physical or biological features in the adjacent critical habitat.

VIII. Final Critical Habitat Designation

Consistent with the standards of the Act and our regulations we have identified 9,577,969 ac (3,876,064ha) in 11 units and 60 subunits as meeting the definition of critical habitat for the northern spotted owl. The 11 units we have identified as critical habitat are: (1) North Coast Olympics, (2) Oregon Coast Ranges, (3) Redwood Coast, (4) West Cascades North, (5) West Cascades Central, (6) West Cascades South, (7) East Cascades North, (8) East Cascades South, (9) Klamath West, (10) Klamath East, and (11) Interior California Coast Ranges. All of the critical habitat units and subunits identified were occupied at the time of listing; however, some units may include some smaller areas that were not known to be occupied at the time of listing but have been determined to be essential to the conservation of the species. In addition, as described above, we have determined that all areas being designated are essential to the conservation of the species. Land ownership of the designated critical habitat includes Federal and State lands. No tribal lands are included in the critical habitat designation. The approximate area of each critical habitat unit is shown in Table 6. Table 7 gives totals by land ownership.

TABLE 6—REVISED CRITICAL HABITAT UNITS FOR THE NORTHERN SPOTTED OWL

[Area estimates reflect all land within critical habitat unit boundaries.]

Critical habitat unit	Land ownership	Acres	Hectares
Unit 1—North Coast Olympics	Federal	696,230	281,754
	State	128,270	51,909
	Total	824,500	333,663
Unit 2—Oregon Coast Ranges	Federal	788,919	319,264
	State	70,945	28,711
	Total	859,864	347,975
Unit 3—Redwood Coast	Federal	111,258	45,025
	State	48,912	19,794
	Local government	20,684	8,371
	Total	180,855	73,189
Unit 4—West Cascades North	Federal	541,476	219,127
	State	798	323
	Total	542,274	219,450
Unit 5—West Cascades Central	Federal	908,861	367,802
	State	825	334
	Total	909,687	368,136
Unit 6—West Cascades South	Federal	1,354,989	548,345
	State	209	85
	Total	1,355,198	548,429
Unit 7—East Cascades North	Federal	1,338,988	541,869
	State	6,534	2,644
	Total	1,345,523	544,514
Unit 8—East Cascades South	Federal	368,380	149,078
Unit 9—Klamath West	Federal	1,186,750	480,260
	State	10,639	4,305
	Total	1,197,389	484,565
Unit 10—Klamath East	Federal	1,049,826	424,850
	State	2,905	1,175
	Total	1,052,731	426,025
Unit 11—Inner California Coast Ranges	Federal	940,721	380,696
	State	848	343
	Total	941,568	381,039
Grand Total		9,577,969	3,876,064

Note: Area sizes may not sum due to rounding.

TABLE 7—REVISED CRITICAL HABITAT UNITS FOR THE NORTHERN SPOTTED OWL, DESCRIBING AREA INCLUDED UNDER DIFFERENT LANDOWNERSHIPS

	Acres	Hectares
USFS	7,957,787	3,220,399
BLM	1,328,612	537,670
NPS	0	0
State	270,886	109,624
Local Government	20,684	8,371
Private	0	0
Other Federal (DOD)	0	0
Tribal	0	0
Total	9,577,969	3,876,064

We present brief descriptions of all units and their subunits below. For each subunit, we describe the proportion of the area that is covered by verified northern spotted owl home ranges at the time of listing. As described above in the section Criteria Used to Identify Critical Habitat, all areas being designated that were occupied at the time of listing contain the physical or biological features essential to the conservation of the northern spotted owl, and which may require special management considerations or protection. In addition, there are smaller areas of suitable habitat within subunits that we considered likely occupied by nonterritorial owls and dispersing subadults, at the time of listing, as well as some smaller areas of younger forest within the larger habitat mosaic that may have been unoccupied at the time of listing. Due to some potential for uncertainty in these latter two categories of areas in terms of occupancy at the time of listing, we evaluated all such areas applying the standard under section 3(5)(A)(ii) of the Act, and have determined that all such areas included in this designation are essential to the conservation of the species. In addition, as a result of our application of the modeling framework described earlier, we have determined that all areas identified here as critical habitat, whether occupied at the time of listing or unoccupied at the time of listing, are essential to the conservation of the species and therefore meet the definition of critical habitat under section 3(5)(A)(ii) of the Act. This applies to all units and subunits described below.

Unit 1: North Coast Ranges and Olympic Peninsula (NCO)

Unit 1 consists of 824,500 ac (333,623 ha) and contains five subunits. This unit consists of the Oregon and Washington Coast Ranges Section M242A, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994a, Section M242A). This region is characterized by high rainfall, cool to moderate temperatures, and generally low topography (1,470 to 2,460 ft (448 to 750 m)). High elevations and cold temperatures occur in the interior portions of the Olympic Peninsula, but northern spotted owls in this area are limited to the lower elevations (less than 2,950 ft (900 m)). Forests in the NCO are dominated by western hemlock, Sitka spruce, Douglas-fir, and western red cedar (*Thuja plicata*). Hardwoods are limited in species diversity (consist mostly of bigleaf maple and red alder (*Alnus rubra*)) and distribution within this region, and typically occur in riparian zones. Root pathogens like laminated root rot (*Phellinus weirii*) are important gap formers, and vine maple (*Acer circinatum*), among others, fills these gaps. Because Douglas-fir dwarf mistletoe is unusual in this region, northern spotted owl nesting habitat consists of stands providing very large trees with cavities or deformities. A few nests are associated with western hemlock dwarf mistletoe (*Arceuthobium tsugense* subsp. *tsugense*). Northern spotted owl diets are dominated by species associated with mature to late-successional forests (flying squirrels, red tree voles), resulting in similar definitions of habitats used for nesting/roosting and foraging by northern spotted owls.

Subunit Descriptions: Unit 1

NCO–1. The NCO–1 subunit consists of approximately 293,539 ac (118,791 ha) in Clallam, Jefferson, Grays Harbor, and Mason Counties, Washington, and comprises lands managed by U.S. Forest Service (USFS) and State of Washington. The USFS manages 230,966 ac (93,309 ha) as Late-successional Reserves to maintain functional, interactive, late-successional and old-growth forest ecosystems and 62,966 ac (25,481 ha) under the adaptive management area land use allocation. Threats in this subunit include current and past timber harvest, competition with barred owls, and isolation on a peninsula (along with subunit NCO–2). This subunit is expected to function primarily for demographic support of the overall population. NCO–1 is located primarily in the watersheds of Lyre, Hoko, Soleduck, Hoh, Quinault, Queets, and Clearwater Rivers, and includes the northern part of the Lower Chehalis River watershed.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 94 percent of the area of NCO–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

NCO–2. The NCO–2 subunit consists of approximately 213,633 ac (86,454 ha) in Kitsap, Clallam, Jefferson, Grays Harbor, and Mason Counties, Washington, and comprises lands managed by the USFS. The USFS manages 173,682 ac (70,287 ha) as Late-successional Reserves to maintain functional, interactive, late-successional and old-growth forest ecosystems and 39,083 ac (15,816 ha) under the adaptive management area land use allocation. Threats in this subunit include current and past timber harvest, competition with barred owls, and isolation on a peninsula (along with subunit NCO–1). This subunit is expected to function primarily for demographic support of the overall population. NCO–2 is located primarily in the watersheds of the Elwha, Dungeness, Quilcene, Snow, Skokomish, and Dosewallips rivers.

Our evaluation of sites known to be occupied at the time of listing indicate that approximately 95 percent of the area of this subunit was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

NCO–3. We exempted subunit NCO–3 from the final designation of critical habitat under Section 4(a)(3) of the Act (See Exemptions section below). This subunit is comprised approximately 14,313 ac (5,792 ha) of lands managed by the Department of Defense as part of Joint Base Lewis-McChord under their integrated natural resource management plan (INRMP).

NCO–4. The NCO–4 subunit consists of approximately 179,745 ac (72,740 ha) in Clatsop, Columbia, Tillamook, and Washington Counties, Oregon, and comprises Federal lands and lands managed by the State of Oregon. Of this subunit, 117,033 ac (47,361 ha) are managed as part of the Tillamook and Clatsop State Forests for multiple uses including timber revenue production, recreation, and wildlife habitat according to the Northwest Oregon State Forest Management Plan (ODF 2010a, entire). Federal lands encompass 62,712 ac (25,379 ha) of this subunit and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population. This subunit is isolated from the nearest subunit to the north but is adjacent to subunit NCO–5 to the south.

Our evaluation of sites known to be occupied at the time of listing indicate that approximately 63 percent of the area of NCO–4 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider a large part of this subunit to have been occupied at the time of listing. There are some areas of younger forest in this subunit that may have been unoccupied at the time of listing. We have

determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat in this subunit is especially important for providing for population growth and additional demographic support in this region. The development of additional suitable habitat in this subunit is needed to support viable northern spotted owl populations over the long term. The recruitment of additional suitable habitat will also contribute to the successful dispersal of northern spotted owls, and serve to buffer northern spotted owls from competition with the barred owl.

NCO–5. The NCO–5 subunit consists of approximately 142,937 ac (57,845 ha) in Yamhill, Lincoln, Tillamook, and Polk Counties, Oregon, and comprises lands managed by the State of Oregon, the BLM, and the USFS. Of this subunit 11,067 ac (4,479 ha) are managed by the State of Oregon for multiple uses including timber revenue production, recreation, and wildlife habitat according to the Northwest Oregon State Forest Management Plan (ODF 2010a, entire), and may be considered for exclusion from the final critical habitat designation. Federal lands comprise 131,870 ac (53,666 ha) and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population and north-south connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicate that approximately 63 percent of the area of NCO–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider a large part of this subunit to have been occupied at the time of listing. There are some areas of younger forest in this subunit that may have been unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat in this subunit is especially important for providing for population growth and additional demographic support in this region. The development of additional suitable habitat in this subunit is needed to support viable northern spotted owl populations over the long term. The recruitment of additional suitable habitat will also contribute to the successful dispersal of northern spotted owls, and serve to buffer northern spotted owls from competition with the barred owl.

Unit 2: Oregon Coast Ranges (OCR)

Unit 2 consists of 859,864 ac (347,975 ha) and contains six subunits. This unit consists of the southern third of the Oregon and Washington Coast Ranges Section M242A, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994a, Section M242A). We split the section in the vicinity of Otter Rock, OR, based on gradients of increased temperature and decreased moisture that result in different patterns of vegetation to the south. Generally this region is characterized by high rainfall, cool to moderate temperatures, and generally low topography (980 to 2,460 ft (300 to 750 m)). Forests in this region are dominated by western hemlock, Sitka spruce, and Douglas-fir; hardwoods are limited in species diversity (largely bigleaf maple and red alder) and distribution, and are typically limited to riparian zones. Douglas-fir and hardwood species associated with the California Floristic Province (tanoak, Pacific madrone, black oak, giant chinquapin (*Castanopsis chrysophylla*)) increase toward the southern end of the OCR. On the eastern side of the Coast Ranges crest, habitats tend to be drier and dominated by Douglas-fir. Root pathogens like laminated root rot are important gap formers, and vine maple among others fills these gaps. Because Douglas-fir dwarf mistletoe is unusual in this region, northern spotted owl nesting habitat tends to be limited to stands providing very large trees with cavities or deformities. A few nests are associated with western hemlock dwarf mistletoe. Northern spotted owl diets are dominated by species associated with mature to late-successional forests (flying squirrels, red tree voles), resulting in similar definitions of habitats used for nesting/roosting and foraging by northern spotted owls. One significant difference between OCR and NCO is that woodrats comprise an increasing proportion of the diet in the southern portion of the modeling region.

Subunit Descriptions—Unit 2

OCR–1. The OCR–1 subunit consists of approximately 110,657 ac (44,781 ha) in Polk, Benton and Lincoln Counties, Oregon, and comprises lands managed by the State of Oregon, the BLM, and the USFS. Of this subunit 6,612 ac (2,676 ha) are managed by the State of Oregon for multiple uses including timber revenue production, recreation, and wildlife habitat according to the Northwest Oregon State Forest Management Plan (ODF 2010a, entire). Federal lands comprise 104,045 ac (42,105 ha) and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population and north-south connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 55 percent of the area of OCR–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider a large part of this subunit to have been occupied at the time of listing. There are some areas of younger forest in this subunit that may have been unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat in this subunit is especially important for providing for population growth and additional demographic support in this region. The development of additional suitable habitat in this subunit is needed to support viable northern spotted owl populations over the long term. The recruitment of additional suitable habitat will also contribute to the successful dispersal of northern spotted owls, and serve to buffer northern spotted owls from competition with the barred owl.

OCR–2. The OCR–2 subunit consists of approximately 261,405 ac (105,787 ha) in Lane, Benton, and Lincoln Counties, Oregon, and comprises lands

managed by the State of Oregon, the BLM, and the USFS. Of this subunit 18,504 ac (7,448 ha) are managed by the State of Oregon for multiple uses including timber revenue production, recreation, and wildlife habitat according to the Northwest Oregon State Forest Management Plan (ODF 2010a, entire). Federal lands comprise 242,901 ac (98,298 ha) and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population and north-south connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 77 percent of the area of OCR–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

OCR–3. The OCR–3 subunit consists of approximately 203,681 ac (82,427 ha) in Lane and Douglas Counties, Oregon, and comprises lands managed by the State of Oregon, the BLM, and the USFS. Of this subunit 5,082 ac (2,07 ha) are managed by the State of Oregon for multiple uses including timber revenue production, recreation, and wildlife habitat according to the Northwest Oregon State Forest Management Plan (ODF 2010a, entire). Federal lands comprise 198,599 ac (80,369 ha) and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population and for both north-south and east-west connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 97 percent of the area of OCR–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

OCR–4. The OCR–4 subunit consists of approximately 8,263 ac (3,344 ha) in Lane and Douglas Counties, Oregon, and comprises lands managed by the BLM as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for east-west connectivity between subunits and critical habitat units, and between the Oregon coast and the western Cascades.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 43 percent of the area of OCR–4 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider a large part of this subunit to have been occupied at the time of listing. There are some areas of younger forest in this subunit that may have been unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat in this subunit is especially important for providing essential connectivity between currently occupied areas to support the successful dispersal of northern spotted owls, and may also help to buffer northern spotted owls from competition with the barred owl.

OCR–5. The OCR–5 subunit consists of approximately 176,905 ac (71,591ha) in Coos and Douglas Counties, Oregon, and comprises lands managed by the State of Oregon, the BLM, and the USFS. Of this subunit 40,747 ac (16,490 ha) are managed by the State of Oregon for multiple uses including sustained economic benefit through timber harvest and management, recreation, and wildlife habitat according to the Elliot State Forest Management Plan (ODF 2011, entire). Federal lands comprise 136,158 ac (55,101 ha) and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population and for north-south, and potentially east-west, connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 94 percent of the area of OCR–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

OCR–6. The OCR–6 subunit consists of approximately 81,900 ac (33,144 ha) in Coos and Douglas Counties, Oregon, and comprises lands managed by the BLM as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population and for north-south connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 97 percent of the area of OCR–6 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 3: Redwood Coast (RWC)

Unit 3 contains 180,855ac (73,189ha) and three subunits. This unit consists of the Northern California Coast Ecological Section 263, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994b, entire). This region is characterized by low-lying terrain (0 to 2,950 ft (0 to 900 m)) with a maritime climate, generally mesic conditions, and moderate temperatures. Climatic conditions are rarely limiting to northern spotted owls at all elevations. Forest communities are dominated by redwood, Douglas-fir-tanoak forest, coast live oak, and tanoak series. The vast majority of the region is in private ownership, dominated by a few large industrial timberland holdings. The results of numerous studies of northern spotted owl habitat relationships suggest stump-sprouting and rapid growth rates of redwoods, combined with high availability of woodrats in patchy, intensively managed forests, enables northern spotted owls to maintain high densities in a wide range of habitat conditions within the Redwood zone.

Subunit Descriptions—Unit 3

RDC–1. This subunit contains 63,127 ac (25,547 ha) of lands managed by the USFS and BLM in Curry County, Oregon and in Del Norte, Humboldt, and Trinity Counties, California. Special management considerations or protection are required in this subunit to address threats from the barred owl. Suitable habitat within the subunit is relatively contiguous north-to-south, and is capable of supporting a sustainable subpopulation of owls. We expect that this subunit will provide strong connectivity among the adjacent critical habitat units to the north (OCR) and east (KLW, ICC). The subunit is weakly connected to the adjacent subunit to the south (RDC–2).

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 78 percent of the area of RDC–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

RDC–2. This subunit contains 65,391 ac (26,463 ha) in Mendocino and southwestern Humboldt Counties, California. There are 16,479 ac (6,669 ha) of Federal lands in the subunit, managed by the Bureau of Land Management. The California Department of Forestry and Fire Protection operates the Jackson Demonstration State Forest (48,912 ac (19,794 ha)) for multiple uses including timber production, water quality, wildlife habitat, and research.

Special management considerations or protection are required in this subunit to address threats from the barred owl. Suitable habitat within the subunit is relatively contiguous north-to-south, and is capable of supporting a sustainable subpopulation of owls. The subunit is weakly connected to the adjacent CHU to the east (ICC) and to the coastal subunit to the north (RDC–1); it is relatively well connected to the coastal subunit to the south (RDC–3).

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 85 percent of the area of RDC–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

RDC–3. This subunit was comprised entirely of private lands, which have been excluded from the final rule.

RDC–4. This subunit was comprised entirely of private lands, which have been excluded from the final rule.

RDC–5. This subunit contains 20,684 ac (8,371 ha) in southern Marin County, California and represents the southern range limit of the subspecies. No private lands are contained in this subunit. The Mount Tamalpais Watershed (18,900 ac (7,649 ha)) of the Marin Municipal Water District is included in the final critical habitat designation. Six Open Space Preserves (OSPs) in the Marin County Parks and Open Space System, totaling 3,627 ac (1,468 ha), are included in the final critical habitat designation, including Gary Giacomini, White Hill, Cascade Canyon, Baltimore Canyon, Camino Alto, and Blithedale Summit OSPs. Special management considerations or protection are required in this subunit to address

incipient threats from the barred owl. Suitable habitat within the subunit is continuous from east to west. It is unknown whether this subunit is capable of supporting a self-sustaining subpopulation of owls without support from the subunit to the north (RDC–4). The lands between this subunit and the nearest subunit to the east (ICC–6) are dominated by agricultural and urban land use, and are very weakly connected.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 82 percent of the area of RDC–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 4: West Cascades North (WCN)

This unit contains 542,274 ac (219,450 ha) and two subunits. This unit coincides with the northern Western Cascades Section M242B, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994a, Section M242B), combined with the western portion of M242D (Northern Cascades Section), extending from the U.S.-Canadian border south to Snoqualmie Pass in central Washington. It is similar to the Northern Cascades Province of Franklin and Dyrness (1988, pp. 17–20). This region is characterized by high mountainous terrain with extensive areas of glaciers and snowfields at higher elevation. The marine climate brings high precipitation (both annual and summer) but is modified by high elevations and low temperatures over much of this modeling region. The resulting distribution of forest vegetation is dominated by subalpine species, mountain hemlock and silver fir; the western hemlock and Douglas-fir forests typically used by northern spotted owls are more limited to lower elevations and river valleys (northern spotted owls are rarely found at elevations greater than 4,200 ft (1,280 m) in this region) grading into the mesic Puget lowland to the west.

Subunit Descriptions—Unit 4

WCN–1. The WCN–1 subunit consists of approximately 438,255 ac (177,355 ha) in Whatcom, Skagit, and Snohomish Counties, Washington, and comprises lands managed by the USFS and the State of Washington. The USFS manages 320,146 ac (129,559 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 6,147 ac (2,487 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, steep topography with high-elevation ridges that separate relatively small, linear strips of suitable habitat in valley bottoms, and location at the northern limit of the subspecies range. This subunit is expected to function primarily for demographic support of the overall population and to maintain the subspecies distribution in the northernmost portion of its range. WCN–1 is located in the watersheds of the Stillaguamish, Skagit, and Nooksack rivers, and is bounded on the north by the international boundary with British Columbia, Canada. In this subunit, we have excluded lands covered under the Washington Department of Natural Resources State Lands HCP.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 92 percent of the area of WCN–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCN–2. The WCN–2 subunit consists of approximately 103,988 ac (42,083 ha) in King and Snohomish Counties, Washington, and comprises lands managed by the USFS, State of Washington, and private landowners. The USFS manages 82,316 ac (33,312 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 834 ac (338 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, and steep topography with high-elevation ridges that separate relatively small, linear strips of suitable habitat in valley bottoms. This subunit has a key role in maintaining connectivity between northern spotted owl populations, both north to south in the West Cascades and west to east between the West and East Cascades units. This role is shared with the WCC–1 subunit to the south and the ECN–4 subunit to the east. This subunit is also expected to provide demographic support of the overall population. WCN–2 is located in the watersheds of the Snohomish and Cedar/Sammamish Rivers. In this subunit, we have excluded lands covered under the Washington Department of Natural Resources State Lands HCP in the final designation.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 79 percent of the area of WCN–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long

term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 5: West Cascades Central (WCC)

This unit contains 909,687 ac (368,136 ha) and three subunits. This region consists of the midsection of the Western Cascades Section M242B, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994a, Section M242B), extending from Snoqualmie Pass in central Washington south to the Columbia River. It is similar to the Southern Washington Cascades Province of Franklin and Dyrness (1988, pp. 21–23). We separated this region from the northern section based on differences in northern spotted owl habitat due to relatively milder temperatures, lower elevations, and greater proportion of western hemlock/Douglas-fir forest and occurrence of noble fir (*A. procera*) to the south of Snoqualmie Pass. Because Douglas-fir dwarf mistletoe occurs rarely in this region, northern spotted owl nest sites are largely limited to defects in large trees, and occasionally nests of other raptors.

Subunit Descriptions—Unit 5

WCC–1. The WCC–1 subunit consists of approximately 225,847 ac (91,397 ha) in King, Pierce, Thurston, Lewis, Kittitas, and Yakima Counties, Washington, and comprises lands managed by USFS and State of Washington. The USFS manages 183,884 ac (76,843 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 35,145 ac (14,222 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, and stand conversion. This subunit is expected to provide demographic support of the overall population and to maintain demographic connectivity between the Cascade Range and the Olympic Peninsula in conjunction with subunit NCO–3. WCC–1 is located primarily in the watersheds of the Nisqually, Puyallup, White, Duwamish, and Green Rivers. In this subunit, we have excluded lands from our final critical habitat designation that are covered under the Washington Department of Natural Resources State Lands HCP, the Cedar River Watershed HCP, the Plum Creek Timber Central Cascades HCP, the West Fork Timber HCP, the Tacoma Water Green River Water Supply Operations and Watershed Protection HCP as well as other private lands from the final designation.

Our evaluation of sites known to be occupied at the time of listing indicate that approximately 96 percent of the area of WCC–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCC–2. The WCC–2 subunit consists of approximately 279,445 ac (113,087 ha) in Pierce, Lewis, Cowlitz, Skamania, and Yakima Counties, Washington, and comprises lands managed by USFS, State of Washington, and private landowners. The USFS manages 92,835 ac (37,569 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 88,655 ac (35,878 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest and competition with barred owls. This subunit is expected to provide demographic support of the overall population. WCC–2 is located primarily in the Cowlitz River watersheds west of the Cascade Crest and the headwaters of the Naches River watershed east of the Crest. In this subunit, we have excluded lands covered under the Washington Department of Natural Resources State Lands HCP, the West Fork Timber HCP, and the Port Blakely Tree Farms L.P. (Morton Block) SHA, Landowner Option Plan, and Cooperative Habitat Enhancement Agreement in the final critical habitat designation.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 96 percent of the area of WCC–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCC–3. The WCC–3 subunit consists of approximately 394,501 ac (159,649 ha) in Clark, Skamania, and Yakima Counties, Washington, and comprises lands managed by the USFS, the State of Washington, and private landowners. The USFS manages 242,929 ac (98,310 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 122,641 ac (49,631 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, and the Columbia River as an impediment to northern spotted owl dispersal. This subunit is expected to provide demographic support of the overall population and an opportunity for demographic exchange between the WCC Unit and the WCS Unit. WCC–3 is located primarily in the watersheds of the Lewis, Wind, and White Salmon Rivers, and is bounded on the south by the Columbia River. In this subunit, we have excluded lands covered under the Washington Department of Natural Resources State Lands HCP from critical habitat designation.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 96 percent of the area of WCC–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and

occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 6: West Cascades South (WCS)

Unit 6 contains 1,355,198ac (548,429 ha) and contains six subunits. This unit consists of the southern portion of the Western Cascades Section M242B, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994a, Section M242B), and extends from the Columbia River south to the North Umpqua River. We separated this region from the northern section due to its relatively milder temperatures, reduced summer precipitation due to the influence of the Willamette Valley to the west, lower elevations, and greater proportion of western hemlock/Douglas-fir forest. The southern portion of this region exhibits a gradient between Douglas-fir/western hemlock and increasing Klamath-like vegetation (mixed conifer/evergreen hardwoods), which continues across the Umpqua divide area. The southern boundary of this region is novel and reflects a transition to mixed-conifer forest (Franklin and Dyrness 1988, pp. 23–24, 137–143). The importance of Douglas-fir dwarf mistletoe increases to the south in this region, but most northern spotted owl nest sites are found in defective large trees, and occasionally nests of other raptors.

Subunit Descriptions—Unit 6

WCS–1. The WCS–1 subunit consists of approximately 92,586 ac (37,468 ha) in Multnomah, Hood River, and Clackamas Counties, Oregon, and comprises only Federal lands managed by the BLM and the USFS under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south and east-west connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 88 percent of the area of WCS–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCS–2. The WCS–2 subunit consists of approximately 150,105 ac (60,745 ha) in Clackamas, Marion, and Wasco Counties, Oregon, and comprises only Federal lands managed by the BLM and the USFS under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 82 percent of the area of WCS–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011 p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCS–3. The WCS–3 subunit consists of approximately 319,736 ac (129,393 ha) in Clackamas, Marion, Linn, and Lane Counties, Oregon, and comprises lands managed by the State of Oregon, the BLM, and the USFS. Of this subunit, 184 ac (75 ha) are managed by the State of Oregon primarily for recreation (Oregon Administrative Rules, Chapter 736, entire). The remaining 319,552 ac (129,318 ha) are Federal lands managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 85 percent of the area of WCS–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCS–4. The WCS–4 subunit consists of approximately 379,130 ac (153,429 ha) in Lane and Douglas Counties,

Oregon, and comprises only Federal lands managed by the BLM and the USFS under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 86 percent of the area of WCS–4 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCS–5. The WCS–5 subunit consists of approximately 356,415 ac (144,236 ha) in Lane and Douglas Counties, Oregon, and comprises only Federal lands managed by the USFS under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south and east-west connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 83 percent of the area of WCS–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

WCS–6. The WCS–6 subunit consists of approximately 99,558 ac (40,290 ha) in Lane, Klamath, and Douglas Counties, Oregon, and is managed by the BLM and the USFS as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest and competition with barred owls. This subunit is expected to function primarily for east-west connectivity between subunits and critical habitat units, and between the Oregon coast and the western Cascades.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 97 percent of the area of WCS–6 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 7: East Cascades North (ECN)

Unit 7 contains 1,345,523ac (557,002 ha) and nine subunits. This unit consists of the eastern slopes of the Cascade range, extending from the Canadian border south to the Deschutes National Forest near Bend, OR. Terrain in portions of this region is glaciated and steeply dissected. This region is characterized by a continental climate (cold, snowy winters and dry summers). High-frequency, low-intensity fire regimes occur at lower elevations, mid elevations have mixed-severity regimes, and high elevations have high-severity regimes. Increased precipitation from marine air passing east through Snoqualmie Pass and the Columbia River has resulted in an increase of moist forest conditions in this region (Hessburg *et al.* 2000b, p. 165). In Washington, ponderosa pine and Douglas-fir forest are dominant at low elevations, Douglas-fir/grand fir mixed-conifer forest are characteristic of mid-elevations, and higher elevations support forests of silver fir, hemlock, and subalpine fir. The terrain is highly dissected and mountainous. The terrain and ecology are different on the southern portion of the unit, where ponderosa pine predominates on flat terrain at low elevations, and owl habitat is restricted to buttes and the slopes of the Cascade Range in forests of Douglas-fir, grand/white fir, and true firs. There is substantially less habitat in the Deschutes area of Oregon compared to the area north of Sisters, Oregon, and into Washington. The bulk of owls in this Unit are in Washington.

Forest composition, particularly the presence of grand fir and western larch, distinguishes this modeling region from the southern section of the eastern Cascades. While ponderosa pine forest dominates lower and middle elevations in both this and the southern section, the northern section supports grand fir and Douglas-fir habitat at middle elevations. Dwarf mistletoe provides an important component of nesting habitat, enabling northern spotted owls to nest within stands of relatively younger and smaller trees.

Subunit Descriptions—Unit 7

ECN–1. The ECN–1 subunit consists of approximately 101,661 ac (41,141 ha) in Whatcom, Skagit, and Okanogan Counties, Washington, and comprises lands managed by USFS. The USFS manages 60,173 ac (24,351 ha) as Late-successional Reserves to maintain functional, interactive, late-successional and old-growth forest ecosystems and 22,802 ac (9,228 ha) under the matrix land use allocation where multiple uses

occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest; competition with barred owls; removal or modification of habitat by forest fires, insects, and diseases; steep topography with high-elevation ridges that separate relatively small, linear strips of suitable habitat in valley bottoms; and location at the northeastern limit of the range of the subspecies. This subunit is expected to provide demographic support of the overall population and maintain the subspecies distribution in the northeastern portion of its range. ECN–1 is located primarily in the watershed of the Methow River and includes a small portion of the upper Skagit River watershed. It is bounded on the north by the international boundary with British Columbia, Canada.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 41 percent of the area of ECN–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–2. The ECN–2 subunit consists of approximately 60,128 ac (24,333 ha) in Chelan County, Washington, and comprises lands managed by USFS. The USFS manages 35,835 ac (14,502 ha) as Late-successional Reserves to maintain functional, interactive, late-successional and old-growth forest ecosystems and 17,545 ac (7,100 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest; competition with barred owls; steep topography with high-elevation ridges that separate relatively small, linear strips of suitable habitat in valley bottoms; the combination of Lake Chelan and the Sawtooth Mountains acting as a barrier to dispersal; and removal or modification of habitat by forest fires, insects, and diseases. This subunit is expected to provide demographic support of the overall population. ECN–2 is located primarily in the watersheds of the Chelan and Entiat Rivers.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 34 percent of the area of ECN–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–3. The ECN–3 subunit consists of approximately 301,219 ac (121,899 ha) in Chelan County, Washington, and comprises lands managed by the USFS and private landowners. The USFS manages 187,103 ac (75,718 ha) as Late-successional Reserves to maintain functional, interactive, late-successional and old-growth forest ecosystems and 114,117 ac (46,181 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, and removal or modification of habitat by forest fires, insects, and diseases. This subunit is expected to provide demographic support of the overall population. ECN–3 is located primarily in the watershed of the Wenatchee River. In this subunit, we have excluded private lands and lands covered under the Washington Department of Natural Resources State Lands HCP.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 71 percent of the area of ECN–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–4. The ECN–4 subunit consists of approximately 222,818 ac (90,171 ha) in Kittitas County, Washington, and comprises lands managed by the USFS and the State of Washington. The USFS manages 99,641 ac (40,323 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 118,676 ac (48,027 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. The Washington Department of Fish and Wildlife manages 4,498 ac (1,820 ha). Threats in this subunit include current and past timber harvest, competition with barred owls, and removal or modification of habitat by forest fires, insects, and diseases. This subunit is expected to provide demographic support of the overall population. This subunit also has a key role in maintaining connectivity between northern spotted owl populations, both north to south in the East Cascades North Unit and west to east between the West and East Cascades units. This role is shared with the WCN–2 subunit and the WCC–1 subunit to the west. ECN–4 is located primarily in the Upper Yakima River watershed. In this subunit, we have excluded private lands and lands covered under the Washington Department of Natural Resources State Lands HCP and the Plum Creek Timber Central Cascades HCP.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 78 percent of the area of ECN–4 was covered by verified

northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–5. The ECN–5 subunit consists of approximately 201,108 ac (81,415 ha) in Kittitas and Yakima Counties, Washington, and comprises lands managed by the USFS and the State of Washington. The USFS manages 115,289 ac (46,656 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems and 83,849 ac (33,933 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, and removal or modification of habitat by forest fires, insects, and diseases. This subunit is expected to provide demographic support of the overall population. ECN–5 is located primarily in the watershed of the Naches River. In this subunit, we have excluded from final critical habitat designation lands covered under the Washington Department of Natural Resources State Lands HCP, the Plum Creek Timber Central Cascades HCP, and private lands.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 85 percent of the area of ECN–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–6. The ECN–6 subunit consists of approximately 81,852 ac (33,124 ha) in Skamania, Yakima, and Klickitat Counties, Washington, and comprises lands managed by the USFS and the State of Washington. The USFS manages 32,400 ac (13,112 ha) as Late-successional Reserves to maintain functional, interactive, late-successional, and old-growth forest ecosystems; and 49,452 ac (20,012 ha) under the matrix land use allocation where multiple uses occur, including most timber harvest and other silvicultural activities. Threats in this subunit include current and past timber harvest, competition with barred owls, and the Columbia River as an impediment to northern spotted owl dispersal. This subunit is expected to provide demographic support of the overall population. ECN–6 is located primarily in the watersheds of the Klickitat and White Salmon Rivers, and is bounded on the south by the Columbia River. In this subunit, we have excluded lands covered under the Washington Department of Natural Resources State Lands HCP as well as private lands from the final designation.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 88 percent of the area of ECN–6 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–7. The ECN–7 subunit consists of approximately 139,983 ac (56,649 ha) in Hood River and Wasco Counties, Oregon, and comprises only Federal lands managed by the USFS under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest, removal or modification of habitat by forest fires and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south and east-west connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that nearly 100 percent of the area of ECN–7 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–8. The ECN–8 subunit consists of approximately 94,622 ac (38,292 ha) in Jefferson and Deschutes Counties, Oregon, of Federal lands managed by the USFS under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This

subunit is expected to function primarily for demographic support to the overall population, as well as north-south connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicate that approximately 61 percent of the area of ECN–8 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECN–9. The ECN–9 subunit consists of approximately 155,434 ac (62,902 ha) in Deschutes and Klamath Counties, Oregon, and comprises only Federal lands managed by the USFS under the NWFP (USDA and USDI 1994). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 45 percent of the area of ECN–9 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 8: East Cascades South (ECS)

Unit 8 contains 368,381 ac (149,078 ha) and three subunits. This unit incorporates the Southern Cascades Ecological Section M261D, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994c, Section M261D) and the eastern slopes of the Cascades from the Crescent Ranger District of the Deschutes National Forest south to the Shasta area. Topography is gentler and less dissected than the glaciated northern section of the eastern Cascades. A large expanse of recent volcanic soils (pumice region) (Franklin and Dyrness 1988, pp. 25–26), large areas of lodgepole pine, and increasing presence of red fir (*Abies magnifica*) and white fir (and decreasing grand fir) along a south-trending gradient further supported separation of this region from the northern portion of the eastern Cascades. This region is characterized by a continental climate (cold, snowy winters and dry summers) and a high-frequency/low-mixed severity fire regime. Ponderosa pine is a dominant forest type at mid-to-lower elevations, with a narrow band of Douglas-fir and white fir at middle elevations providing the majority of northern spotted owl habitat. Dwarf mistletoe provides an important component of nesting habitat, enabling northern spotted owls to nest within stands of relatively younger, smaller trees.

Subunit Descriptions—Unit 8

ECS–1. The ECS–1 subunit consists of approximately 127,801 ac (51,719 ha) in Klamath, Jackson, and Douglas Counties, Oregon, and comprises lands managed by the BLM and the USFS. Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south and east-west connectivity between subunits and critical habitat units. This subunit is adjacent to ECS–2 to the south.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 78 percent of the area of ECS–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECS–2. The ECS–2 subunit consists of approximately 66,086 ac (26,744 ha) in Klamath and Jackson Counties, Oregon, and Siskiyou County, California, all of which are Federal lands managed by the BLM and USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for north-south connectivity between subunits, but also for demographic support in this area of sparse Federal land and sparse high-quality nesting habitat.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 77 percent of the area of ECS–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the

time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ECS–3. The ECS–3 subunit consists of approximately 112,179 ac (45,397 ha) in Siskiyou County, California, all of which are Federal lands managed by the USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. The function of this subunit is to provide demographic support in this area of sparsely distributed high-quality habitat and Federal land, and to provide for population connectivity between subunits to the north and south.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 69 percent of the area of ECS–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider a large part of this subunit to have been occupied at the time of listing. There are some areas of younger forest in this subunit that may have been unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat in this subunit is especially important for providing essential connectivity between currently occupied areas to support the successful dispersal of northern spotted owls, and may also help to buffer northern spotted owls from competition with the barred owl.

Unit 9: Klamath West (KLW)

Unit 9 contains 1,197,389 ac (484,565 ha) and nine subunits. This unit consists of the western portion of the Klamath Mountains Ecological Section M261A, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994c, Section M261A). A long north-south trending system of mountains (particularly South Fork Mountain) creates a rainshadow effect that separates this region from more mesic conditions to the west. This region is characterized by very high climatic and vegetative diversity resulting from steep gradients of elevation, dissected topography, and the influence of marine air (relatively high potential precipitation). These conditions support a highly diverse mix of mesic forest communities such as Pacific Douglas-fir, Douglas-fir tanoak, and mixed evergreen forest interspersed with more xeric forest types. Overall, the distribution of tanoak is a dominant factor distinguishing the Western Klamath Region. Douglas-fir dwarf mistletoe is uncommon and seldom used for nesting platforms by northern spotted owls. The prey base of northern spotted owls within the Western Klamath is diverse, but dominated by woodrats and flying squirrels.

Subunit Descriptions—Unit 9

KLW–1. The KLW–1 subunit consists of approximately 147,326 ac (59,621 ha) in Douglas, Josephine, Curry, and Coos Counties, Oregon, and comprises lands managed by the State of Oregon and the BLM. Of this subunit 7,682 ac (3,109 ha) are managed by the State of Oregon for multiple uses including timber revenue production, recreation, and wildlife habitat according to the Southwest Oregon State Forests Management Plan (ODF 2010b, entire). Federal lands comprise 139,644 ac (56,512 ha) and are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support to the overall population and for north-south and east-west connectivity between subunits and critical habitat units. This subunit sits at the western edge of an important connectivity corridor between coastal Oregon and the western Cascades.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 96 percent of the area of KLW–1was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–2. The KLW–2 subunit consists of approximately 148,929 ac (60,674 ha) in Josephine, Curry, and Coos Counties, Oregon, and comprises lands managed by the USFS and the BLM as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support to the overall population and for north-south and east-west connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 71 percent of the area of KLW–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance

and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–3. The KLW–3 subunit consists of approximately 143,862 ac (58,219 ha) in Josephine, Curry, and Coos Counties, Oregon, and comprises lands managed by the USFS, the BLM and the State of Oregon. There are 142,982 ac (57,863 ha) of Federal lands managed as directed by the NWFP (USDA and USDI 1994, entire). The 880 ac (356 ha) of State of Oregon lands are managed according to the Southwest Oregon State Forests Management Plan (ODF 2010b, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support to the overall population and for north-south connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 88 percent of the area of KLW–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–4. The KLW–4 subunit consists of approximately 158,299 ac (64,061 ha) in Josephine and Jackson Counties, Oregon, and Del Norte and Siskiyou Counties, California, and comprises lands managed by the USFS and the BLM that are managed as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support to the overall population and for north-south and east-west connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 95 percent of the area of KLW–4 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–5. The KLW–5 subunit consists of approximately 31,085 ac (12,580 ha) in Josephine County, Oregon, and Del Norte and Siskiyou Counties, California, all of which are Federal lands managed by the BLM and USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 98 percent of the area of KLW–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–6. The KLW–6 subunit consists of approximately 117,545 ac (47,569 ha) in Del Norte, Humboldt, and Siskiyou Counties, California, all of which are Federal lands managed by the USFS as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 91 percent of the area of KLW–6 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and

buffering from competition with the barred owl.

KLW–7. The KLW–7 subunit consists of approximately 255,779 ac (103,510 ha) in Del Norte, Humboldt, and Siskiyou Counties, California, all of which are Federal lands managed by the BLM and USFS as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential or physical features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 91 percent of the area of KLW–7 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–8. The KLW–8 subunit consists of approximately 114,287 ac (46,250 ha) in Siskiyou and Trinity Counties, California, all of which are Federal lands managed by the BLM and USFS as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 85 percent of the area of KLW–8 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLW–9. The KLW–9 subunit consists of approximately 149,656 ac (60,564 ha) in Humboldt and Trinity Counties, California, all of which are Federal lands managed by the USFS as directed by the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 89 percent of the area of KLW–9 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 10: Klamath East (KLE)

Unit 10 contains 1,052,731ac (426,025ha) and seven subunits. This unit consists of the eastern portion of the Klamath Mountains Ecological Section M261A, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994c, Section M261A), and portions of the Southern Cascades Ecological Section M261D in Oregon. This region is characterized by a Mediterranean climate, greatly reduced influence of marine air, and steep, dissected terrain. Franklin and Dyrness (1988, pp. 137–149) differentiate the mixed-conifer forest occurring on the ''Cascade side of the Klamath from the more mesic mixed evergreen forests on the western portion (Siskiyou Mountains),'' and Kuchler (1977) separates out the eastern Klamath based on increased occurrence of ponderosa pine. The mixed-conifer/evergreen hardwood forest types typical of the Klamath region extend into the southern Cascades in the vicinity of Roseburg and the North Umpqua River, where they grade into the western hemlock forest typical of the Cascades. High summer temperatures and a mosaic of open forest conditions and Oregon white oak (*Quercus garryana*) woodlands act to influence northern spotted owl distribution in this region. Northern spotted owls occur at elevations up to 1,768 m. Dwarf mistletoe provides an important component of nesting habitat, providing additional structure and enabling northern spotted owls to occasionally nest within stands of relatively younger, small trees.

Subunit Descriptions—Unit 10

KLE–1. The KLE–1 subunit consists of approximately 242,338 ac (98,071 ha) in Jackson and Douglas Counties, Oregon, and comprises Federal lands managed by the USFS and the BLM under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support to the overall population, as well as north-south and east-west connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 84 percent of the area of KLE–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLE–2. The KLE–2 subunit consists of approximately 101,942 ac (41,255 ha) in Josephine and Douglas Counties, Oregon, and comprises Federal lands managed by the USFS and the BLM under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for east-west connectivity between subunits and critical habitat units, but also for demographic support. This subunit facilitates northern spotted owl movements between the western Cascades and coastal Oregon and the Klamath Mountains.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 92 percent of the area of KLE–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLE–3. The KLE–3 subunit consists of approximately 111,410 ac (45,086 ha) in Jackson, Josephine, and Douglas Counties, Oregon, and comprises Federal lands managed by the USFS and the BLM under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for east-west connectivity between subunits and critical habitat units, but also for demographic support. This subunit facilitates northern spotted owl movements between the western Cascades and coastal Oregon and the Klamath Mountains.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 97 percent of the area of KLE–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLE–4. The KLE–4 subunit consists of approximately 254,442 ac (102,969 ha) in Jackson, Klamath, and Douglas Counties, Oregon, and comprises Federal lands managed by the USFS and the BLM under the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for east-west connectivity between subunits and critical habitat units, but also for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 81 percent of the area of KLE–4 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLE–5. The KLE–5 subunit consists of approximately 38,283 ac (15,493 ha) in Jackson County, Oregon, and comprises lands managed by the BLM and USFS. The BLM and USFS lands are managed per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for north-south connectivity between subunits, but also for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 86 percent of the area of KLE–5 was covered by verified

northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLE–6. The KLE–6 subunit consists of approximately 167,849 ac (67,926 ha) in Jackson County, Oregon, and Siskiyou County, California, all of which are Federal lands managed by the BLM and USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for north-south connectivity between subunits, but also for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 97 percent of the area of KLE–6 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

KLE–7. The KLE–7 subunit consists of approximately 66,078 ac (26,741 ha) in Siskiyou County, California, all of which are Federal lands managed by the BLM and USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function for demographic support and also for connectivity across the landscape.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 96 percent of the area of KLE–7 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

Unit 11: Interior California Coast (ICC)

Unit 11 contains 941,568 ac (381,039 ha) and eight subunits. This unit consists of the Northern California Coast Ranges ecological Section M261B, based on section descriptions of forest types from Ecological Subregions of the United States (McNab and Avers 1994c, Section M261B), and differs markedly from the adjacent redwood coast region. Marine air moderates winter climate, but precipitation is limited by rainshadow effects from steep elevational gradients (328 to 7,847 ft (100 to 2,400 m)) along a series of north-south trending mountain ridges. Due to the influence of the adjacent Central Valley, summer temperatures in the interior portions of this region are among the highest within the northern spotted owl's range. Forest communities tend to be relatively dry mixed-conifer, blue and Oregon white oak, and the Douglas-fir tanoak series. Northern spotted owl habitat within this region is poorly known; there are no Demographic Study Areas (DSAs—areas within forested habitats specifically surveyed to determine northern spotted owl occupation and density), and few studies have been conducted here. Northern spotted owl habitat and occupancy data obtained during this project suggests that some northern spotted owls occupy steep canyons dominated by live oak and Douglas-fir. The distribution of dense conifer habitats most suitable for the northern spotted owl is limited to higher elevations on the Mendocino National Forest.

Subunit Descriptions—Unit 11

ICC–1. The ICC–1 subunit consists of approximately 332,042 ac (134,372 ha) in Humboldt, Trinity, Shasta, and Tehama Counties, California, all of which are Federal lands managed by the BLM and the USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support, but also for connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 97 percent of the area of ICC–1 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern

spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–2. The ICC–2 subunit consists of approximately 204,400 ac (82,718 ha) in Humboldt and Trinity Counties, California, all of which are Federal lands managed by the BLM and the USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support, but also for connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 98 percent of the area of ICC–2 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–3. The ICC–3 subunit consists of approximately 103,971 ac (42,035 ha) in Trinity, Tehama, and Mendocino Counties, California, all of which are Federal lands managed by the BLM and the USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support, but also for north-south connectivity between subunits.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 89 percent of the area of ICC–3 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–4. The ICC–4 subunit consists of approximately 120,997 ac (48,966 ha) in Mendocino, Glenn, and Colusa Counties, California, all of which are Federal lands managed by the BLM and USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 93 percent of the area of ICC–4 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–5. The ICC–5 subunit consists of approximately 34,957 ac (14,147 ha) in Lake and Mendocino Counties, California, all of which are Federal lands managed by the USFS and BLM per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function primarily for demographic support, but also for connectivity between subunits and critical habitat units.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 78 percent of the area of ICC–5 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–6. The ICC–6 subunit consists of approximately 2,072 ac (839 ha) of State and Federal lands in Napa and Sonoma Counties, California.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 90 percent of the

area of ICC–6 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–7. The ICC–7 subunit consists of approximately 119,742 ac (48,458 ha) in Trinity and Shasta Counties, California, all of which are Federal lands managed by the BLM and USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats to the essential physical or biological features from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function both for demographic support and for east-west connectivity between subunits in an area of sparse Federal ownership.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 73 percent of the area of ICC–7 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

ICC–8. The ICC–8 subunit consists of approximately 83,376 ac (33,742 ha) in Siskiyou and Shasta Counties, California, all of which are Federal lands managed by the BLM and the USFS per the NWFP (USDA and USDI 1994, entire). Special management considerations or protection are required in this subunit to address threats from current and past timber harvest, losses due to wildfire and the effects on vegetation from fire exclusion, and competition with barred owls. This subunit is expected to function both for demographic support and for connectivity between subunits in an area of sparse Federal ownership.

Our evaluation of sites known to be occupied at the time of listing indicates that approximately 84 percent of the area of ICC–8 was covered by verified northern spotted owl home ranges at the time of listing. When combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for the continued maintenance and recruitment of northern spotted owl habitat (USFWS 2011, p. ix). The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.

IX. 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 determinations of designated critical habitat of such species. Decisions by the Fifth and Ninth Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (*Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004); *Sierra Club* v. *U.S. Fish and Wildlife Service.,* 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 function or purpose 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 the Service. Examples of actions that are subject to the section 7 consultation process are actions on State, Indian, 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, Indian, local, or private lands that are not federally funded or federally authorized do not require section 7 consultation.

Section 7 consultation results in 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.

Determinations of Adverse Effects and Application of the ''Adverse Modification'' Standard

The key factor involved in the destruction/adverse modification determination for a proposed Federal agency action is whether the affected critical habitat would continue to serve its intended conservation function or purpose for the species with implementation of the proposed action after taking into account any anticipated cumulative effects (USFWS 2004, *in litt.* entire). Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the northern spotted owl. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the northern spotted owl under section 7(a)(2) of the Act. In general, there are five possible outcomes in terms of how proposed Federal actions may affect the PCEs or physical or biological features of northern spotted owl critical habitat or essential habitat qualities associated with that critical habitat area: (1) No effect; (2) wholly beneficial effects (e.g., improve habitat condition); (3) both short-term adverse effects and long-term beneficial effects; (4) insignificant or discountable adverse effects; or (5) wholly adverse effects. Actions with no effect on the PCEs and physical or biological features of occupied areas or the essential habitat qualities in unoccupied areas do not require section 7 consultation, although such actions may still require consultation if they have effects on the species itself as a result of its status as a threatened species under the Act. Actions with effects to the PCEs, physical or biological features, or other essential habitat qualities of northern spotted owl critical habitat that are discountable, insignificant, or wholly beneficial would be considered not likely to adversely affect critical habitat, and do not require formal consultation if the Service concurs in writing with that Federal action agency determination. Actions that are likely to adversely affect the physical or biological features or other essential habitat qualities of northern spotted owl critical habitat require formal consultation and the preparation of a Biological Opinion by the Service. The Biological Opinion sets forth the basis for our section 7(a)(2) determination as to whether the proposed Federal action is likely to destroy or adversely modify northern spotted owl critical habitat.

Activities that may destroy or adversely modify critical habitat are those that alter the essential physical or biological features or other essential habitat qualities of the critical habitat to an extent that appreciably reduces the conservation value of the critical habitat for the listed species. As discussed above, the conservation role or value of northern spotted owl critical habitat is to adequately support the life-history needs of the species to the extent that well-distributed and interconnected northern spotted owl nesting populations are likely to persist within properly functioning ecosystems at the critical habitat unit and range-wide scales.

Proposed Federal actions that may affect northern spotted owl critical habitat will trigger the consultation requirements under section 7 of the Act and compliance with the section 7(a)(2) standard described above. The consultation process evaluates the effects of a proposed action to designated critical habitat regardless of the species' presence or absence. For an action that may affect critical habitat, the next step is to determine whether it is likely to adversely affect critical habitat. For example, where a project is designed to reduce fuels such that the effect of wildfires will be reduced, but will also reduce foraging opportunities within treatment areas, established interagency consultation teams should determine whether the proposed project has more than an insignificant impact on the foraging PCEs for northern spotted owls. A localized reduction in foraging habitat within a stand may have such an insignificant impact on foraging PCEs within the stand that a not likely to adversely affect determination is appropriate. Similarly, a hazard tree removal project in a stand with many suitable nest trees may have such a minimal reduction in nesting PCEs of that stand that the effect to nesting habitat is insignificant. In such a case, a ''not likely to adversely affect'' determination would be appropriate.

For actions that are likely to adversely affect critical habitat, the agencies will enter into formal consultation. At this stage of consultation, scale and context are especially important in evaluating the potential effects of forest management on northern spotted owl habitat. The degree to which various forest management activities are likely to affect the capability of the critical habitat to support northern spotted owl nesting, roosting, foraging, or dispersal will vary depending on factors such as the scope and location of the action, and the quantity of the critical habitat affected. In addition, in analyzing whether an action will likely destroy or adversely modify critical habitat, the effects of the action on the factors that were the basis for determining the area to meet the definition of critical habitat should be considered.

In general, we would anticipate that management actions that are consistent with the overall purpose for which a critical habitat unit was designated would not likely destroy or adversely modify critical habitat as those terms are used in the context of section 7(a)(2) of the Act. Such actions include activities whose intent is to restore ecological processes or long-term forest health to

forested landscapes that contain northern spotted owl habitat, such as those actions described in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and elsewhere in this document. However, each proposed action will be considered on a case-by-case basis.

Section 7 Process Under This Critical Habitat Rule

The Presidential Memo, dated February 28, 2012 (77 FR 12985; March 5, 2012), directed the Service to address six action items in the final revised critical habitat rule for the northern spotted owl. One item in the Memo called for the Service to develop clear direction ''for evaluating logging activity in areas of critical habitat, in accordance with the scientific principles of active forestry management and to the extent permitted by law.'' The following summarizes the evaluation process for logging activities in areas of northern spotted owl critical habitat under section 7 of the Act and its implementing regulations, and our plans for close coordination with the land management agencies to best meet the dual goals of recovering the northern spotted owl and managing our public forest lands for multiple use.

Coordination With Land Management Agencies

The Service is committed to working closely with the U.S. Forest Service and BLM to implement the active management and ecological forestry concepts discussed in the Revised Recovery Plan and this critical habitat rule. Both recommend that land managers use the best science to maintain and restore forest health and resilience in the face of climate change and other challenges.

To meet this goal, we have prioritized the timely review of forestry projects that will be proposed in critical habitat. We have already completed section 7 conference opinions on the proposed rule with the agencies, and have recently held interagency coordination meetings with the section 7 Level 1 staff in Oregon, Washington, and California. In these meetings, we identified ways to streamline the section 7 process to ensure that potential projects can be implemented in a timely manner consistent with northern spotted owl conservation. We are also closely involved in and supportive of the respective Forest Service and BLM landscape-level planning efforts currently underway, and will work with the agencies to incorporate the conservation planning recommended in the Revised Recovery Plan and discussed in this final critical habitat designation.

Finally, appropriate Service staff have been directed that all levels of management and field teams stay fully engaged in this process to ensure these commitments are met.

Determining Whether an Action Is Likely to Adversely Affect Critical Habitat

The 1992 northern spotted owl critical habitat rule (57 FR 1796; January 15, 1992) identified the primary constituent element (PCE) as the fundamental scale of analysis at which the ''evaluation of actions that may affect critical habitat for the northern spotted owl'' should occur. Those elements included nesting, roosting, foraging and dispersal habitats. In the 2008 northern spotted owl critical habitat rule (73 FR 47326; August 13, 2008), the forested stand is identified as the appropriate scale for determining whether an action was likely to adversely affect northern spotted owl critical habitat. The 2012 proposed revised critical habitat rule identified a 500-ac (200-ha) circle as a logical scale for determining the effects of a timber sale to critical habitat because research shows northern spotted owls respond more favorably to an area larger than a single tree when choosing where to live.

However, there are many variables to be considered when determining whether the effects to critical habitat are adverse or not. When making a determination as to whether an action is likely to adversely affect critical habitat, and thus require formal consultation, it is not possible to design a ''one size fits all'' set of rules due to differences in project types, habitat types, and habitat needs across the range of the species (Fontaine and Kennedy 2012, p. 1559). This determination should be conducted at a scale that is relevant to the northern spotted owl life-history functions supplied by the PCEs and affected by the project. We note that this more localized scale differs from that used in determining whether an action will destroy or adversely modify critical habitat, which is made at the scale of the designated critical habitat, as described further below.

Northern spotted owl critical habitat PCE 4 (habitat to support the transience and colonization phases of dispersal) provides a life-history need that functions at a landscape-level scale and should be assessed at a larger scale than the other PCEs. Potential scales of analysis include the local watershed (e.g., fifth-field watershed) or subwatershed (e.g., sixth-field watershed), a dispersal corridor, or a relevant landform. Both PCE 2 (habitat that provides for nesting and roosting) and PCE 3 (habitat that provides for foraging) provide life-history needs that function at a more localized landscape, which should help inform the scale at which the determination of whether an action will likely adversely affect critical habitat should be conducted. We encourage the level one consultation teams to tailor this scale of the effects determination to the localized biology of the life-history needs of the northern spotted owl (such as the stand scale, a 500-ac (200-ha) circle, or other appropriate, localized scale).

If a project produces an effect on critical habitat that is wholly beneficial, insignificant, or discountable, then the project is not likely to adversely affect critical habitat, and consultation would be concluded with a letter of concurrence. Wholly beneficial effects include those that actively promote the development or improve the functionality of critical habitat for the northern spotted owl without causing adverse effects to the PCEs. Such actions might involve variable-density thinning in forest stands that do not currently support nesting, roosting, or foraging habitat for the northern spotted owl, which would speed the development of these types of habitats, while maintaining dispersal habitat function. Thinning or other treatments in young plantations that are specifically designed to accelerate the development of owl habitat, and either are in areas that do not provide dispersal habitat or where the effects to dispersal capability would be insignificant or discountable, would also fall into the ''not likely to adversely affect'' category. While these wholly beneficial actions may affect critical habitat and would, therefore, require consultation under section 7 of the Act, they most likely would be completed via an informal consultation with a determination that they are not likely to adversely affect critical habitat.

Likewise, if the adverse effects of a proposed Federal action on the life-history needs supported by physical or biological features of northern spotted owl critical habitat are expected to be discountable or insignificant, that action would also be considered not likely to adversely affect northern spotted owl critical habitat. In such cases, the section 7 consultation requirements can also be satisfied through the informal concurrence process. Examples of such actions may include: Pre-commercial or commercial thinning that does not delay the development of essential physical or biological features; fuel-reduction treatments that have a negligible effect on northern spotted owl foraging habitat

within the stand; and the removal of hazard trees, where the removal has an insignificant effect on the capability of the stand to provide northern spotted owl nesting opportunities.

Some proposed Federal forest management activities may have short-term adverse effects and long-term beneficial effects on the physical or biological features of northern spotted owl critical habitat. The Revised Recovery Plan for the Northern Spotted Owl recommends that land managers actively manage portions of both moist and dry forests to improve stand conditions and forest resiliency, which should benefit the long-term recovery of the northern spotted owl (USFWS 2011, p. III–11). For example, variable thinning in single-story, uniform forest stands to promote the development of multistory structure and nest trees may result in short-term adverse impacts to the habitat's current capability to support owl dispersal and foraging, but have long-term benefits by creating higher quality habitat that will better support territorial pairs of northern spotted owls. Such activities would have less impact in areas where foraging and dispersal habitat is not limiting, and ideally can be conducted in a manner that minimizes short-term negative impacts. Even though they may have long-term beneficial effects, if they have short-term adverse effects, such actions may adversely affect critical habitat, and would require formal consultation under section 7 of the Act. For efficiency, such actions may be evaluated under section 7 programmatically at the landscape scale (e.g., USFS or BLM District).

Habitat conditions in moist/wet and dry/fire-prone forests within the range of the northern spotted owl vary widely, as do the types of management activities designed to accelerate or enhance the development of northern spotted owl habitat. ''Wet'' and ''dry'' are ends of a spectrum, not distinct categories that adequately describe the full range of forest types within the range of the northern spotted owl. Because these categories are broad, and conditions on the ground are more variable, land managers and cooperators should have the expectation that multiple forest types may be involved, and similar projects in different forest types may not always lead to the same effect determination for purposes of compliance with section 7 of the Act.

To make effects determinations, we recommend generating area-specific maps showing the current habitat condition (such as types of habitat, known nest trees, or other feature) and, using information on the proposed action (such as location, type and intensity of harvest, location of new roads and landings, or other proposed activity effects), produce a post-project habitat map such that the pre- and post-project comparison of the PCEs can be assessed. We also recommend the cooperative development of a spatial and temporal framework for evaluating the impact of both the short- and long-term effects of the proposed activities on the northern spotted owl. Framework examples include a landscape assessment or a checklist of key questions the answers to which will illustrate how the project will impact the northern spotted owl (see Spies *et al.* 2012, p. 11, for an example).

Determining Whether an Action Will Destroy or Adversely Modify Critical Habitat

If the effects of the project have more than an insignificant or discountable impact on the ability of the PCEs to provide life-history functions for the northern spotted owl, then the project is likely to adversely affect northern spotted owl critical habitat, and formal consultation is warranted. For projects that will adversely affect critical habitat, it is the Service's responsibility to conduct an analysis of whether the action is likely to ''destroy or adversely modify critical habitat'' during the formal consultation process. As discussed below, the determination of whether an action is likely to destroy or adversely modify critical habitat is made at the scale of the entire critical habitat network. However, a proposed action that compromises the capability of a subunit or unit to fulfill its intended conservation function or purpose could represent an appreciable reduction in the conservation value of the entire designated critical habitat. Therefore, the biological opinion should describe the relationship between the conservation role of the action area, affected subunits, units, and the entire designated critical habitat. This analysis must incorporate all direct and indirect effects and any cumulative effects from the project within the action area. If, after the formal consultation analysis, it is determined that the proposed project will not destroy or adversely modify critical habitat, then the action can be conducted.

Factors to consider in evaluating whether activities, including timber harvest, are likely to destroy or adversely modify critical habitat pursuant to section 7 include:

- The extent of the proposed action, both its temporal and spatial scale, relative to the critical habitat subunit and unit within which it occurs, and the entire critical habitat network.
- The specific purpose for which the affected subunit was identified and designated as critical habitat.
- The cumulative effects of all completed activities in the critical habitat unit.
- The impact of the proposed action on the ability of the affected critical habitat to continue to support the life-history functions supplied by the PCEs.
- The impact of the proposed action on the subunit's likelihood of serving its intended conservation function or purpose.
- The impact of the proposed action on the unit's likelihood of continuing to contribute to the conservation of the species.
- The overall consistency of the proposed action with the intent of the recovery plan or other landscape-level conservation plans.
- The special importance of project scale and context in evaluating the potential effects of timber harvest to northern spotted owl critical habitat.

The first step is to describe the impacts to critical habitat in the action area with respect to the subunit's intended functions as identified in this rule. For example, if a particular subunit was designated to support northern spotted owl connectivity between subunits, then the loss or impact to connectivity must be assessed. Subunits that are expected to provide demographic support should be assessed for their ability to continue to support northern spotted owl nesting territories in conditions suitable for occupancy by pairs of owls (e.g., amount and location of nesting habitat, proximity of foraging habitat, etc.). The analysis should describe the extent to which the project is expected to prevent, preclude, or significantly impair the ability of that subunit to meet its intended function. The analysis should not incorporate the effect of the proposed action on individual northern spotted owls but, instead, on the life-history functions supplied by the PCEs and the physical biological features. Effects to northern spotted owls should be included in the effects to the species section of a biological opinion, as appropriate.

The analysis in a biological assessment or a biological opinion should include an evaluation of the type, frequency, magnitude, and duration of impacts likely to be caused by the action on the PCEs of the action area, affected subunits and critical habitat units, and an assessment of how those impacts are likely to influence the capability of the affected critical habitat

units to provide for a well-distributed and self-sustaining northern spotted owl population. The analysis in a biological assessment or a biological opinion of cumulative effects on critical habitat should include a similar assessment for any future, non-Federal actions reasonably certain to occur in the action area, and at the level of the affected subunits and critical habitat units.

Consideration of the effects of the action, together with any cumulative effects, will form the basis for the biological opinion's determination as to whether the action will destroy or adversely modify critical habitat. In accordance with Service policy, the adverse modification determination is made at the scale of the entire designated critical habitat, unless the critical habitat rule identifies another basis for the analysis (FWS and NMFS 1998). The adverse modification determination for the northern spotted owl will occur at the scale of the entire designated critical habitat, as described below, with consideration given to the need to conserve viable populations within each of the recovery units identified in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Recovery Criterion 2).

It is important to note that although the adverse modification determination is made at the scale of the entire designated critical habitat, a proposed action that compromises the capability of a subunit or unit to fulfill its intended conservation function or purpose could represent an appreciable reduction in the conservation value of the entire designated critical habitat. Therefore, the biological opinion should describe the relationship between the conservation role of the action area, affected subunits, units, and the entire designated critical habitat. In this way, the biological opinion establishes a sensitive analytical framework for informing the determination of whether a proposed action is likely to appreciably reduce the conservation role of critical habitat overall.

The Service has assured the BLM and FS that it is committed to working closely with them to evaluate and implement active management and ecological forestry concepts of the recovery plan and critical habitat rule into potential timber management projects. Both documents recommend that land managers use the best science to maintain and restore forest health and resilience in the face of climate change and other challenges.

To meet this goal we have prioritized the timely review of forestry projects that will be proposed in critical habitat. We have already completed section 7 conference opinions on the proposed rule with several of your units, and we have recently held interagency coordination meetings with the section 7 Level 1 staff in Oregon, Washington, and California. In these meetings, we identified ways to streamline the section 7 process to ensure that potential projects can be implemented in a timely manner consistent with northern spotted owl conservation. We are also closely involved in and supportive of the respective FS and BLM landscape-level planning efforts currently underway and will work with you to incorporate the conservation planning reflected in the revised recovery plan and the final critical habitat designation.

Finally, appropriate Service staff have been directed that all levels of management and field teams—from Level 1 biologists up to the Assistant Regional Director—stay fully engaged in this process to ensure these commitments are met. Any problems or disagreement should be promptly elevated and resolved.

Within dry forests, the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) emphasizes active forest management that could meet overlapping goals of northern spotted owl conservation, climate change response, and restoration of dry forest ecological structure, composition, and process, including wildfire and other disturbances (USFWS 2011, pp. III–20). For the rest of the northern spotted owl's range that is not fire-prone, the Revised Recovery Plan emphasizes habitat management that accelerates the development of future habitat, restores larger habitat blocks, and reduces habitat fragmentation. The following discussion describes the type of management approaches that would be consistent with the Revised Recovery Plan in the West Cascades/Coast Ranges of Oregon and Washington, East Cascades, and the Redwood Coast zones, and in some cases includes consideration of possible corresponding effect determinations for activities implementing these approaches, for the purpose of analyzing effects to critical habitat under section 7 of the Act. The Klamath and Northern California Interior Coast Ranges regions contain conditions similar to the three regions discussed below, and similar management approaches would be consistent with the recovery needs of the owl.

West Cascades/Coast Ranges of Oregon and Washington

The primary goal of the Revised Recovery Plan for this portion of the northern spotted owl's range is to conserve stands that support northern spotted owl occupancy or contain high-value northern spotted owl habitat (USFWS 2011, p. III–17). Silvicultural treatments are generally not needed to accomplish this goal. However, there is a significant amount of younger forest that occurs between and around the older stands, where silvicultural treatments may accelerate the development of these stands into future northern spotted owl nesting habitat, even if doing so temporarily degrades existing dispersal habitat, as is recommended in Recovery Action 6 (USFWS 2011, p. III–19). The Revised Recovery Plan encourages silviculture designed to develop late-successional structural complexity and to promote resilience (USFWS 2011, pp. III–17 to III–19). Restoration or ecological prescriptions can help uniform stands of poor quality develop more quickly into more diverse, higher quality northern spotted owl habitat, and provide resiliency in the face of potential climate change impacts in the future. Targeted vegetation treatments could simultaneously increase canopy and age-class diversity, putting those stands on a more efficient trajectory towards nesting and roosting habitat, while reducing fuel loads. Introducing varying levels of spatial heterogeneity, both vertically and horizontally, into forest ecosystems can contribute to both of the goals stated above.

On matrix lands under the NWFP where land managers have a range of management goals, the Service anticipates that not all forest management projects in critical habitat will be focused on the development or conservation of northern spotted owl habitat. Ideally, proposed actions within critical habitat should occur on relatively small patches of younger, mid-seral forest stands that do not cause reductions in higher quality northern spotted owl habitat. They should also be planned in such a way that their net occurrence on the regional landscape is consistent with broader ecosystem-based planning targets (e.g., Spies *et al.* 2007a, entire) to provide the physical or biological features that are essential to the conservation of the northern spotted owl. Within that context, thinning and targeted variable-retention harvest in moist forests could be considered where the conservation of complex early-seral forest habitat is a management goal. This approach provides a contrast to traditional clearcutting that does not mimic natural disturbance or create viable early-seral communities that grow into high-quality habitat (Dodson *et al.* 2012, p. 353; Franklin *et al.* 2002,

p. 419; Swanson *et al.* 2011, p. 123; Kane *et al.* 2011, pp. 2289–2290; Betts *et al.* 2010, p. 2127, Hagar 2007, pp. 117–118). Swanson (2012, entire) provides a good overview and some management considerations.

In cases where these moist forest treatments in matrix are intended to meet management goals other than northern spotted owl conservation, they can be designed to enable the development of northern spotted owl habitat over time at the landscape scale. If planned well at this scale, these projects may have short-term adverse effects, but are not expected to adversely modify the role and function of critical habitat units. In other words, such treatments can be dispersed across the landscape and over time to both accommodate northern spotted owl habitat needs and conservation of diverse and complex early-seral habitat. Additional information about ecological forestry activities in moist forests can be found in the Revised Recovery Plan under *Northern Spotted Owls and Ecological Forestry* (USFWS 2011, p. III–11) and *Habitat Management in Moist Forests* (USFWS 2011, p. III–17).

East Cascades

The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) recommends that the dynamic, fire-prone portion of the northern spotted owl's range be actively managed to conserve northern spotted owls, but also address climate change and restore dry forest ecological structure, composition, and processes (*e.g.,* wildfire) to provide for the long-term conservation of the species and its habitat in a dynamic ecosystem (USFWS 2011, pp. III–13, III–20). To do this, management actions should be considered to balance short-term adverse effects with long-term beneficial effects. In some cases, formal consultation on the effects of dry forest management activities on northern spotted owl critical habitat is likely to occur; in other cases, there may be no adverse effects and consultation can be concluded informally.

Management in dry forests should increase the likelihood that northern spotted owl habitat will remain on the landscape longer and develop as part of the dynamic fire- and disturbance-adapted community. Several management approaches can be described for these systems. The first is to maintain adequate northern spotted owl habitat in the near term to allow owls to persist on the landscape in the face of threats from barred owl expansion and habitat alterations from fire and other disturbances. The next is to restore landscapes that are resilient to fire and other disturbances, including those projected to occur with climate change. This will require more than reducing fuels and thinning trees to promote low-severity fires; management will need to develop ''more natural patterns and patch size distributions of forest structure, composition, fuels, and fire regime area'' (Hessburg *et al.* 2007, p. 21).

Our prime objective for vegetation management activities within northern spotted owl critical habitat is to maintain adequate amounts of nesting, roosting, foraging, or dispersal habitat where it currently exists, and to restore degraded habitat where it is essential to the owl and can be best sustained on the landscape, as recommended in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Section III). Successfully accomplishing these objectives can be facilitated by spatially and temporally explicit landscape assessments that identify areas valuable for northern spotted owl conservation and recovery, as well as areas important for process restoration (*e.g.,* Prather *et al.* 2008, p. 149; Franklin *et al.* 2008, p. 46; Spies *et al.* 2012, entire). Such assessments could answer questions that are frequently asked about proposed forest management activities, namely ''why here?'' and ''why now?'' Providing well-reasoned responses to these questions becomes especially important when restoration activities degrade or remove existing northern spotted owl habitat. By scaling up conservation and restoration planning from the stand to the landscape level, many apparent conflicts may disappear because management actions can be prioritized and spatially partitioned (Prather *et al.* 2008, p. 149; Rieman *et al.* 2010, p. 464). For example, portions of the landscape can be identified where there may be no conflict between objectives, and where relatively aggressive approaches to ecosystem restoration can occur without placing listed species at substantial risk (Prather *et al.* 2008, pp. 147–149; Gaines *et al.* 2010, pp. 2049–2050). Conflicts between objectives will remain in some locations, such as in places where removing younger, shade-intolerant conifers to reduce competition with larger, legacy conifers may result in a substantial decrease in canopy cover that translates into a reduction in northern spotted owl habitat quality. However, when this sort of treatment is well designed, strategically located, and justified within a landscape approach to treatments, it is easier to assess its effectiveness in meeting both owl conservation and forest restoration needs.

Landscape assessments developed at the scale of entire National Forests, Ranger Districts, or BLM Districts have the broad perspective that can improve ability to estimate effects of management activities on the function of critical habitat and better identify and prioritize treatment areas and the actions that will restore landscapes while conserving northern spotted owl habitat. The Okanogan-Wenatchee National Forest has developed a landscape evaluation process as part of their forest restoration strategy (USDA 2010, pp. 36–52) that can serve as an example for other administrative units when developing their own assessment approaches. We suggest that the value of such assessments in guiding vegetation management within critical habitat can be enhanced by spatially identifying locations where restoration objectives and northern spotted owl habitat objectives converge, are in conflict, or simply are not an issue (see, *e.g.,* Davis *et al.* 2012, entire). We suggest the following approach for the East Cascades:

1. Spatially identify and map:

a. Existing northern spotted owl habitat and northern spotted owl nesting sites.

b. Places on the landscape where northern spotted owl habitat is expected to be retained longer on the landscape in the face of disturbance activities such as fire and insect outbreaks.

c. Places on the landscape where key ecosystem structures and processes are at risk and would benefit from restoration (e.g. legacy trees, unique habitats).

2. Overlay what is known about landscape patterns of vegetation and disturbance processes with items from step 1 above to determine:

a. Stands of high restoration value but low value as existing northern spotted owl habitat.

b. Stands of low restoration value but high value as existing northern spotted owl habitat.

c. Stands of low restoration value and low value as existing northern spotted owl habitat.

d. Stands of high restoration value and high value as existing northern spotted owl habitat.

In locations where there is high restoration value and high value as existing northern spotted owl habitat, a landscape assessment can help to build a strong rationale for impacting owl habitat functionality to achieve broader landscape goals. Conditions that may support management activities in these

stands may include, but are not limited to the following:

1. The patch of habitat is located in an area where it is likely unsustainable and has the potential for conveying natural disturbances across the landscape in ways that jeopardize large patches of suitable northern spotted owl habitat.

2. There are nearby areas that are more likely to sustain suitable northern spotted owl habitat and are either currently habitat or will likely develop suitable conditions within the next 30 years.

3. The patch of habitat does not appear to be associated with a northern spotted owl home range or to promote successful dispersal between existing home ranges.

4. The area will still retain some habitat function after treatment, while still meeting the intended restoration objective. For example, stands that are suitable as foraging habitat may be degraded post treatment but remain foraging habitat after treatment. Or, stands may be downgraded to dispersal habitat as a result of treatment.

We do not expect the desired landscape conditions will be achieved within the next decade or two; a longer time will be required as younger forests develop into northern spotted owl nesting, roosting, and foraging habitat. In the interim, we recommend that land managers consider management actions to protect current habitat, especially where it occurs in larger blocks on areas of the landscape, where it is more likely to be resistant or resilient to fires and other disturbance agents. We also encourage land managers to consider actions to accelerate the restoration of habitat, especially where it is consistent with overall forest restoration and occurs in those portions of the landscape that are less fire prone or are resilient in the face of these disturbances. The careful application of these types of activities is expected to achieve a landscape that is more resilient to future disturbances. As such, we anticipate that projects designed to achieve this goal will need to be of a larger spatial scale as to have a meaningful effect on wildfire behavior, regimes, and extent. The effects of these projects will vary depending on existing condition, prescriptions, proximity of habitat, and other factors. It is likely that such projects may affect northern spotted owl critical habitat and require section 7 consultation.

Some situations also exist in the final critical habitat area where northern spotted owl habitat has been created through fire suppression activities (e.g., meadow conversion, white fir intrusion), but retention of those forested habitat elements is contrary to the overall goals of ecosystem restoration and long-term security for the owl. Restoration projects that modify these elements, while sometimes prudent and recommended (Franklin *et al.* 2008, p. 46), may adversely affect northern spotted owls or their critical habitat, and may need to be evaluated through the section 7 consultation process. Additional information about restoration activities in dry forests can be found in the Revised Recovery Plan for the Northern Spotted Owl under *Restoring Dry Forest Ecosystems* (USFWS 2011, p. III–32).

Redwood Coast

While the Redwood Coast region of coastal northern California is similar to the West Cascades/Coast region in many respects, there are some distinct differences in northern spotted owl habitat use and diet within this zone. The long growing season, combined with the redwood's ability to resprout from stumps, allows redwood stands to attain suitable stand structure for nesting in a relatively short period of time (40 to 60 years) if legacy structures are present. In contrast to the large, contiguous, older stands desired in other wet provinces, some degree of fine-scale fragmentation in redwood forests appears to benefit northern spotted owls. These openings provide habitat for the northern spotted owl's primary prey, the dusky-footed woodrat. High woodrat abundance is associated with dense shrub and hardwood cover that persists for up to 20 years in recent forest openings created by harvesting or burns. Under dense shrub and hardwood cover, woodrats can forage, build nests, and reproduce, relatively secure from owl predation. These sites quickly become overpopulated, and surplus individuals are displaced into adjacent older stands where they become available as owl prey. When developing stands reach an age of around 20 years, understory vegetation is increasingly shaded-out, cover and food sources become scarce, and woodrat abundance declines rapidly. By this time, the stand that once supported a dense woodrat population makes a structural transition into a stand where woodrats are subject to intense owl predation. In northern spotted owl territories within the Redwood Forest zone, active management that creates small openings within foraging habitat can enhance northern spotted owl foraging opportunities and produce or retain habitat suitability in the short term. Actions consistent with this type of land management are not expected to adversely modify critical habitat.

Summary of Section 7 Process

This discussion has covered projects that may or may not require formal section 7 consultation. It is important to distinguish between a finding that a project is likely to adversely affect critical habitat and a finding at the conclusion of formal consultation that a project is likely to destroy or adversely modify critical habitat; these are two very different outcomes. It is not uncommon for a proposed project to be considered likely to adversely affect critical habitat, and thus require formal consultation, but still warrant a conclusion that it will not destroy or adversely modify critical habitat. An action may destroy or adversely modify critical habitat if it adversely affects the essential physical or biological features to an extent that the intended conservation function or purpose of critical habitat for the northern spotted owl is appreciably reduced.

The adverse modification determination is made at the scale of the entire designated critical habitat, unless the final critical habitat rule identifies another basis for that determination, such as at the scale of discrete units and/or groups of units necessary for different life cycle phases, units representing distinctive habitat characteristics or gene pools, or units fulfilling essential geographical distribution requirements of the species (USFWS and NMFS 1998, p. 4–39). In the case of northern spotted owl critical habitat, the adverse modification determination will be made at the scale of the entire designated critical habitat. However, by describing the relationship between the conservation role of affected subunits, units, and the entire designated critical habitat in the biological opinion, a sensitive analytical framework is established for informing the determination of whether a proposed action is likely to appreciably reduce the conservation role of the critical habitat overall. In this way, a proposed action that compromises the capability of a subunit or unit to fulfill its intended conservation function or purpose (e.g., demographic, genetic, or distributional support for northern spotted owl recovery) could represent an appreciable reduction in the conservation value of the entire designated critical habitat. This approach should avoid false no-adverse-modification determinations, when the functionality of a unit or subunit would actually be impaired by a proposed action.

As described above, in general, we do not anticipate that activities consistent with the stated management goals or recommended recovery actions of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Chapters II and III) would constitute adverse modification of critical habitat, even if those activities may have adverse effects in the short term, if the intended result over the long term is an improvement in the function of the habitat to provide for the essential life-history needs of the northern spotted owl. However, such activities will be evaluated under section 7, taking into account the specific proposed action, location, and other site-specific factors.

X. 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 listed species. We analyzed INRMPs developed by military installations located within the range of the designated critical habitat designation for the northern spotted owl to determine if they are exempt under section 4(a)(3) of the Act. The following areas are Department of Defense lands with completed, Service-approved INRMPs that fell within the area we proposed as revised critical habitat (77 FR 14062; March 8, 2012).

Approved INRMPs

U.S. Army Joint Base Lewis-McChord

Joint Base Lewis-McChord (JBLM), formerly known as Fort Lewis, is an 86,500-ac (35,000-ha) U.S. Army military reservation in western Washington, south of Tacoma and the Puget Sound. JBLM contains one of the largest remaining intact forest areas in the Puget Sound basin, with approximately 54,400 ac (22,000 ha) of forests and woodlands, predominantly of the dry Douglas-fir forest type and including some moist forest types (Douglas-fir, red cedar, hemlock). The forested area of JBLM is managed by the Base's Forestry Program, and the primary mission for the JBLM Forest is to provide a variety of forested environments for military training. JBLM has a history of applying an ecosystem management strategy to their forests to provide for multiple conservation goals, which have included promoting native biological diversity, maintaining and restoring unique plant communities, and developing late-successional (older) forest structure. There are 14,997 ac (6,069 ha) of lands within the boundary of JBLM that were identified in the proposed critical habitat designation; these lands comprised subunit NCO–3 in the proposed rule (77 FR 14062; March 8, 2012).

JBLM has an INRMP in place that was approved in 2008; JBLM is in the process of updating that INRMP. To date, JBLM has managed their forest lands according to their Forest Management Strategy, first prepared for then-Fort Lewis in 1995 by the Public Forestry Foundation based in Eugene, Oregon, in collaboration with The Nature Conservancy. The Forest Management Strategy was last revised in May 2005, and is also in the process of being updated (Forest Management Strategy 2005, entire). However, in 2012, JBLM amended their existing INRMP with specific regard to the northern spotted owl by completing an Endangered Species Management Plan (ESMP) that includes guidelines for protecting, maintaining, and enhancing habitat essential to support the northern spotted owl on JBLM. The Service has found, in writing, that the amended INRMP provides a net conservation benefit to the species.

The ESMP identifies management objectives for the conservation of the northern spotted owl. Specifically, the ESMP includes three focus areas for management of northern spotted owl. The long-term objective for the first is development of all four types of owl habitat (nesting, roosting, foraging, and dispersal). The long-term objectives for Focus Areas 2 and 3 are development of owl foraging and dispersal habitat. The primary conservation goals for northern spotted owl habitat on JBLM are to protect and maintain existing northern spotted owl suitable habitat; manipulate unsuitable habitat to suitable habitat; and ensure long-term suitable habitat and monitor northern spotted owl habitat to assure that goals are met and actions are successful. Although northern spotted owls are not currently known to occupy JBLM, it is the only significant Federal ownership in this region of Washington, and it provides the largest contiguous block of forest in this area as well. The potential development of suitable owl habitat at JBLM provides one of the only feasible opportunities for establishing connectivity between owl populations in the Olympic Peninsula and the western Cascades Range. Connectivity allows gene flow between populations, and further maintains northern spotted owl distribution and metapopulation dynamics, which are important components of the recovery strategy for the northern spotted owl (USFWS 2011, p. III–1, III–44). The Forest Management Strategy (2005, p. 82) notes that the mosaic of dry forest, woodland, and prairie at JBLM is very different from typical forest landscapes that support northern spotted owls, and that while suitable habitat for dispersal of northern spotted owls can be achieved in the short term, at least 40 to 50 years may be needed to meet the desired condition for foraging, nesting, and roosting habitat.

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 JBLM INRMP and that

conservation efforts identified in the INRMP through its ESMP for the northern spotted owl will provide a benefit to the species occurring in habitats within or adjacent to JBLM, including the northern spotted owl. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 14,997 ac (6,069 ha) of habitat in this final critical habitat designation as a result of this exemption.

XI. Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or 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 impacts of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

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 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 the overall conservation of the northern spotted owl through the continuation, strengthening, or encouragement of partnerships and the implementation of management plans or programs that provide equal or more conservation for the northern spotted owl than could be achieved through a designation of critical habitat. The Secretary can consider the existence of conservation agreements and other land management plans with Federal, State, private, and tribal entities when making decisions under section 4(b)(2) of the Act. The Secretary may also consider relationships with landowners, voluntary partnerships, and conservation plans, and weigh the implementation and effectiveness of these against that of designation to determine which provides the greatest conservation value to the listed species.

Consideration of relevant impacts of designation or exclusion under section 4(b)(2) may include, but is not limited to, any of the following factors: (1) Whether the plan provides specific information on how it protects the species and the physical or biological features, and whether the plan is at a geographical scope commensurate with the species; (2) whether the plan is complete and will be effective at conserving and protecting the physical or biological features; (3) whether a reasonable expectation exists that conservation management strategies and actions will be implemented, that those responsible for implementing the plan are capable of achieving the objectives, that an implementation schedule exists, and that adequate funding exists; (4) whether the plan provides assurances that the conservation strategies and measures will be effective (i.e., identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan); (5) whether the plan has a monitoring program or adaptive management to ensure that the conservation measures are effective; (6) the degree to which the record supports a conclusion that a critical habitat designation would impair the benefits of the plan; (7) the extent of public participation; (8) a demonstrated track record of implementation success; (9) the level of public benefits derived from encouraging collaborative efforts and encouraging private and local conservation efforts; and (10) the effect designation would have on partnerships.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of excluding a particular area outweigh the benefits of its inclusion in critical habitat. If we determine that the benefits of excluding a particular area outweigh the benefits of its inclusion, then the Secretary can exercise his discretion to exclude the area, provided that the exclusion will not result in the extinction of the species.

Under section 4(b)(2) of the Act, we must consider all relevant impacts of the designation of critical habitat, including economic impacts. In addition to economic impacts (discussed in the Economics Analysis section, below), we considered a number of factors in a section 4(b)(2) analysis. We considered whether Federal or private landowners or other public agencies have developed management plans, habitat conservation plans (HCPs) or Safe Harbor Agreements (SHAs) for the area or whether there are conservation partnerships or other conservation benefits that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. We also considered other relevant impacts that might occur because of the designation. To ensure that our final determination is based on the best available information, we also considered comments received on foreseeable economic, national security, or other potential impacts resulting from this designation of critical habitat from governmental, business, or private interests and, in particular, any potential impacts on small businesses.

Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we evaluated whether certain lands in the proposed revised critical habitat were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. Based on our evaluation, we are excluding approximately 3,879,506 ac (1,567,875 ha) of lands that meet the definition of critical habitat under section 4(b)(2) of the Act from final critical habitat.

Final Economic Analysis

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 (DEA) of the proposed critical habitat designation and related factors (IEC 2012a). The draft analysis was made available for public review from June 1, 2012, through July 6, 2012 (77 FR 32483). Following the close of the comment period, we developed a final economic analysis (FEA) (IEC 2012b) of the potential economic effects of the designation taking into consideration the public comments and any new information.

The intent of the FEA is to quantify economic impacts that may be directly attributable to the designation of critical habitat—that is, costs above and beyond what are considered ''baseline'' costs, as described below. 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, and considers the costs incurred as a result of protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations); these are costs that are incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the ''incremental'' economic impacts associated specifically with the designation of critical habitat for the species—these costs are those not expected to occur but for 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 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. Decisionmakers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA considers those costs that may occur in the 20 years following the revised 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 northern spotted owl conservation efforts associated with timber harvests, wildfire management, barred owl management, road construction, and linear projects (road and bridge construction and maintenance, installation of power transmission lines and utility pipelines), as these are the types of activities we determined were most likely to occur within northern spotted owl habitat.

The results of the FEA concludes that only a portion of the overall proposed revised designation will result in more than incremental, minor administrative costs. Specifically, of the 13,962,449 ac proposed for designation, potential incremental changes in timber harvest practices were anticipated on only 1,449,534 ac (585,612 ha) of USFS and BLM lands, or approximately 10 percent of the proposed designation. In addition, there was potential for the owners of 307,308 ac (123,364 ha) of private land to experience incremental changes in harvests (approximately 2 percent of the proposed designation). No incremental changes in harvests are expected on State lands.

In addition, to address the uncertainty in the types of management and activities that may or may not occur within the proposed critical habitat, the FEA evaluated three scenarios to capture the full range of potential economic impacts of the designation. The first scenario contemplates that minimal or no changes to current timber management practices will occur, thus the incremental costs of the designation would be predominantly administrative. The potential additional administrative costs due to critical habitat designation on Federal lands range from $185,000 to $316,000 on an annualized basis for timber harvest.

The second scenario posits that action agencies may choose to implement management practices that yield an increase in timber harvest relative to the baseline (current realized levels of timber harvest). For this scenario, baseline harvest projections were scaled upward by 10 percent, resulting in a positive impact on Federal lands ranging from $893,000 to $2,870,000 on an annualized basis for timber harvest.

The third scenario considers that actions agencies may choose to be more restrictive in response to critical habitat designation, resulting in a decline in harvest volumes relative to the baseline. To illustrate the potential for this effect, baseline harvest projections were scaled downward by 20 percent, resulting in a negative impact on timber harvest on Federal lands ranging from $2,650,000 to $6,480,000 on an annualized basis.

The USFS and BLM suggested certain alterations to the baseline timber harvest projections, based on differing assumptions regarding northern spotted owl occupancy in matrix lands and projected levels of timber harvest relative to historical yields. The FEA presents the results of a sensitivity analysis considering these alternative assumptions, which widen the range of annualized potential impacts to Federal timber harvest relative to the scenarios described above (IEC 2012b, pp. 4–37 to 4–39). This sensitivity analysis contemplated a situation in which 26.6 percent of northern spotted owl habitat on BLM matrix lands is unoccupied, and a 20 percent increase in baseline timber harvest in USFS Region 6 relative to historical yields. The range of incremental impacts under these alternative assumptions widens to a potential annualized increase of $0.7 million under Scenario 2, and an annualized decrease of $1.4 million under Scenario 3, relative to the results reported above.

Timber harvest was not anticipated to change on State lands in response to critical habitat designation. Timber harvest effects on private lands were highly uncertain, and were only identified qualitatively as potential negative impacts associated with regulatory uncertainty, and possibly (but speculative) new regulation in the State of Washington.

Under all three scenarios, linear projects reflected administrative costs only, ranging from $10,800 to $19,500 on an annualized basis.

Counties receive Federal lands payments from a subset of four programs: The U.S. Forest Service 25% Fund; the BLM O&C lands payments; Payment in Lieu of Taxes (PILT); and Secure Rural Schools and Community Self-determination Act (SRS) (please see FEA pp. 3–19 to 3–21 for a thorough discussion of these programs). Counties have the option of receiving either SRS of 25%/O&C payments, but not both. For reasons unrelated to proposed critical habitat, the future of the PILT and SRS programs is uncertain and depends on forces, including Congressional action, unrelated to critical habitat designation. If funding is not appropriated to PILT, or SRS is not reauthorized, payments from the USFS 25% Fund and the BLM O&C lands become relatively more important. Payments for these latter two programs are based on commercial receipts, main from timber generated on Federal lands; payments from PILT and SRS are not as closely linked to fluctuations in timber sales. In recent years, most counties have opted to receive SRS payments; for example, in FY 2009 all 18 counties in Oregon that contain BLM lands opted to receive SRS payments instead of the LBM O&C lands revenue-sharing payment. Therefore, it is difficult to quantify the effects that future changes in timber harvests from Federal lands resulting from critical habitat designation would have on counties if SRS and PILT payment programs ended and the counties were forced to rely on revenue-sharing payments only. Given the baseline uncertainty associated with the continuance of SRS and PILT payments, we were unable to quantify possible changes in county revenue payments that could result from the critical habitat designation. However, based on recent socioeconomic trends, we were able to identify those counties that may be more sensitive to future changes in timber harvests, industry employment, and Federal land payments. Potential timber harvest changes related to critical habitat designation, whether positive, negative, or neutral, are one potential aspect of

this sensitivity. The counties identified as relatively more sensitive to future changes in timber harvests, employment, and payments were Del Norte and Trinity Counties, California; Douglas and Klamath Counties, Oregon; and Skamania County, Washington.

With regard to jobs, increases or decreases in timber harvests from Federal or private lands could result in positive or negative changes in jobs, respectively. The FEA notes that many factors affect timber industry employment (Chapter 6). The scope of our analysis was limited to the incremental effects of critical habitat within the area proposed for designation by the northern spotted owl. The FEA did not consider potential changes in timber activities outside the proposed critical habitat designation, and did not evaluate the potential effects related to the timber industry as a whole.

Based on our economic analysis of the potential effects of the proposed revised designation of critical habitat for the northern spotted owl, there is a range of potential outcomes, ranging from positive to negative impacts of the designation. Most potential economic impacts would occur, if at all, on Federal matrix lands managed by BLM and the Forest Service, although we note that the amount of Federal matrix lands has been reduced from the proposed rule, as described in Changes from the Proposed Rule, which would have the effect of reducing the range of potential economic impacts presented by the FEA. While there is uncertainty over whether such impacts will occur and to what extent, even assuming higher economic impacts suggested by some commenters, we would not exclude these lands from designation under section 4(b)(2) because a critical habitat designation on these lands will have benefits in conserving this essential habitat. In addition, our evaluation of these matrix lands clearly demonstrates their importance to the conservation of the northern spotted owl; as also discussed in the section Changes from the Proposed Rule, our evaluation of a habitat network with reduced areas of high value habitat on matrix lands indicated a significant increase in extinction risk to the species as a result.

A copy of the FEA with supporting documents may be obtained by contacting the Oregon Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

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 final rule, we have determined that the only lands within the proposed revised designation of critical habitat for the northern spotted owl that are owned or managed by the Department of Defense have an active INRMP which provides a benefit to the species, and are thus exempt from critical habitat designation under section 4(a)(3) of the Act (see Exemptions, above). We therefore anticipate no impact on national security from this designation. Consequently, the Secretary is not exercising his discretion to exclude any additional areas from this final revised designation based on impacts to national security.

Relevant Impacts

Under section 4(b)(2) of the Act, we consider all relevant impacts, including but not limited to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

Here we provide our analysis of areas that were proposed as revised designation of critical habitat for the northern spotted owl, for which there may be a greater conservation benefit to exclude rather than include in the designation. Our weighing of the benefits of inclusion versus exclusion considered all relevant factors in order to make our final determination as to what will result in the greatest conservation benefit to the owl. Depending on the specifics of each situation, there may be cases where the designation of critical habitat will not necessarily provide enhanced protection, and may actually lead to a net loss of conservation benefit.

Benefits of Designating Critical Habitat

The process of designating critical habitat as described in the Act requires that the Service identify those lands within the geographical area occupied by the species at the time of listing on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species.

The identification of areas that contain the features essential to the conservation of the species, or are otherwise essential for the conservation of the species if outside the geographical area occupied by the species at the time of listing, is a benefit resulting from the designation. The critical habitat designation process includes peer review and public comment on the identified physical or biological features and areas, and provides a mechanism to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the species, and is valuable to land owners and managers in developing conservation management plans by describing the essential physical or biological features and special management actions or protections that are needed for identified areas. Including lands in critical habitat also informs State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, the prohibition on destruction or adverse modification under section 7(a)(2) of the Act constitutes the only Federal regulatory benefit of critical habitat designation. As discussed above, Federal agencies must consult with the Service on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. 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 to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses also represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar because effects on habitat will often result in effects on the species. However, these two regulatory standards are different. The jeopardy analysis evaluates how a proposed action is likely to influence the likelihood of a species' survival and recovery. The adverse modification analysis evaluates how an action affects the capability of the critical habitat to serve its intended conservation function or purpose (USFWS, in litt. 2004). Although these standards are different,

it has been the Service's experience that in many instances proposed actions that affect both a listed species and its critical habitat and that constitute jeopardy also constitute adverse modification. In some cases, however, application of these different standards results in different section 7(a)(2) determinations, especially in situations where the affected area is mostly or exclusively unoccupied critical habitat. Thus, critical habitat designations may provide greater benefits to the recovery of a species than would listing as endangered or threatened under the Act alone.

There are two limitations to the regulatory effect of critical habitat. First, a section 7(a)(2) consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of non-Federal lands itself does not restrict any actions that destroy or adversely modify critical habitat. Aside from the requirement that Federal agencies ensure that their actions are not likely to result in destruction or adverse modification of critical habitat under section 7, the Act does not provide any additional regulatory protection to lands designated as critical habitat.

Second, designating critical habitat does not create a management plan for the areas; does not establish numerical population goals or prescribe specific management actions (inside or outside of critical habitat); and does not have a direct effect on areas not designated as critical habitat. The designation only limits destruction or adverse modification of critical habitat, not all adverse effects. By its nature, the prohibition on adverse modification ensures that the conservation role and function of the critical habitat network is not appreciably reduced as a result of a Federal action.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the species or critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then formal consultation is initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat.

For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may recommend additional conservation measures to minimize adverse effects to primary constituent elements, but such measures would be discretionary on the part of the Federal agency.

The designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation has been initiated under section 7(a)(2) of the Act because of effects to critical habitat, the end result of consultation is to avoid adverse modification, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. On the other hand, voluntary conservation efforts by landowners can remove or reduce known threats to a species or its habitat by implementing recovery actions. We find that in many instances the regulatory benefit of critical habitat is minimal when compared to the conservation benefit that can be achieved through implementing HCPs under section 10 of the Act, or other voluntary conservation efforts or management plans. The conservation achieved through implementing HCPs, or other habitat management plans can be greater than what we achieve through multiple site-by-site, project-by-project section 7(a)(2) consultations involving project effects to critical habitat. Management plans can commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7(a)(2) consultations commit Federal agencies to preventing adverse modification of critical habitat caused by the particular project; consultation does not require Federal agencies to provide for conservation or long-term benefits to areas not affected by the proposed project. Thus, implementation of any HCP, or management plan that incorporates enhancement or recovery as the management standard may often provide as much or more benefit than a consultation for critical habitat designation. After reviewing all current HCPs, SHAs, and any other active management plans or conservation agreements, and weighing the benefits of inclusion and exclusion (see below), we are excluding all State and private lands covered by such agreements from the final critical habitat designation.

We are also excluding under section 4(b)(2) congressionally-reserved natural areas such as national parks and wilderness areas, State parks, and other private lands that had been proposed for designation, for the reasons discussed below. These analyses are based in large part on the particular conservation requirements of the northern spotted owl or the State laws aimed at protecting this species, and are specific to this designation. Thus, our determination that the benefits of exclusion outweigh the benefits of inclusion in these cases, as well as the decision to exclude in these instances, do not necessarily have a bearing on any future critical habitat designations.

Table 8 identifies all lands excluded from the final rule.

TABLE 8—LANDS EXCLUDED FROM THE FINAL REVISED DESIGNATION OF CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL UNDER SECTION 4(B)(2) OF THE ACT

Type of agreement	Critical habitat unit	State	Land owner/agency	*Acres*	*Hectares*
Safe Harbor Agreement	WCC	WA	Port Blakely Tree Farms, L.P., Safe Harbor Agreement, Landowner Option Plan, Cooperative Habitat Enhancement.	195	79
	WCC/ECN	WA	SDS Co. & Broughton Lumber Co. Conservation Plan	2,035	824
	RWC	CA	Forster-Gill, Inc	238	96
	RWC	CA	Van Eck Forest Foundation, Safe Harbor Agreement	2,774	1,122
Habitat Conservation Plan	WCC	WA	Cedar River Watershed Habitat Conservation Plan	3,244	1,313
	WCC	WA	Green River Water Supply Operations and Watershed Protection Habitat Conservation Plan.	3,162	1,280
	WCC/ECN	WA	Plum Creek Timber Central Cascades I–90 Habitat Conservation Plan.	33,144	13,413

TABLE 8—LANDS EXCLUDED FROM THE FINAL REVISED DESIGNATION OF CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL UNDER SECTION 4(B)(2) OF THE ACT—Continued

Type of agreement	Critical habitat unit	State	Land owner/agency	*Acres*	*Hectares*
	WCC	WA	West Fork Timber Habitat Conservation Plan	5,105	2,066
	RWC	CA	Green Diamond Resource Company Habitat Conservation Plan.	369,384	149,484
	RWC	CA	Humboldt Redwood Company, Habitat Conservation Plan.	208,172	84,244
	RWC	CA	Regli Estate Habitat Conservation Plan	484	196
	ICC	CA	Terra Springs Habitat Conservation Plan	39	16
		WA	Washington Department of Natural Resources State Lands HCP.	225,751	91,358
Other Conservation Measures or Partnerships.	ECN	WA	Scofield Corporation	40	16
	RWC	CA	Mendocino Redwood Company	232,584	94,123
National Parks, State Parks, and Congressionally Reserved Lands.			National Parks	998,585	404,113
			State Parks and Natural Areas	180,894	73,267
			Congressionally Reserved USFS and BLM Lands	1,625,068	657,644
Other Private Lands		WA		42,513	17,204
		CA		123,348	49,917
Total lands excluded under section 4(b)(2) of the Act.				4,056,759	1,641,777

Benefits of Excluding Lands With Safe Harbor Agreements

A Safe Harbor Agreement (SHA) is a voluntary agreement involving private or other non-Federal property owners whose actions contribute to the recovery of listed species. The agreement is between cooperating non-Federal property owners and the Service. In exchange for actions that contribute to the recovery of listed species on non-Federal lands, participating property owners receive formal assurances from the Service that, if they fulfill the conditions of the SHA, the Service will not require any additional or different management activities by the participants without their consent. In addition, at the end of the agreement period, participants may return the enrolled property to the baseline conditions that existed at the beginning of the SHA.

Because many endangered and threatened species occur exclusively, or to a large extent, on privately owned property, the involvement of the private sector in the conservation and recovery of species is crucial. Property owners are often willing partners in efforts to recover listed species. However, some property owners may be reluctant to undertake activities that support or attract listed species on their properties, due to fear of future property-use restrictions related to the Act. To address this concern, an SHA provides that future property-use limitations will not occur without the landowner's consent if the landowner is in compliance with the permit and agreement and the activity is not likely to result in jeopardy to the listed species.

Central to this approach is that the actions taken under the SHA must provide a net conservation benefit that contributes to the recovery of the covered species. Examples of conservation benefits include:

- Reduced habitat fragmentation;
- Maintenance, restoration, or enhancement of existing habitats;
- Increases in habitat connectivity;
- Stabilized or increased numbers or distribution;
- The creation of buffers for protected areas; and
- Opportunities to test and develop new habitat management techniques.

By entering into a SHA, property owners receive assurances that land use restrictions will not be required even if the voluntary actions taken under the agreement attract particular listed species onto enrolled properties or increase the numbers of distribution of those listed species already present on those properties. The assurances are provided through an enhancement of survival permit issued to the property owner, under the authority of section 10(a)(1)(A) of the Act. To implement this provision of the Act, the Service and National Marine Fisheries Service (NMFS) issued a joint policy for developing SHAs for listed species on June 17, 1999 (64 FR 32717). The Service simultaneously issued regulations for implementing SHAs on June 17, 1999 (64 FR 32706). A correction to the final rule was announced on September 30, 1999 (64 FR 52676). The enhancement of survival permit issued in association with an SHA authorizes incidental take of species that may result from actions undertaken by the landowner under the SHA, which could include returning the property to the baseline conditions at the end of the agreement. The permit also specifies that the Service will not require any additional or different management activities by participants without their consent if the permittee is in compliance with the requirements of the permit and the SHA and the permittee's actions are not likely to result in jeopardy.

The benefits of excluding lands with approved SHAs from critical habitat designation may include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed as a result of the critical habitat designation. Even if any additional regulatory burden would be unlikely due to a lack of a Federal nexus, the designation of critical habitat could nonetheless have an unintended negative effect on our relationship with non-Federal landowners, due to the perceived imposition of government regulation. An additional benefit of excluding lands covered by approved SHAs from critical habitat designation is that it may make it easier for us to seek new partnerships with future SHA participants, including States, counties,

local jurisdictions, conservation organizations, and private landowners, in cases where potential partners may be reluctant to encourage the development of habitat that supports endangered or threatened species. In such cases, we may be able to implement conservation actions that we would be unable to accomplish otherwise. By excluding these lands, we may preserve our current partnerships and encourage additional future conservation actions.

In weighing the benefits of inclusion versus the benefits of exclusion for lands subject to approved SHAs, it is important to note that a fundamental requirement of an SHA is an advance determination by the Service that the provisions of the SHA will result in a net conservation benefit to the listed species. Approved SHAs have, therefore, already been determined to provide a net conservation benefit to the listed species; in addition, the management activities provided in an SHA often provide conservation benefits to unlisted sensitive species as well. As described earlier, the designation of critical habitat may not provide any substantial realized conservation benefit to the species on non-Federal lands absent a Federal nexus for an activity. Especially where further Federal action is unlikely, the net conservation benefit provided by the terms of the SHA itself, considered in conjunction with the benefit of excluding lands subject to an SHA by preserving our working relationships with landowners who have entered into SHAs with the Service, and the benefit of laying the positive groundwork for possible future agreements with other landowners, may collectively outweigh the potentially limited benefit that would be realized on these lands from the designation of critical habitat. However, as with all potential exclusions under consideration, lands subject to an SHA will only be excluded if we determine that the benefits of exclusion outweigh the benefits of inclusion following a rigorous examination of the record on a case-by-case basis.

We note that permit issuance in association with SHA applications requires consultation under section 7(a)(2) of the Act, which would include the review of the effects of all SHA-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), even without the critical habitat designation. In addition, all other Federal actions that may affect the listed species would still require consultation under section 7(a)(2) of the Act, and we would review these actions for possible significant habitat modification in accordance with the definition of harm, described in the *Benefits of Excluding Lands with Habitat Conservation Plans,* below.

We further note that SHAs may include a provision that the landowner may return the area to baseline conditions upon expiration of the permit. The term of the permit is thus an important consideration in weighing the relative benefits of inclusion versus exclusion from the designation of critical habitat. However, the Service has the right to revise a critical habitat designation at any time. Furthermore, the potential benefit of acknowledging the positive conservation contributions of landowners willing to enter into voluntary conservation agreements with the Service for the recovery of endangered or threatened species may nonetheless outweigh the loss of benefit that may be incurred through a possible return to baseline following permit expiration. As stated above, such circumstances require careful consideration on a case-by-case basis in order to make a final determination of the benefits of exclusion or inclusion in a critical habitat designation.

Below is a description of each SHA and our analysis of the benefits of including and excluding it from the critical habitat designation under section 4(b)(2) of the Act.

State of California

Forster-Gill, Inc., Safe Harbor Agreement

In this final designation, the Secretary has exercised his authority to exclude 238 ac (96 ha) of lands from critical habitat, under section 4(b)(2) of the Act, that are covered by the Safe Harbor Agreement (SHA) of Forster-Gill, Inc., within subunit 1 of the Redwood Coast CHU in Humboldt County, California. The enhancement of survival permit associated with this SHA was noticed in the **Federal Register** on March 22, 2002 (67 FR 13357), and issued June 18, 2002. The term of the agreement is 80 years, and the term of the permit is 90 years. The SHA provides for the creation and enhancement of habitat for the northern spotted owl on 238 ac (96 ha) of lands in Humboldt County, California, and provides for continued timber harvest on those lands. There are two baseline conditions that will be maintained under the SHA: (1) Protection of an 11.2-ac (5-ha) no-harvest area that will buffer the most recent active northern spotted owl nest site, but will also be maintained in the absence of a nest site; and (2) maintenance of 216 ac (87 ha) on the property such that the trees will always average 12 to 24 in (30 to 60 cm) dbh with a canopy cover of 60 to 100 percent. At the time of the agreement, forest conditions were on the lower end of the diameter and canopy cover ranges. By the end of the agreement, the property will be at the upper end of the diameter and canopy cover ranges. Under the SHA, Forster-Gill, Inc., agrees to: (1) Annually, survey and monitor for the location and reproductive status of northern spotted owls on the property; (2) protect all active nest sites (locations where nesting behavior is observed during any of the previous 3 years) with a no-harvest area that buffers the nest site by no less than 300 ft (90 m) and limits timber harvest operations within 1,000 ft (305 m) of an active nest site during the breeding season, allowing only the use of existing haul roads; and (3) manage the second-growth redwood timber on the property in a manner that maintains suitable northern spotted owl habitat, while creating, over time, the multilayered canopy structure with an older, larger tree component associated with high-quality northern spotted owl habitat. The SHA is expected to provide, maintain, and enhance for the 80-year life of the agreement over 200 ac (80 ha) of northern spotted owl habitat within a matrix of private timberland. The cumulative impact of the agreement and the timber management activities it covers, which are facilitated by the allowable incidental take, is expected to provide a net benefit to the northern spotted owl.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited (there is little likelihood of an action that will involve Federal funding, authorization, or implementation). In addition, since the lands under the SHA in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the additional conservation that could be attained through the supplemental adverse modification analysis for critical habitat under section 7 would likely not be significant, and would be triggered only in the event of a Federal action. Furthermore, any such potential benefit would be small in comparison to the benefits derived from the SHA, which already incorporates measures that specifically benefit the northern spotted owl and its habitat, as described above, and remains in place regardless of the designation of critical habitat.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, in this case the landowners are aware of the needs of the species through the development of their SHA, in which they have agreed to take measures to protect the northern spotted owl on their property and create and enhance suitable habitat for the species as well. Any additional educational and information benefits that might arise from critical habitat designation have been largely accomplished through the public review of and comment on the SHA and the associated permit. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was also preceded by outreach efforts and public comment opportunities. In addition, the rulemaking process associated with critical habitat designation included several opportunities for public comment, and we also held multiple public information meetings across the range of the species. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the current status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to us that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 236 ac (96 ha) of lands currently managed under the SHA are substantial. We have created a close partnership with Forster-Gill through the development of the SHA, which incorporates protections and management objectives for the northern spotted owl and the habitat upon which it depends for breeding, sheltering, and foraging activities, as described above. The conservation approach identified in the Forster-Gill, Inc. SHA, along with our close coordination with the company, addresses the identified threats to northern spotted owl habitat on the covered lands that contain the physical or biological features essential to the conservation of the species.

The conservation measures identified within the SHA seek to achieve conservation goals for northern spotted owls and their habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive management actions. If there is a Federal nexus, consultation under critical habitat requires only that the action agency avoid actions that destroy or adversely modify critical habitat. In contrast, SHA conservation measures that provide a benefit to the northern spotted owl and its habitat have been, and will be, implemented continuously beginning with the enactment of the SHA in 2002 through the 80-year term of the ITP, through 2082, on all covered lands owned and managed by Forster-Gill, Inc. The key conservation measure is a provision that will lead to an approximate doubling of mean tree diameter from roughly 12 to 24 in (30 to 60 cm) on covered lands over the life of the permit, leading to enhancement of habitat suitability.

The designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Forster-Gill SHA are designated as critical habitat, it would likely have a chilling effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans, particularly large, regional Conservation Plans that involve numerous participants and/or address landscape-level conservation of species and habitats) that we would be unable to accomplish otherwise.

Excluding the approximately 238 ac (96 ha) owned and managed by Forster-Gill, Inc. from critical habitat designation will sustain and enhance the working relationship between the Service and this private lands partner. The willingness of Forster-Gill to work with the Service to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. We consider this voluntary partnership in conservation vital to our understanding of the status of species on non-Federal lands and necessary to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species. By excluding these lands, we preserve our current conservation partnership with Forster-Gill and encourage additional conservation actions by this partner, and potentially others as well, in the future. We consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We reviewed and evaluated the exclusion of approximately 238 ac (96 ha) of land owned and managed by Forster-Gill, Inc. from our designation of critical habitat. The benefits of including these lands in the designation are relatively small. The habitat on the covered lands is already being monitored and managed under the SHA to improve the habitat elements that are equivalent to the physical or biological features that are outlined in this critical habitat rule. The additional designation of critical habitat would provide unnecessarily duplicative protections, and would in any case be unlikely to be triggered under section 7, since there is little probability of a Federal nexus for any

activity on these lands. Even if triggered, since the lands in question are occupied by the species, section 7 consultation would already be required under the jeopardy standard, and as noted, the analysis under the adverse modification standard would be unlikely to provide additional protections beyond those already in place under the SHA. The regulatory benefit of additional Federal review on individual proposed actions is episodic and confined to the scope and scale of the specific actions, whereas implementation of the SHA is continuous and affects the entire property.

Educational benefits are also limited. The landowner is already aware of the conservation needs of the species through development of the SHA. Because there is no public access to the land, we are not aware of any public constituency connected with this ownership which would derive informational benefits from the designation of critical habitat. However, as noted, we have conducted extensive outreach efforts, both in relation to the SHA and its associated permit, as well as our proposed critical habitat, which have provided opportunity for public education and comment on critical habitat for the northern spotted owl. As such, much of the potential educational benefit of critical habitat on these lands has already been accomplished.

On the other hand, the SHA has provisions for protecting and maintaining northern spotted owl habitat that far exceed the conservation benefits that could be obtained through section 7 consultation. These measures will not only prevent the degradation of essential features of the northern spotted owl, but they will maintain or improve these features over time. Furthermore, landowners always have the option not to return to baseline after the term of the SHA is over. Exclusion of these lands from critical habitat will help foster the partnership we have developed with Forster-Gill through the development and continuing implementation of the SHA, and may encourage the landowner to continue these cooperative efforts even after the term of the SHA. In addition, this partnership may serve as a model and aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species. For these reasons, we have determined that the benefits of exclusion of lands covered by the Forster-Gill, Inc. SHA outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 238 ac (96 ha) from the designation of critical habitat for the northern spotted owl of lands owned and managed by Forster-Gill, Inc., as identified in their SHA 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 having a Federal nexus and affecting northern spotted owls in occupied areas, as in this case, the jeopardy standard of section 7 of the Act, coupled with protection provided under the terms of the SHA, 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 proposed critical habitat units or subunits that are within the Forster-Gill, Inc. SHA boundary totaling 238 ac (96 ha).

Van Eck Forest Foundation Safe Harbor Agreement

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, that are covered by the SHA between the Fred M. Van Eck Forest Foundation and the Service within subunit 1 of the Redwood Coast CHU in California. These lands are also protected under a conservation easement held by the Pacific Forest Trust. The enhancement of survival permit associated with this SHA was noticed in the **Federal Register** on July 8, 2008 (73 FR 39026), and issued August 18, 2008. The term of the permit and the agreement is 90 years. The SHA provides for the creation and enhancement of habitat for the northern spotted owl on 2,774 ac (1,122 ha) of lands in Humboldt County, California, and provides for continued timber harvest on those lands. At the time of the agreement, the lands under consideration supported 1,730 ac (700 ha) of northern spotted owl nesting and roosting habitat and one northern spotted owl activity center (a location where owls are observed nesting or roosting). We anticipate that under the northern spotted owl habitat creation and enhancement timber management regime proposed in the SHA that approximately 1,947 ac (788 ha) of nesting and roosting habitat and potentially up to five northern spotted owl activity centers could exist on the property at the end of 90 years. The SHA does not provide for a return to baseline conditions at the end of the agreement term. Instead, the agreement provides that if more than five northern spotted owl activity centers should become established on the property during the 90-year term, the landowner would be allowed to remove such additional activity centers during the agreement period.

Under the SHA, the Fred M. van Eck Forest Foundation agrees to: (1) Conduct surveys annually to determine the locations and reproductive status of any northern spotted owls; (2) protect up to five activity centers with a no-harvest area that buffers the activity center by no less than 100 ft (30 m); (3) utilize selective timber harvest methods such that suitable nesting habitat is maintained within 300 ft (91 m) of each activity center; (4) limit noise disturbance from timber harvest operations within 1,000 ft (305 m) of an active nest during the breeding season; and (5) manage all second-growth redwood timber on the property in a manner that maintains or creates suitable nesting and roosting habitat over time. The term of the SHA and ITP is 90 years; there is no term limitation on the easement deed held by the Pacific Forest Trust. Specific long-term management targets for second-growth timber are enumerated in the easement deed. All are expressed as propertywide averages; for example, a stocking target of 100,000 board feet (bf) per acre, 75 percent minimum conifer occupancy, 25 percent of standing inventory made up of trees greater than 200 years of age, 15 dominant conifers per acre 36-inches DBH or greater, 4 standing snags per acre 30-inches DBH or greater, 1,600 cubic feet per acre of dead and down logs. The cumulative impact of the SHA and the easement, is expected to provide a substantial net benefit to the northern spotted owl.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands is limited (there is little likelihood of an action that will involve Federal funding, authorization, or implementation). In addition, since the lands under the SHA in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section

7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the additional conservation that could be attained through the supplemental adverse modification analysis for critical habitat under section 7 would likely not be significant, and would be triggered only in the event of a Federal action. Furthermore, any such potential benefit would be small in comparison to the benefits already derived from the SHA, which already incorporates measures that specifically benefit the northern spotted owl and its habitat, as described above, and remains in place regardless of the designation of critical habitat.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. The landowners in this case are aware of the needs of the species through the development of their SHA, in which they have agreed to take measures to protect the northern spotted owl on their property and create and enhance suitable habitat for the species as well. Any additional educational and information benefits that might arise from critical habitat designation have been largely accomplished through the public review of and comment on the SHA and the associated permit. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was also preceded by outreach efforts and public comment opportunities. In addition, the rulemaking process associated with critical habitat designation included several opportunities for public comment, and we also held multiple public information meetings across the range of the species. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the current status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to us that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 2,774 ac (1,122 ha) of lands currently managed under the SHA are substantial. We have created a close partnership with the Foundation through the development of the SHA, which incorporates protections and management objectives for the northern spotted owl and the habitat upon which it depends for breeding, sheltering, and foraging activities, as described above. The conservation approach identified in the Van Eck Forest Foundation SHA, along with our close coordination with the Foundation, addresses the identified threats to northern spotted owl on covered lands that contain the physical or biological features essential to the conservation of the species.

The SHA conservation measures that provide a benefit to the northern spotted owl and its habitat have been, and will be, implemented continuously beginning with the enactment of the SHA in 2008 through the 90-year term of the ITP, through 2088, on all covered lands owned and managed by the Van Eck Forest Foundation. Such measures include the examples we identified above: A volume-based mean stocking target, mean conifer occupancy, mean percentages of standing inventory in older age classes, mean size and density of dominant conifers, mean size and density of standing snags, and mean volume of dead and down logs. The measures provided in the SHA are aimed at the maintenance and enhancement of suitable nesting and roosting habitat over time to benefit the northern spotted owl.

The designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Van Eck Forest Foundation SHA are designated as critical habitat, it would likely have a chilling effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans) that we would be unable to accomplish otherwise. Excluding the approximately 2,774 ac (1,122 ha) owned and managed by the Van Eck Forest Foundation from critical habitat designation will sustain and enhance this working relationship between the Service and the Foundation. The willingness of the Foundation to work with us to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. 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. Further, this partnership may aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species. We consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We reviewed and evaluated the exclusion of approximately 2,774 ac (1,122 ha) of land owned and managed by the Van Eck Forest Foundation from our designation of critical habitat. The benefits of including these lands in the designation are relatively small, since the habitat on the covered lands is already being monitored and managed under the SHA to improve the habitat elements that are equivalent to the physical or biological features that are outlined in this critical habitat rule. The additional designation of critical habitat would provide unnecessarily duplicative protections, and would in any case be unlikely to be triggered under section 7, since there is little probability of a Federal nexus on these lands. Even if triggered, since the lands

in question are occupied by the species, section 7 consultation would already be required under the jeopardy standard, and, as noted, the analysis under the adverse modification standard would be unlikely to provide additional protections beyond those already in place under the SHA.

Educational benefits are also limited. The landowner is already aware of the conservation needs of the species through development of the SHA. Because the Van Eck lands, for the most part, are not open to the general public, there is no public constituency that would derive informational benefits from the designation of critical habitat. However, as noted, we have conducted extensive outreach efforts, both in relation to the SHA and its associated permit, as well as our proposed revision of critical habitat, which have provided opportunity for public education and comment on critical habitat for the northern spotted owl. As such, much of the potential educational benefit of critical habitat on these lands has already been accomplished.

On the other hand, the conservation measures identified within the SHA seek to achieve conservation goals for northern spotted owls and their habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive actions. Thus, the implementation of the SHA provides a substantially greater benefit to the northern spotted owl than would be obtained through section 7 consultation. The measures provided in the SHA will not only prevent the degradation of essential features for the northern spotted owl, but they are designed to maintain or enhance these features over time. Furthermore, landowners always have the option not to return to baseline after the term of the SHA is over. Exclusion of these lands from critical habitat will help foster the partnership we have developed with the Van Eck Forest Foundation through the development and continuing implementation of the SHA and may encourage the landowner to continue these cooperative efforts even after the term of the SHA. In addition, this partnership may serve as a model and aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species. For these reasons we have determined that the benefits of exclusion of lands covered by the Van Eck Forest Foundation SHA outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 2,774 ac (1,122 ha) from the designation of critical habitat for the northern spotted owl of lands owned and managed by the Van Eck Forest Foundation, as identified in their SHA 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 having a Federal nexus and affecting northern spotted owls in occupied areas, such as in this case, the jeopardy standard of section 7 of the Act, coupled with protection provided under the terms of the SHA and Conservation Easement Agreement, 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 proposed critical habitat units or subunits that are within the Van Eck Forest Foundation SHA boundary totaling 2,774 ac (1,122 ha).

State of Washington

Port Blakely Tree Farms L.P. (Morton Block) Safe Harbor Agreement, Landowner Option Plan, and Cooperative Habitat Enhancement Agreement

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, totaling approximately 195 ac (79 ha) that are covered under the Port Blakely Tree Farms (also known as Morton Block) SHA in the West Cascades Central CHU in Washington. The enhancement of survival permit associated with this SHA was noticed in the **Federal Register** on December 17, 2008 (73 FR 76680) and issued May 22, 2009. The SHA and permit include both the marbled murrelet (*Brachyramphus marmoratus*) and the northern spotted owl, and covers an area of 45,306 ac (18,335 ha) of managed forest lands known as the ''Morton Block,'' in Lewis and Skamania Counties. The term of the permit and SHA is 60 years.

The covered lands have been intensively managed for timber production and at the time the permit was issued were not known to be occupied by northern spotted owls. The environmental baseline was measured in terms of dispersal habitat. There are no known northern spotted owls nesting on Port Blakely lands. However, northern spotted owls have historically nested on adjacent Federal lands and the 1.82-mile (2.9-km) radius circles around those sites that are used for evaluating potential habitat availability for northern spotted owls extend onto Port Blakely lands. Because of this, Port Blakely Tree Farms conducted habitat evaluations of their properties to determine the amount of suitable northern spotted owl habitat present. The baseline estimate to be provided by the SHA is 8,360 ac (3,383 ha) of northern spotted owl dispersal habitat.

Under the SHA, Port Blakely is implementing conservation measures that are expected to provide net conservation benefits to the northern spotted owl and marbled murrelet. The SHA also provides that Port Blakely will manage their tree farm in a manner that contributes to the goals of the Mineral Block Northern Spotted Owl Special Emphasis Area (SOSEA) according to Washington Forest Practices Rules and Regulations (Washington Forest Practices Board 2002, WAC 222–16–080, WAC 222–16– 086). This area is intended to facilitate dispersal of juvenile northern spotted owls, as well as provide demographic support to core northern spotted owl populations.

Under the SHA, Port Blakely is implementing enhanced forest-management measures that would create potential habitat for the northern spotted owl and marbled murrelet, such as longer harvest rotations, additional thinning to accelerate forest growth, a snag-creation program, retention of more fallen wood than is required by Washington Forest Practices Rules, establishment of special management areas and special set-aside areas, and monitoring. The terms of the agreement are intended to produce conditions that will facilitate the dispersal of the northern spotted owl across the Port Blakely ownership.

At present, there are no known nesting sites for owls in the covered area. However, portions of the covered area are within owl management circles associated with site centers on adjacent ownerships. The majority of the stand-management units are composed of 20- to 60-year-old timber. There are no stands that would provide nesting opportunities for owls in the covered area, and very little young forest marginal habitat is present in the areas of the Morton Block with the potential for utilization by owls that may occur on adjacent ownerships. The young forest marginal habitat known to exist on Port Blakely's ownership is within circles that have greater than 40 percent suitable habitat and, thus, may be

harvested under Washington State Forest Practices Rules.

The SHA landscape-management approach contributes to owl recovery by complementing the existing owl landscape-management strategies on adjacent Federal and State forestlands. The SHA goals and objectives for the northern spotted owl are to provide demographic interchange through dispersal and foraging habitat across their ownership on a dynamic basis, as well as higher-quality habitat in harvest set-asides. These habitats provide for both dispersal and demographic interchange. SOSEA goals are identified in the Washington State Forest Practices Rules and shown on the SOSEA maps (see WAC 222–16–086). SOSEA goals provide for demographic and dispersal support as necessary to complement the northern spotted owl protection strategies on Federal lands within or adjacent to the SOSEA (WAC 222–16–010).

Port Blakely will achieve these goals and objectives both in the near term and over the term of the SHA by immediately protecting special management areas and special set-aside areas of northern spotted owl habitat, and managing commercial forested lands in the plan area on an average rotation length of 60 years. In addition, the SHA provides silvicultural measures to benefit the northern spotted owl, including a thinning program and a snag-retention and creation program.

Port Blakely has agreed to collaborate with State and Federal biologists in research efforts to better understand how their management will influence dispersal habitat conditions in the plan area. Port Blakely is working cooperatively with the Service, WDFW, WDNR, and other entities that have expertise, in designing a statistically robust snag-monitoring study. Port Blakely will also map all leave tree areas, and mark a sample of snag and defective trees for use in snag-monitoring studies. The SHA acknowledges uncertainty in some aspects of anticipated results. Areas of uncertainty include the likelihood that green retention trees will become snags during the period between commercial thinning and future entries, as well as the recruitment success and persistence of snags. Port Blakely has committed to work collaboratively with agencies in these matters. The SHA also contains monitoring and reporting requirements.

Benefits of Inclusion—Critical habitat designation on private lands introduces a higher level of Federal scrutiny under the interagency consultation process in section 7 of the Act. This higher level of scrutiny can arise through two avenues. Under section 7(a)(2) of the Act, Federal agencies that grant funds or issue permits for proposed actions on private lands, whether or not those lands are designated critical habitat, are required to consult with the Service to ensure that the proposed action ''* * * is not likely to jeopardize the continued existence of any endangered species or threatened species * * *'' When lands are designated critical habitat, the section 7(a)(2) consultation requirement is expanded so that the granting or permitting Federal agencies and the Service are required to ensure that the proposed action will not ''* * * result in the destruction or adverse modification of critical habitat * * *'' of any endangered species or threatened species. Critical habitat designation adds a new element to the Federal consultation: The consideration and analysis of adverse effects to habitat that might potentially arise from the proposed action. In evaluating the effects of proposed actions on critical habitat, the Service must be satisfied that the essential physical or biological features of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation function of the designated critical habitat would be appreciably diminished. Briefly, if the land potentially affected by the proposed action is not designated critical habitat, the scope of the consultation must include a consideration of ''jeopardy'' to threatened or endangered species; but if the same land is designated critical habitat, the consultation must include considerations of both ''jeopardy'' and ''adverse modification'' of critical habitat.

We find that the conservation achieved through implementing these types of agreements is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. In addition, it is unlikely that Federal projects would be proposed on these relatively remote forest lands unless it was a linear project such as a powerline, pipeline, or transportation project. Due to the scope of such projects, they would likely already have a Federal nexus regardless whether these lands are designated as critical habitat. While the SHA lands may not have nesting sites on them at this time, degradation of the habitats on the SHA or adjacent lands could be considered an adverse effect to the species. Because one of the primary threats to the northern spotted owl is habitat loss and degradation, the consultation process under section 7 of the Act for projects with a Federal nexus likely would, in evaluating effects to the northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species, regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on land designated as critical habitat. However, the amount of conservation that could be attained through the addition of a critical habitat analysis to the section 7 consultation would be relatively low in comparison to the conservation provided by the SHA. The additional benefits of inclusion on the section 7 process are therefore relatively small.

The benefits of inclusion are further minimized because, as mentioned above, the Port Blakely SHA provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat, as well as foraging and dispersal habitat over the term of the SHA in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. A fundamental requirement of an SHA is a determination by the Service that the provisions of the SHA will result in a net conservation benefit to the listed species. Approved SHAs have, therefore, already been determined to provide a net conservation benefit to the listed species. In addition, monitoring will track SHA progress over the term of the permit and provide feedback on management actions. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat could inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. However, not

only has the public process for this rulemaking provided information to the landowner, State agencies and local governments and the public about the importance of this area, but the process for approving a SHA, which requires public notice and comment, has served this educational function as well. Through these opportunities, land owners, State agencies, and local governments have become more aware of the status of and threats to listed species, and the conservation actions needed for recovery particularly as it relates to this property. For this reason, we believe that the educational benefits that might accrue from critical habitat designation would be minimal.

Thus, we find that there is minimal benefit from designating critical habitat for the northern spotted owl within the Port Blakely SHA.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 195 ac (79 ha) of lands currently managed under the SHA are substantial and include maintaining our partnership with this landowner. This is important because it may encourage the company not to return to baseline immediately after expiration of the SHA.

Excluding lands with SHAs from critical habitat designation may also enhance our ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within the plan area are designated as critical habitat, it could have a negative effect on our ability to work with various companies to accomplish our goals for the SHA program and recovery of the northern spotted owl. This SHA is located in a key landscape between the Mineral Block and other Federal lands, and represents a unique opportunity to maintain northern spotted owls at the western extreme of the Cascades, which may support dispersal between the Cascades and Olympics. This SHA contributes meaningfully to the recovery of the northern spotted owl and serves as an example to other industrial companies. This SHA was the first to combine a Federal SHA effort with similar planning processes under State jurisdiction and serves as a role model in combining SHA planning with State processes. By excluding these lands, we preserve our current private and local conservation partnerships and encourage additional conservation actions in the future.

Benefits of Exclusion Outweigh the Benefits of Inclusion—In summary, we determine that the benefits of excluding the Port Blakely SHA from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat. We find that including the Port Blakely SHA would result in minimal, if any, additional benefits to the northern spotted owl, as explained above. We also find that the benefits of including these lands are further minimized by the fact that the management strategies of the Port Blakely SHA are designed to maintain and enhance habitat for the northern spotted owl. The SHA includes species-specific avoidance and minimization measures, monitoring requirements to track success and ensure proper implementation, and forest-management practices and habitat conservation objectives that benefit the northern spotted owl and its habitat, which exceeds any conservation value provided as a result of a critical habitat designation. Furthermore, encouraging landowners to enter into voluntary conservation agreements with the Service for the recovery of endangered or threatened species which we believe would be one of the benefits of exclusion may outweigh the loss of benefit that may be incurred through a possible return to baseline following permit expiration.

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 benefits of exclusion of lands covered by the Port Blakely SHA outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of a net of approximately 195 ac (79 ha) of lands within the Port Blakely SHA will not result in extinction of the northern spotted owl because current and future conservation efforts under the agreement provide management to facilitate dispersal of juvenile northern spotted owls, as well as provide demographic support to core northern spotted owl populations. Further, should nesting populations of the owl become reestablished in this area (and projects subsequently planned that have a Federal nexus and would potentially affect northern spotted owls), the jeopardy standard of section 7 of the Act, coupled with protection provided by the Port Blakely SHA, would provide a level of assurance 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 proposed critical habitat units or subunits that are within the Port Blakely SHA totaling about 195 ac (79 ha).

SDS Company LLC and Broughton Lumber Company Safe Harbor Agreement

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, lands totaling about 2,035 ac (824 ha) that are covered under the SDS Lumber Company LLC and its registered business name Stevenson Land Company (together SDS) and Broughton Lumber Company (in total are related companies and are herein known as ''the Companies'') SHA, in Washington and Oregon. (Note the proposed rule contained an error, in which we mistakenly identified approximately 16,031 ac (6,487 ha) of SDS and Broughton lands for potential exclusion). The enhancement of survival permits associated with this SHA were noticed in the **Federal Register** on August 21, 2012 (77 FR 50526) and issued to the Companies on October 26, 2012. The term of each of the permits is 60 years. The Companies collectively manage approximately 83,000 ac (33,589 ha) of forestland in Skamania and Klickitat Counties in Washington, and Hood River and Wasco Counties in Oregon. Much of this ownership is composed of potential habitat outside of any owl circles and, therefore, is currently available for harvest under Washington State Forest Practices Rules. However, 30 northern spotted owl home ranges overlap some portion of the Companies' land base. Most site centers are currently located on Federal or State ownership; only one site center is located on Companies' ownership. Because the Companies have committed to manage their commercial forest lands for a substantially longer rotation than the typical 45-year rotation, and to implement additional conservation measures, northern spotted owls could occupy the covered area in the future under the SHA.

The Companies' landscape management approach contributes to owl recovery by complementing the existing owl landscape-management strategies on adjacent Federal and State forestlands. The Companies' SHA goals and objectives for the northern spotted owl are to provide dispersal and young forest marginal habitat across their

ownership on a dynamic basis, as well as submature and higher quality habitat in harvest set-asides. These habitats provide both dispersal and demographic support, an established goal for lands within the two northern spotted owl special emphasis areas (SOSEAs). SOSEA goals are identified in the Forest Practices Rules and shown on the SOSEA maps (see WAC 222–16–086). SOSEA goals provide for demographic and/or dispersal support as necessary to complement the northern spotted owl protection strategies on Federal lands within or adjacent to the SOSEA (WAC 222–16–010).

The Companies will achieve these goals and objectives both in the near term and over the term of the SHA by immediately protecting special set-aside areas of northern spotted owl habitat and managing commercial forested lands in the plan area on an average rotation length of 60 years. In addition, the SHA provides silvicultural measures to benefit the northern spotted owl, including a snag-retention and creation program.

The SHA includes an elevated baseline, provisions for a 240-acre nesting set-aside and a 411-acre reserve in the White Salmon SOSEA, a 10-year deferral of harvest of any habitat in the 0.7-mile circle of the four site centers in which the Companies' covered lands comprise greater than 15 percent, future nest site protection, and the support and enhancement of existing conservation agreements. The SHA will include a monitoring and reporting schedule to ensure that the anticipated benefits will accrue both in the near term and over the term of the SHA.

Benefits of Inclusion—We find that there is minimal benefit from designating critical habitat for the northern spotted owl within the SDS SHA. It is unlikely that Federal projects would be proposed on these relatively remote forest lands unless it was a linear project such as a powerline, pipeline, or transportation project. Due to the scope of such projects, they would likely already have a Federal nexus regardless whether these lands are designated as critical habitat. Even where the SHA lands may not have nesting sites on them at this time, degradation of the habitats on the SHA or adjacent lands could be considered an adverse effect to the species. Because one of the primary threats to the northern spotted owl is habitat loss and degradation, the consultation process under section 7 of the Act for projects with a Federal nexus likely would, in evaluating effects to the northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species, regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on land designated as critical habitat. However, the amount of conservation that could be attained through the addition of a critical habitat analysis to the section 7 consultation would be relatively low in comparison to the conservation provided by the SHA, as discussed below. The additional benefits of inclusion on the section 7 process are therefore relatively small.

The benefits of inclusion are further minimized because this SHA provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat, as well as foraging and dispersal habitat over the term of the SHA in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. A fundamental requirement of an SHA is a determination by the Service that the provisions of the SHA will result in a net conservation benefit to the listed species. Approved SHAs have, therefore, already been determined to provide a net conservation benefit to the listed species. In addition, funding for management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to SHAs, do not commit the project proponent to long-term, special management practices or protections. In addition, monitoring will track SHA progress over the term of the permit and provide feedback on management actions. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat could inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. However, not only has the public process for this rulemaking provided information to the landowner, State agencies and local governments and the public about the importance of this area, but the process for approving a SHA, which also requires public notice and comment, has served this educational function too. Through these opportunities, land owners, State agencies, and local governments have become more aware of the status of and threats to listed species, and the conservation actions needed for recovery particularly as it relates to this property. For these reasons, we believe that the educational benefits that might accrue from critical habitat designation would be minimal.

Therefore, we find that there is minimal benefit from designating critical habitat for the northern spotted owl within this SHA.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 2,035 ac (824 ha) of lands currently managed under the SHA are substantial and include maintaining our partnership with this landowner. This is important because it may encourage the company not to return to baseline immediately after expiration of the SHA.

Excluding lands with SHAs from critical habitat designation may also enhance our ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within the plan area are designated as critical habitat, it could have a negative effect on our ability to work with various companies to accomplish our goals for the SHA program and recovery of the northern spotted owl. This SHA is located in key northern spotted owl landscapes and contributes meaningfully to the recovery of the northern spotted owl. Two SOSEAs, the White Salmon and Columbia Gorge SOSEAs, encompass approximately 54 percent of the Companies' lands in Skamania and Klickitat Counties. The Companies' landscape-management approach contributes to northern spotted owl recovery by complementing the existing northern spotted owl landscape-management strategies on adjacent Federal and State forestlands. With the Companies' participation in northern spotted owl conservation, it will be the first time in these SOSEAs, that a private landowner has joined State and Federal land managers to

implement a landscape approach for northern spotted owl habitat. The Companies' lands provide a major link in the goal of managing both the Columbia River and White Salmon SOSEAs under a unified landscape-management regime rather than a competitive harvesting regime under owl-circle management.

The designation of critical habitat could nonetheless have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the SDS SHA plan area are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop SHAs, HCPs, and other conservation plans, particularly plans that address landscape-level conservation of species and habitats. This SHA is being observed by other land and timber companies in Washington and Oregon and may serve as a model for ongoing and future efforts. By excluding these lands, we preserve our current private and local conservation partnerships and encourage additional conservation actions in the future.

Benefits of Exclusion Outweigh the Benefits of Inclusion—In summary, we determine that the benefits of excluding the SDS SHA from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat. We find that including it would result in minimal, if any, additional benefits to the northern spotted owl, as explained above. We also find that the benefits of including these lands are further minimized by the fact that the management strategies of the SHA are designed to maintain and enhance habitat for the northern spotted owl. The SHA includes species-specific avoidance and minimization measures, monitoring requirements to track success and ensure proper implementation, and forest-management practices and habitat conservation objectives that benefit the northern spotted owl and its habitat, which exceeds any conservation value provided as a result of a critical habitat designation. Furthermore, encouraging landowners to enter into voluntary conservation agreements with the Service for the recovery of endangered or threatened species which we believe would be one of the benefits of exclusion may outweigh the loss of benefit that may be incurred through a possible return to baseline following permit expiration.

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 benefits of exclusion of lands covered by the Port Blakely SHA outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of a net of approximately 2,035 ac (824 ha) of lands within the SDS SHA will not result in extinction of the northern spotted owl because, under this agreement, the landscape management approach contributes to owl recovery by complementing the existing owl landscape-management strategies on adjacent Federal and State forestlands. The SDS SHA goals and objectives for the northern spotted owl are to provide dispersal and young forest marginal habitat across their ownership on a dynamic basis, as well as submature and higher quality habitat in harvest set-asides. These habitats provide both dispersal and demographic support, an established goal for lands within the two northern spotted owl special emphasis areas (SOSEAs). Further, for projects having a Federal nexus and affecting northern spotted owls in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the SDS SHA, would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. We find that exclusion of these lands within the SDS SHA will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are within the SDS SHA totaling about 2,035 ac (824 ha).

How We Evaluate Lands Protected Under HCPs for Exclusion

The consultation provisions under section 7(a)(2) of the Act constitute a regulatory benefit of critical habitat. Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. In areas without designated critical habitat, Federal agencies consult with us on actions that may affect a listed species and must refrain from undertaking actions that are likely to jeopardize the continued existence of the species. Thus, the analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. The difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different: The jeopardy analysis looks at the action's impact on survival and recovery of the species, while the adverse modification analysis looks at the action's effects on the designated habitat's contribution to the species' conservation. This will, in some instances, lead to different results or consultation where it might not have otherwise occurred (e.g. in habitat not currently occupied by the species).

Once an agency determines that consultation under section 7 of the Act is necessary, the process may conclude informally when we concur in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if the action agency determines through informal consultation that adverse effects are likely to occur, then it would initiate formal consultation, which would conclude when we issue a biological opinion on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat. A biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to critical habitat, but it would not contain any mandatory reasonable and prudent measures or terms and conditions because these do not apply to critical habitat. In addition, we suggest reasonable and prudent alternatives to the proposed Federal action only when our biological opinion finds that the action may destroy or adversely modify critical habitat.

The process of designating critical habitat as described in the Act requires, in part, that the Service identify those lands occupied at the time of listing on which are found the physical or biological features essential to the conservation of the species, which may require special management considerations or protection and any unoccupied lands that are essential to the conservation of the species. In identifying those lands, the Service must consider the recovery needs of the species. Once critical habitat has been designated, Federal agencies must consult with the Service under section 7(a)(2) of the Act on their actions that may adversely affect the species or critical habitat to ensure that their actions are not likely to adversely

modify critical habitat or jeopardize the continued existence of the species.

We find that in some cases, the conservation benefits to a species and its habitat that may be achieved through the designation of critical habitat are less than those that could be achieved through the implementation of a habitat conservation management plan that includes specific provisions based on enhancement or recovery as the management standard. Consequently, the implementation of any HCP or management plan that considers enhancement or recovery as the management standard will often provide as much or more benefit than a section 7(a)(2) consultation under the Act. There may be some regulatory benefit that results from designating critical habitat in the areas covered by the HCPs because of section 7 consultation requirements; however, they are often minimal compared to the benefits of exclusion.

Non-Federal landowners are often motivated to work with the Service collaboratively to develop HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act, including assurances under the No Surprises Policy (63 FR 8859; February 23, 1998). The No Surprises Policy sets forth a clear commitment to incidental take permittees that, to the extent consistent with the Act and other Federal laws, the government will not seek additional mitigation under an approved HCP where the permittee is implementing the HCP's terms and conditions. Although the HCP process can be complex and time-consuming, the benefit to landowners in undertaking this extensive process is not only incidental take authorization but the resulting regulatory certainty, which translates into real savings for private landowners in terms of opportunity costs, as well as direct savings and avoided costs. Designation of critical habitat within the boundaries of already approved HCPs may be viewed as a disincentive by other entities currently developing HCPs or contemplating them in the future, because it may be perceived as imposing duplicative regulatory burdens. In discussions with the Service, HCP permittees have indicated they view critical habitat designation as an unnecessary additional intrusion on their property, and have expressed concern that the Service may request new conservation measures for the northern spotted owl, even though they have an existing HCP and associated incidental take permit that has already gone through NEPA and the section 7 consultation process already in place.

Although parties whose actions may take listed species may still desire incidental take permits to avoid liability under section 9 of the Act, failure to exclude HCP lands from critical habitat could reduce the conservation value of the HCP program in several ways. First, parties may be less willing to seek a section 10 (a)(2) permit and develop an HCP where they are not certain their actions will cause incidental take in order to avoid involving the Federal government when that involvement could lead to future section 7 consultations because of critical habitat designation. Second, in any given HCP, applicants may reduce the amount of protection to which they are willing to agree, in effect holding some additional protective measures ''in reserve'' for use in any future discussions to address critical habitat. The failure to exclude qualified HCP lands from critical habitat designations could decrease the program's efficacy and have profound effects on our ability to establish and maintain important conservation partnerships with stakeholders.

Excluding qualified HCP lands from critical habitat provides permittees with the greatest possible certainty, and thereby may help foster the cooperation necessary to allow the HCP program to achieve the greatest possible conservation benefit. Thus, excluding the lands covered by HCPs may improve the Service's ability to enter into new partnerships. In addition, permittees who trust and benefit from the HCP process may encourage future HCP participants, such as States, counties, local jurisdictions, conservation organizations, and private landowners, leading to new HCPs that may result in implementation of conservation actions we would be unable to accomplish otherwise.

Excluding lands covered under HCPs from the critical habitat designation may also relieve landowners from the possibility of any additional regulatory burden and costs associated with the preparation of section 7 documents related to critical habitat. While the costs of providing these additional documents to the Service is minor, there may be resulting delays that generate perceived or very real costs to private landowners in the form of opportunity costs, as well as direct costs.

HCPs can provide other important conservation benefits, including the development of important biological information needed to guide conservation efforts and assist in species conservation outside the HCP planning area. Each of the HCPs evaluated below have some component of adaptive forest management to address uncertainties in achieving their agreed-upon conservation objectives for the northern spotted owl. The adaptive management strategy helps to ensure management will continue to be consistent with agreed-upon northern spotted owl conservation objectives.

Below is a brief description of each HCP and the lands proposed as critical habitat covered by each plan that we have excluded from critical habitat designation under section 4(b)(2) of the Act.

State of California

Green Diamond Resource Company Habitat Conservation Plan

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, that are covered under the Green Diamond Resource Company Northern Spotted Owl Habitat Conservation Plan of 1992. The Green Diamond Resource Company (Green Diamond, formerly Simpson Timber Company) operates under a northern spotted owl HCP within the Redwood Coast Critical Habitat Unit in California. The Incidental Take Permit (ITP) issued in association with this HCP was initially noticed in the **Federal Register** on May 27, 1992 (57 FR 22254) and issued September 17, 1992. Both the HCP and the permit had a term of 30 years, with a comprehensive review scheduled after 10 years to review the efficacy of the plan. The permit allows incidental take of up to 50 pairs of northern spotted owls and their habitat during the course of timber harvest operations on 369,384 ac (149,484 ha) of forest lands in Del Norte and Humboldt Counties.

At the time the permit was issued, more than 100 northern spotted owl nest sites or activity centers were known or suspected on the property. The Service determined that the projected growth and harvest rates indicated more habitat of the age class primarily used by northern spotted owls would exist on the property at the end of the 30-year permit period. In addition, the HCP provided that nest sites would be protected during the breeding season, and no direct killing or injuring of owls was anticipated. Green Diamond also agreed to continue their monitoring programs, in which more than 250 adult owls and more than 100 juveniles were already banded, as well as analyses of timber stands used by owls. As required by the terms of the HCP, Green Diamond and the Service conducted a comprehensive review of the first 20

years of implementation, including a comparison of actual and estimated levels of owl displacement, a comparison of estimated and actual distribution of habitat, a reevaluation of the biological basis for the HCP's conservation strategy, an examination of the efficacy of and continued need for habitat set-asides, and an estimate of future owl displacements. During the comprehensive review, Green Diamond requested an amendment to the 1992 ITP to allow incidental take of up to eight additional northern spotted owl pairs. This request was noticed in the **Federal Register** on February 26, 2007 (72 FR 8393) and the modified permit was issued in October 2007.The original Green Diamond Northern Spotted Owl HCP relied on extensive monitoring and research to inform development of more comprehensive conservation strategies for their lands. The outcome of 20 years of implementation of Green Diamond's 1992 informed the Service and Green Diamond on how to develop new, or modify the original, conservation strategies to further benefit the northern spotted owl.

On April 16, 2010, we announced our intent to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) in response to an expected new HCP from Green Diamond, which would include provisions for the northern spotted owl and possibly the Pacific fisher (*Martes pennanti*), a species that may be considered for listing during the term of the HCP. This new HCP, if completed and approved, would replace the 1992 HCP, and would require the issuance of a new incidental take permit. The proposed new HCP is intended to address the retention of suitable northern spotted owl nesting habitat, the development of older forest habitat elements and habitat structures, and future establishment of northern spotted owl nest sites in streamside retention zones. In addition, the new plan will help cluster owl sites in favorable habitat areas, and initiate future research on other wildlife species such as fishers and barred owls. Since this new draft HCP has not yet been completed, the draft HCP does not serve as the basis for exclusion and we only provide this information in terms of demonstrating the progression of involvement and partnership between the Service and Green Diamond. The existing HCP, originally completed in 1992, is still in effect as of this date and serves, in part, as the basis for this exclusion.

Since approval of the 1992 HCP, personnel from Green Diamond, along with academic and research institutions, have been the largest single contributor of scientific information on the ecology of northern spotted owls and their habitats on managed forest lands in the redwood region, in the form of graduate theses and peer-reviewed papers. Since the initial listing of the northern spotted owl in 1990, Green Diamond has maintained on their lands 1 of the 11 demographic study areas within the range of the northern spotted owl that have been used for rangewide monitoring and evaluation of populations and population trends in the Pacific northwest. This important demographic information is reported in a continuing series of monographs, the most recent being Forsman *et al.* (2011).

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited; there is little likelihood of an action that will involve Federal funding, authorization, or implementation. In addition, since the lands under the HCP in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. While the jeopardy and adverse modification standards are different, the additional conservation that could be attained through the supplemental adverse modification analysis for critical habitat under section 7 would not be significant in light of the benefits of the HCP, which already incorporates protections and management objectives for the northern spotted owl and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation approach identified in the Green Diamond HCP, along with our close coordination with the company, addresses the identified threats to northern spotted owl on lands covered by the HCP that contain the physical or biological features essential to the conservation of the species. The conservation measures identified within the HCP seek to achieve conservation goals for northern spotted owls and their habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive actions. HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs, often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers similar extensive benefits as an HCP. In addition, the protections of critical habitat come into play only in the event of a Federal action, whereas the protections of an HCP are in continuous force.

Another potential benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, State and local government agencies, 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 northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, in this case the educational value of critical habitat is limited. Green Diamond has already made substantial contributions to our knowledge of the species through research and monitoring without critical habitat designated on their lands. In addition, the educational and informational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment on the HCP and associated documents. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was also preceded by outreach efforts and public comment opportunities. Furthermore, we conducted extensive outreach efforts on the proposed revision of critical habitat, including multiple public information meetings and opportunities for public comment. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These

measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to us that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 369,864 ac (149,484 ha) of lands currently managed under the Green Diamond HCP are significant. We have created a close partnership with Green Diamond through development of the HCP, and they have proven to be an invaluable partner in the conservation of the northern spotted owl. Green Diamond has made a significant contribution to our knowledge of the northern spotted owl through their support of continuing research on their lands. Excluding the approximately 369,864 ac (149,484 ha) owned and managed by Green Diamond from critical habitat designation will sustain and enhance the working relationship between the Service and Green Diamond. The willingness of Green Diamond to work with the Service in innovative ways to conduct solid scientific research and manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. Due to the important research they are facilitating, we consider this voluntary partnership in conservation vital to our understanding of the northern spotted owl 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 designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Green Diamond HCP are designated as critical habitat, it would likely have a negative effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans) that we would be unable to accomplish otherwise. In addition, our conservation partnership with Green Diamond may serve as a model and aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species. We consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We reviewed and evaluated the exclusion of approximately 369,864 ac (149,484 ha) of land owned and managed by the Green Diamond Resource Company from our designation of critical habitat. The benefits of including these lands in the designation are comparatively small, since the habitat on the covered lands is already being monitored and managed under the current HCP to improve the habitat elements that are equivalent to the physical or biological features outlined in this critical habitat rule. Any potential regulatory benefits of critical habitat would be minimal, at best, as additional Federal review on individual proposed actions is episodic and confined to the scope and scale of the specific Federal actions that take the form of project review or granting of funds. In any case, any potential regulatory benefit that would be gained from a supplemental adverse modification analysis, should section 7 be triggered, would likely be minimal since the protections afforded by critical habitat would be duplicative with the protections provided through the HCP. Educational benefits to the company that might be attributed to critical habitat designation are limited because the company already has an active program of research and analysis that is embedded in company planning. In addition, extensive outreach efforts that have already occurred in conjunction with the HCP, Revised Recovery Plan, and the proposed revision of critical habitat have raised awareness of the current status of and threats to the northern spotted owl, and the conservation actions needed for recovery. Green Diamond has made a significant contribution to the body of scientific information about the northern spotted owl in the redwood region.

In this instance, the regulatory and educational benefits of inclusion in critical habitat are minimal compared to the significant benefits gained through our conservation partnership with Green Diamond. In addition, the conservation measures of their HCP serves not only an educational function for the company and local and State regulatory jurisdictions, but also provides for significant conservation and management of northern spotted owl habitat and contributes to the recovery of the species. The HCP provisions for protecting and maintaining northern spotted owl habitat far exceed the conservation benefits that would be obtainable through section 7 consultation. The company's current program of research on the northern spotted owl habitat and demographics could not be obtained through section 7 consultation.

Exclusion of these lands from critical habitat will help foster the partnership we have developed with Green Diamond, partly through the development and continuing implementation of the HCP, and partly through the encouragement of elective actions by the company that are unconnected to the HCP. For example, Green Diamond's elective role in maintaining a demographic study area, which is a key part of the network of demographic study areas essential to determining the rangewide population trends of the northern spotted owl, is integral to continuing research on the species. Our partnership with Green Diamond not only provides a benefit for the conservation of the northern spotted owl, but it may also serve as a model and aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species. For these reasons, we have determined that the benefits of exclusion of lands covered by the Green Diamond Resource Company HCP outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 369,864 ac (149,484 ha) from the designation of critical habitat for the northern spotted owl of lands owned and managed by the Green Diamond Resource Company, as identified in their 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 those infrequent projects having a Federal nexus and affecting northern spotted owls on these lands, which are occupied by the species, the jeopardy standard of section 7 of the Act, coupled with protection provided by the current Green Diamond HCP, would provide a level of assurance 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 proposed critical habitat units or subunits that are within the Green Diamond HCP boundary totaling 369,864 ac (149,484 ha).

Humboldt Redwood Company Habitat Conservation Plan

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, that are covered under the Humboldt Redwood Company (formerly Pacific Lumber) HCP in the Redwood Coast CHU in California. The permit under this HCP with a term of 50 years was noticed on July 14, 1998 (63 FR 37900) and issued on March 1, 1999. The HCP includes 208,172 ac (84,244 ha) of commercial timber lands in Humboldt County, essentially all of the formerly Pacific Lumber timberlands outside of the Headwaters Reserve, which is currently under Bureau of Land Management administration. The Humboldt Redwood Company HCP includes nine nonlisted species (including one candidate species) and three listed species, including the northern spotted owl. Activities covered by the HCP include forest management activities and mining or other extractive activities. With regard to the northern spotted owl in particular, the HCP addresses the harvest, retention, and recruitment of requisite habitat types and elements within watershed assessment areas and individual northern spotted owl activity sites. The management objectives of the HCP are to minimize disturbance to northern spotted owl activity sites, monitor to determine whether these efforts maintain a high-density and productive population of northern spotted owls, and apply adaptive forest management provisions as necessary to evaluate or modify existing conservation measures. In addition, there are specific habitat retention requirements to conserve habitat for foraging, roosting, and nesting at northern spotted owl activity sites. The other conservation elements of the HCP are also expected to aid in the retention and recruitment of potential foraging, roosting, and nesting habitat in watersheds across the ownership. For example, the HCP establishes a network of marbled murrelet conservation areas, outlines silvicultural requirements associated with riparian management zones and mass wasting avoidance areas, imposes cumulative effects/disturbance index restrictions, and contains a retention standard of 10 percent late seral habitat in each watershed assessment. Each of these measures is likely to provide additional suitable habitat for the northern spotted owl.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited since there is little likelihood of an action that will involve Federal funding, authorization, or implementation. In addition, since the lands under the HCP in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. Although the jeopardy and adverse modification standards are different, the additional conservation that could be attained through the supplemental adverse modification analysis for critical habitat under section 7 would not be significant because the HCP incorporates protections and management objectives for the northern spotted owl and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation approach identified in the HCP, along with our close coordination with the Humboldt Redwood Company, addresses the identified threats to northern spotted owl on lands covered by the HCP that contain the physical or biological features essential to the conservation of the species. The conservation measures identified within the HCP seek to achieve conservation goals for northern spotted owls and their habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive actions. HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs, often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers similar extensive benefits as an HCP. In addition, the protections of critical habitat come into play only in the event of a Federal action, whereas the protections of an HCP are in continuous force.

The HCP conservation measures that provide direct and indirect benefits to the northern spotted owl and its habitat have been implemented continuously since 1999 on all covered lands owned and managed by the Humboldt Redwood Company. Northern spotted owl conservation measures are subject to re-evaluation and modification through active adaptive forest management provisions in the Plan, which can be initiated by the Service or by the Company.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. The landowners in this case are aware of the needs of the species through the development of their HCP, in which they have agreed to take measures to protect the northern spotted owl and its habitat. Any additional educational and information benefits that might arise from critical habitat designation have been largely accomplished through the public review of and comment on the HCP and the associated permit. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was also preceded by outreach efforts and public comment opportunities. In addition, the rulemaking process associated with critical habitat designation included several opportunities for public comment, and we also held multiple public information meetings across the range of the species. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the current status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher

level of local review on proposed projects. However, CALFIRE has indicated to use that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 208,172 ac (84,244 ha) of lands currently managed under the Humboldt Redwood Company (formerly Pacific Lumber Company) HCP are significant. Although the HCP was originally negotiated with Pacific Lumber, we have developed a good working rapport with Humboldt Redwood Company, and expect this conservation partnership to continue through the implementation of the HCP. We consider conservation partnerships with private landowners to represent an integral component of recovery for listed species. However, the designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Humboldt Redwood Company HCP are designated as critical habitat, it would likely have a chilling effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans) that we would be unable to accomplish otherwise.

Excluding the approximately 208,172 ac (84,244 ha) owned and managed by the Humboldt Redwood Company from critical habitat designation will sustain and enhance the working relationship between the Service and the Company, and will bolster our ability to pursue additional conservation partnerships for the benefit of listed species. The willingness of the Humboldt Redwood Company to work with us to manage their forest lands for the benefit of the northern spotted owl will continue to reinforce those conservation efforts and our partnership, which contributes to the recovery of the species. We consider this voluntary partnership in conservation important to our understanding of the status of northern spotted owls on non-Federal lands and necessary for us to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species. In addition, as noted above, our conservation partnership with the Humboldt Redwood Company may serve as a model and aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species. We consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We have reviewed and evaluated the exclusion, from critical habitat designation, of approximately 208,172 ac (84,244 ha) of land owned and managed by the Humboldt Redwood Company. The benefits of including these lands in the designation are comparatively small, since the habitat on the covered lands is already being monitored and managed under the current HCP to improve the habitat elements that are equivalent to the physical or biological features that are outlined in this critical habitat rule. Because one of the primary threats to the northern spotted owl is habitat loss and degradation, the consultation process under section 7 of the Act for projects with a Federal nexus in areas occupied by the species, such as is the case here, will, in evaluating effects to the northern spotted owl, evaluate the effects of the action on the conservation or function of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the HCP provides habitat conservation measures that apply for the benefit of northern spotted owl. In addition, educational benefits are limited, since outreach efforts associated with various conservation actions for this species have been extensive, and members of the public, as well as State and local agencies, are likely familiar with the species and its biological needs. Company personnel are knowledgeable in the ecology of the northern spotted owl and have contributed to the body of scientific information about the northern spotted owl in the redwood region. In this case, the regulatory and education benefits of inclusion are less than the continued benefit of this conservation partnership.

Humboldt Redwood Company has made important contributions to our understanding of the ecology of the northern spotted owl and its habitats in the redwood region, and continues to do so through HCP implementation and long-term monitoring. The Service recognizes the conservation value of partnerships with non-Federal landowners, such as the Humboldt Redwood Company, which allow us to achieve conservation measures that would not otherwise be attainable on these private lands. We have determined that our conservation partnership with the Humboldt Redwood Company HCP, in conjunction with the conservation measures provided in the HCP, provide a greater benefit than would the regulatory and educational benefits of critical habitat designation. Furthermore, we have determined that the additional regulatory benefits of designating critical habitat, afforded through the section 7(a)(2) consultation process, are minimal because of limited Federal nexus and because conservation measures specifically benefitting the northern spotted owl and its habitat are in place through the implementation of the HCP. 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 benefits of exclusion of lands covered by the Humboldt Redwood Company HCP outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 208,172 ac (84,244 ha) from the designation of critical habitat for the northern spotted owl of lands owned and managed by the Humboldt Redwood Company, as identified in their 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 having a Federal nexus and affecting northern spotted owls in occupied areas, which is the case here, the jeopardy standard of section 7 of the Act, coupled with protection provided by the current Humboldt Redwood Company HCP, would provide a high level of assurance 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 proposed critical habitat units or subunits that are within the Humboldt Redwood Company HCP boundary totaling 208,172 ac (84,244 ha).

Regli Estate Habitat Conservation Plan

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, that are covered under the Regli Estate HCP in the Redwood Coast CHU. The permit issued under this HCP in 1995 (noticed July 17, 1995 (60 FR 36432) and issued August 30, 1995) covers 484 ac (196 ha) in Humboldt County, California, to be used for forest management activities.

Two listed species, the marbled murrelet and northern spotted owl, as well as two nonlisted species, are covered under the incidental take permit. Provisions in the HCP for the northern spotted owl include the mitigation of impacts from forest management activities by using single-tree selection silviculture that would retain owl foraging habitat suitability in all harvested areas; protecting an 80-ac (32-ha) core nesting area for one of the two owl pairs known to exist in the HCP area; and planting conifer tree species on approximately 73 ac (30 ha) of currently nonforested habitat within the HCP area, which would result in a net increase in forested habitat over time. In addition, take of owls would be minimized using seasonal protection measures specified in the HCP.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited since there is little likelihood of an action that will involve Federal funding, authorization, or implementation. In addition, since the lands under the HCP in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. The additional conservation that could be attained through the supplemental adverse modification analysis for critical habitat under section 7 would not be significant because this HCP incorporates measures that specifically benefit the northern spotted owl and its habitat. The HCP incorporates protections and management objectives for the northern spotted owl designed to produce a net increase in forested habitat for the species over time. The conservation measures identified within the HCP seek to achieve conservation goals for northern spotted owls and their habitat can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive actions. HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs, often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers similar extensive benefits as an HCP. In addition, the protections of critical habitat come into play only in the event of a Federal action, whereas the protections of an HCP are in continuous force.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. The landowners in this case are aware of the needs of the species through the development of their HCP, in which they have agreed to take measures to protect the northern spotted owl and its habitat. Any additional educational and information benefits that might arise from critical habitat designation have been largely accomplished through the public review of and comment on the HCP and the associated permit. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was also preceded by outreach efforts and public comment opportunities. In addition, the rulemaking process associated with critical habitat designation included several opportunities for public comment, and we also held multiple public information meetings across the range of the species. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the current status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to us that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from critical habitat designation the approximately 484 ac (196 ha) of lands currently managed under the HCP are greater than those that would accrue from inclusion. We have developed a conservation partnership with Regli Estate through the development and implementation of the HCP. The conservation measures that provide a benefit to the northern spotted owl and its habitat have been, and will continue to be, implemented continuously beginning with the issuance of the Incidental Taking Permit in 1995 and continuing through the 20-year term of the permit, through 2015. These measures include use of single-tree selection silviculture to retain owl foraging habitat suitability, protection of an 80-ac (32-ha) core nesting area for one of the two known owl pairs, and reforestation of approximately 73 ac (30 ha) of ''old-field'' grasslands, the latter which has already been accomplished and will result in a net increase in forested habitat over time. A significant benefit of exclusion would be the increased likelihood of this landowner continuing with conservation actions for the northern spotted owl and its habitat, such as the development of a new HCP and application for a new incidental take permit upon the expiration of their current permit.

The HCP incorporates protections and management objectives for the northern spotted owl and the habitat upon which it depends for breeding, sheltering, and foraging activities. The approach used in the HCP, along with our close coordination with the landowner, addresses the identified threats to northern spotted owl on covered lands that contain the physical or biological features essential to the conservation of the species. The conservation measures identified within the HCP seek to maintain or surpass current habitat

suitability for northern spotted owls, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive actions.

Excluding the approximately 484 ac (196 ha) of this covered land from critical habitat designation will sustain and enhance the working relationship between the Service and the owner, and will increase the likelihood that the owner will update the HCP and apply for a new incidental take permit when the current permit expires in 2015. The willingness of the landowner to work with the Service to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. We consider this voluntary partnership in conservation important in maintaining our ability to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species on non-Federal lands. The Service recognizes the importance of non-Federal landowners in contributing to the conservation and recovery of listed species, and seeks to maintain and promote these partnerships for the benefit of all threatened and endangered species.

We consider conservation partnerships with private landowners to represent an integral component of recovery for listed species. However, the designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Regli Estate HCP are designated as critical habitat, it would likely have a chilling effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans) that we would be unable to accomplish otherwise. We therefore consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We reviewed and evaluated the exclusion of approximately 484 ac (196 ha) of land owned and managed by Regli Estate from our designation of critical habitat. The benefits of including these lands in the designation are relatively small. Because one of the primary threats to the northern spotted owl is habitat loss and degradation, the consultation process under section 7 of the Act for projects with a Federal nexus in areas occupied by the species, such as is the case here, will, in evaluating effects to the northern spotted owl, evaluate the effects of the action on the conservation or function of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the HCP provides habitat conservation measures that apply for the benefit of northern spotted owl, and remains in place regardless of critical habitat. In addition, for the reasons described above, the educational benefits of designation in this instance are minimal.

Exclusion of these lands from critical habitat will help foster the partnership we have developed with the company, through the continuing implementation of the HCP. Furthermore, we believe exclusion of these lands from critical habitat will increase the likelihood that the owner will update the HCP and apply for a new incidental take permit when the current permit expires in 2015, thereby ensuring continuing benefits to the northern spotted owl and its habitat on these lands. The HCP has provisions for protecting and maintaining northern spotted owl habitat that exceed the conservation benefits that could be obtained through section 7 consultation. These measures will not only prevent the degradation of essential features of the northern spotted owl, but they will maintain or improve these features over time. Finally, this partnership may serve as a model and aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species.

In summary, we have determined that our conservation partnership with the Regli Estate, in conjunction with the conservation measures provided in the HCP, provide a greater benefit than would the regulatory and educational benefits of critical habitat designation. We have determined that the additional regulatory benefits of designating critical habitat, afforded through the section 7(a)(2) consultation process, are minimal because the probability of a Federal nexus for projects on this land is limited in scope and will occur episodically at most. On the other hand, the conservation measures specifically benefitting the northern spotted owl and its habitat are in continuous effect throughout the lands covered by this HCP. Finally, the Service acknowledges the importance of conservation partnerships with private landowners in achieving the recovery of listed species, such as the northern spotted owl, and recognizes the positive benefits that accrue to conservation through the exclusion of recognized conservation partners from critical habitat. 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 benefits of exclusion of lands covered by the Regli Estate Habitat Conservation Plan outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 484 ac (196 ha) of Regli Estate lands from the designation of critical habitat for the northern spotted owl, as identified in their 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 having a Federal nexus and affecting northern spotted owls in occupied areas, as is the case here, the jeopardy standard of section 7 of the Act, coupled with protection provided under the terms of the 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 proposed critical habitat units or subunits that are within the Regli Estate Habitat Conservation Plan boundary totaling 484 ac (196 ha).

Terra Springs Habitat Conservation Plan

In this final designation, the Secretary has exercised his authority to exclude 39 ac (16 ha) of lands from critical habitat, under section 4(b)(2) of the Act, that are covered under the Terra Springs LLC HCP in subunit 6 of the Interior California Coast CHU. The permit issued in association with this HCP (noticed October 29, 2002 (67 FR 65998), and issued in 2004) has a term of 30 years and includes a total of 76 ac (31 ha) of covered land second-growth forest lands in Napa County, California. This HCP addresses the effects of timber harvest and conversion of forest lands to vineyard and subsequent maintenance, in perpetuity, of suitable northern

spotted owl habitat characteristics on the remaining 39 ac (16 ha) of mature (80–120 years) Douglas-fir forest on covered lands. The HCP provides a conservation program to minimize and mitigate for the covered activities, including a deed restriction that requires management in perpetuity of 39 ac (16 ha) of the property as nesting and roosting quality habitat for the northern spotted owl. In addition to mitigation, the Plan also includes measures to minimize take of the northern spotted owl.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited since there is little likelihood of an action that will involve Federal funding, authorization, or implementation. In addition, since the lands under the HCP in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. The additional conservation that could be attained through the supplemental adverse modification analysis for critical habitat under section 7 would not be significant because this HCP incorporates measures that specifically benefit the northern spotted owl and its habitat. The HCP incorporates protections and management objectives for the northern spotted owl designed to maintain suitable habitat on the property for the species in perpetuity. The conservation measures identified within the HCP seek to achieve conservation goals for northern spotted owls and their habitat that can be of greater conservation benefit than the designation of critical habitat, which does not require specific, proactive actions. HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs, often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers similar extensive benefits as an HCP. In addition, the protections of critical habitat come into play only in the event of a Federal action, whereas the protections of an HCP are in continuous force.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. The landowners in this case are aware of the needs of the species through the development of their HCP, in which they have agreed to take measures to protect the northern spotted owl and its habitat. Any additional educational and information benefits that might arise from critical habitat designation have been largely accomplished through the public review of and comment on the HCP and the associated permit. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was also preceded by outreach efforts and public comment opportunities. In addition, the rulemaking process associated with critical habitat designation included several opportunities for public comment, and we also held multiple public information meetings across the range of the species. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the current status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to use that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 39 ac (16 ha) of lands currently managed under the HCP are substantial. We have developed a conservation partnership with Terra Springs through the development and implementation of the HCP.

Excluding the approximately 39 ac (16 ha) owned and managed by Terra Springs, LLC from critical habitat designation will sustain and enhance the working relationship between the Service and the company. The willingness of the company to work with the Service to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. We consider this voluntary partnership in conservation important in maintaining our ability to implement recovery actions, such as habitat protection and restoration, and beneficial management actions for species on non-Federal lands. The Service recognizes the importance of non-Federal landowners in contributing to the conservation and recovery of listed species, and seeks to maintain and promote these partnerships for the benefit of all threatened and endangered species.

We consider conservation partnerships with private landowners to represent an integral component of recovery for listed species. However, the designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Terra Springs HCP are designated as critical habitat, it would likely have a chilling effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans) that we would be unable to accomplish otherwise. We therefore consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We reviewed and evaluated the exclusion of approximately 39 ac (16 ha) of land owned and managed by Terra Springs, LLC from our designation of critical habitat. The benefits of including these lands in the designation are relatively small. Because one of the primary threats to the northern spotted owl is habitat loss and degradation, the consultation process under section 7 of the Act for projects with a Federal nexus

in areas occupied by the species, such as is the case here, will, in evaluating effects to the northern spotted owl, evaluate the effects of the action on the conservation or function of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the HCP provides habitat conservation measures that apply for the benefit of northern spotted owl, and remains in place regardless of critical habitat. These measures will not only prevent the degradation of essential features of the northern spotted owl, but will preserve some suitable northern spotted owl habitat in perpetuity.

We have determined that the preservation of our conservation partnership with Terra Springs, in conjunction with the conservation measures provided by the HCP, provide a greater benefit than would the regulatory and educational benefits of critical habitat designation. The additional regulatory benefits of designating critical habitat, afforded through the section 7(a)(2) consultation process, are minimal because there is little probability of a Federal nexus on these private lands. On the other hand, the conservation measures specifically benefitting the northern spotted owl and its habitat are in continuous effect throughout the lands covered by this HCP. Finally, the Service acknowledges the importance of conservation partnerships with private landowners in achieving the recovery of listed species, such as the northern spotted owl, and recognizes the positive benefits that accrue to conservation through the exclusion of recognized conservation partners from critical habitat. 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 benefits of exclusion of lands covered by the Terra Springs Habitat Conservation Plan outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 39 ac (16 ha) from the designation of critical habitat for the northern spotted owl of lands owned and managed by Terra Springs, LLC, as identified in their 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 having a Federal nexus and affecting northern spotted owls in occupied areas, as is the case here, the jeopardy standard of section 7 of the Act, coupled with protection provided under the terms of the 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 proposed critical habitat units or subunits that are within the Terra Springs, LLC Habitat Conservation Plan boundary totaling 76 ac (31 ha).

State of Oregon

No lands covered under an HCP in the State of Oregon are designated as critical habitat.

State of Washington

Cedar River Watershed Habitat Conservation Plan in King County, Washington

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, totaling approximately 3,244 ac (1,313 ha) that are covered under the Cedar River Watershed HCP (Cedar River HCP) in King County, Washington. The permit associated with this HCP was noticed in the **Federal Register** on December 11, 1998 (63 FR 68469), and issued on April 21, 2000. The term of the permit and HCP is 50 years. The plan was prepared to address declining populations of salmon, steelhead, bull trout, northern spotted owl, marbled murrelet, and 76 unlisted species of fish and wildlife in the Cedar River watershed. The City of Seattle's HCP covers 90,535 ac (36,368 ha) of City-owned land in the upper Cedar River watershed and the City's water supply and hydroelectric operations on the Cedar River, which flows into Lake Washington. Participants involved in the development and implementation of the Cedar River HCP include the City of Seattle, Seattle City Light, Seattle Public Utilities, Washington Department of Fish and Wildlife, Washington Department of Ecology, Muckelshoot Indian Tribe, King County, and several conservation-oriented nongovernmental organizations.

At the time the HCP was approved, the 90,535 ac (36,638 ha) in upper Cedar River Watershed, owned and managed by the City of Seattle as a closed-watershed, consisted of approximately 13,889 ac (5,620 ha) of old growth forest (190–800 years old), 91 ac (37 ha) of late-successional (120–189 years old), 1,074 ac (435 ha) of mature forests (80–119 years old), and 70,223 ac (28,418 ha) of second growth forests (greater than 80 years old). Conservation strategies in the HCP for covered lands are centered around protecting and preserving the remaining old growth, late-successional, and mature forest habitats; accelerating the development of mature forest characteristics in the existing second growth forests though a combination of riparian, ecological, and restoration thinnings; and minimizing human disturbance through road closures and road abandonments, elimination of commercial harvest on covered lands, and continued management of the covered lands as a closed municipal watershed.

At the time the HCP was approved, only two northern spotted owl reproductive site centers and two single-resident site centers had been identified on covered lands. In addition, two reproductive site enters located outside the watershed boundary had owl circles that partially overlap the Cedar River watershed. The boundaries of all known reproductive site centers are protected by the City of Seattle's commitment to conservation strategies and species-specific measures in the Cedar River HCP. The objectives of the northern spotted owl conservation strategy are to avoid, minimize, and mitigate impacts of watershed activities to northern spotted owls, provide a long-term net benefit to the northern spotted owl, and contribute to the owl's recovery. These objectives are to be accomplished by protecting existing habitat; enhancing and recruiting significantly more nesting, roosting, foraging, and dispersal habitat in the Cedar River watershed; and protecting nest sites, reproductive pairs, and their offspring from disturbances. In addition, the City of Seattle committed to implementing a monitoring and research program that will be used to help determine if the conservation strategies for the northern spotted owl achieve their conservation objectives and support the adaptive management program designed to provide a means by which conservation measures could be altered to meet these conservation objectives. Elements of the monitoring and research program important to northern spotted owls include a project to improve the City's forest habitat inventory and data base, a project to track changes in forest habitat characteristics, a study to classify old-growth types in the Cedar River

watershed, and projects to monitor all forest restoration efforts.

Benefits of Inclusion—We find that there is minimal benefit from designating critical habitat for the northern spotted owl within the Cedar River HCP because, as explained above, these covered lands are already managed for the conservation of the species over the term of the HCP. As discussed above, the inclusion of these covered lands as critical habitat could provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands would not likely result in the destruction or adverse modification of critical habitat. However, this additional analysis to determine whether a Federal action is likely to result in destruction or adverse modification of critical habitat is not likely to be significant because these covered lands are not under Federal ownership making the application of section 7 less likely, and we are not aware of any other potential Federal nexus. In addition, any Federal agency proposing a Federal action on these covered lands would have to consider the conservation restrictions on these lands and incorporate measures necessary to ensure the conservation of these resources, thereby reducing any incremental benefit critical habitat may have.

The incremental benefit from designating critical habitat for the northern spotted owl within the Cedar River HCP is further minimized because, as explained above, these covered lands are already managed for the conservation of the species over the term of the HCP and the conservation measures provided by the HCP will provide greater protection to northern spotted owl habitat than the designation of critical habitat.

The Cedar River HCP provides for the needs of the northern spotted owl by protecting and preserving thousands of acres of existing suitable northern spotted owl habitat in the Cedar River watershed, committing to the enhancement and recruitment of approximately 70,000 ac (28,328 ha) of additional habitat over the term of the Cedar River HCP, and implementing species-specific conservation measures designed to avoid and minimize impacts to northern spotted owls. Monitoring and research and adaptive management programs were developed to track HCP progress over the term of the permit and provide critical feedback on management actions that allow for management changes in response to this feedback or to larger trends outside the HCP boundaries such as climate change. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, the additional educational and informational benefits that might arise from critical habitat designation here have been largely accomplished through the public review and comment of the HCP, Environmental Impact Statement, and Implementation Agreement. Through these processes, this HCP included intensive public involvement.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, in Washington, State forest practices regulations provide an exemption for review for lands managed under an HCP. Thus, even should the State respond to designation of critical habitat by instituting additional protections, the HCP will not be subject to those protections as the species is considered already addressed, and therefore no additional benefit would accrue through State regulations.

Benefits of Exclusion—Compared to the minimal benefits of inclusion of this area in critical habitat, the benefits of excluding from designated critical habitat the approximately 3,244 ac (1,313 ha) of lands currently managed under the HCP are more substantial.

HCP conservation measures that provide a benefit to the northern spotted owl and its habitat have been implemented continuously since 1998 on all covered lands owned and managed under the Cedar River HCP. Excluding the lands managed under the Cedar River HCP from critical habitat designation will sustain and enhance the working relationship between the Service and the permit holder.

Excluding lands within HCPs from critical habitat designation can also facilitate our ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and/or address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Benefits of Exclusion Outweigh the Benefits of Inclusion—In summary, we determine that the benefits of excluding the Cedar River HCP from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat. The regulatory and informational benefits of inclusion will be minimal. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the additional benefits of inclusion on the section 7 process are relatively unlikely because a Federal nexus on these relatively remote forest lands would rarely occur. If one were to occur, it would most likely be a linear project such as a powerline, pipeline, or transportation. In the last 12 years of the permit, none have occurred.

In addition, the management strategies of the Cedar River HCP are designed to protect and enhance habitat for the northern spotted owl. The Cedar River HCP includes species-specific

avoidance and minimization measures, monitoring requirements to track success and ensure proper implementation, and forest management practices and habitat conservation objectives that benefit the northern spotted owl and its habitat which further minimizes the benefits that would be provided as a result of a critical habitat designation.

On the other hand, the benefit of excluding these lands is that it will help us maintain an important and successful conservation partnership with a major city, and may encourage others to join in conservation partnerships as well. For these reasons, we have determined that the benefits of exclusion outweigh the benefits of inclusion in this case.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 3,244 ac (1,313 ha) of lands covered under the Cedar River HCP will not result in extinction of the northern spotted owl because the Cedar River HCP provides for the needs of the northern spotted owl by protecting and preserving thousands of acres of existing suitable northern spotted owl habitat in the Cedar River watershed, committing to the enhancement and recruitment of additional habitat over the term of the Cedar River HCP, and implementing species-specific conservation measures designed to avoid and minimize impacts to northern spotted owls. In addition, monitoring, research, and adaptive management programs were developed to track HCP progress and provide critical feedback on management actions that allow for management changes in response. Further, for projects having a Federal nexus and affecting northern spotted owls in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the Cedar River HCP, would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. The species is also protected from take under section 9 of the Act. For these reasons we find that exclusion of these lands within the Cedar River HCP will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are within the Cedar River Watershed HCP boundary totaling about 3,244 ac (1,313 ha).

Green River Water Supply Operations and Watershed Protection Habitat Conservation Plan

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, totaling approximately 3,162 ac (1,280 ha) that are covered under Tacoma Water's Green River Water Supply Operations and Watershed Protection HCP (Green River HCP) in the State of Washington. The permit associated with this HCP was noticed in the **Federal Register** on August 21, 1998 (63 FR 44918), and issued on July 6, 2001. The term of the permit and HCP is 50 years. The Green River HCP addresses upstream and downstream fish passage issues, flows in the middle and lower Green River, and timber and watershed-management activities on 15,843 ac (6,411 ha) of Tacoma-owned land in the upper Green River Watershed. The Green River HCP covers 32 species of fish and wildlife, including the northern spotted owl and 10 other listed species, under an agreement designed to allow the continuation of water-supply operations on the Green River, forest management practice in the upper Green River watershed, and aquatic restoration and enhancement activities. The plan also provides for fish passage into and out of the upper Green River Watershed.

The City of Tacoma manages approximately 15,843 ac (6,411 ha) of covered lands in the upper Green River watershed for water quality benefits and timber harvest. The Green River HCP divides Tacoma-owned lands into three distinct management zones, and contains a series of conservation measures that address upland forest management, riparian buffers, and avoid or minimize impacts to covered species. Each management zone has specific goals and objectives that focus on water quality, fish and wildlife, and timber management. The Natural Zone contains 5,850 ac (2,370 ha). In this zone, Tacoma is committed to conduct no timber harvest management except for danger tree removal. The long-term goal is to allow these timber stands to develop into late-seral (greater than 155 years old) and mature timber (106–155 years old) conditions through natural succession. The Conservation Zone contains 5,180 ac (2,080 ha) of covered lands. In this zone, Tacoma will conduct no even-aged harvest in conifer stands and no harvest of any form in stands over 100 years old (except for danger tree removal). Tacoma may conduct uneven-aged harvest in stands less than 100 years old to improve stand condition. Once stands reach 100 years of age, no timber harvest will be conducted and stands will be allowed to develop through natural succession. The Commercial Zone contains 3,858 ac (1,561 ha) of covered lands. Stands in this zone will be managed sustainably for timber production on a 70-year rotation. A considerable area of late-seral and mature forest capable of supporting nesting, roosting, foraging, and dispersal of northern spotted owls is expected to develop over time in the Natural Zone, Conservation Zone, and to a lesser extent, riparian buffers. Over the term of the permit, the amount of late-seral forest is expect to increase from 41 ac (17 ha) to 292 ac (118 ha), and the amount of mature forest is expected to increase from 268 ac (108 ha) to 4,027 ac (1,630 ha).

At the time the permit was approved, there were 16 known northern spotted owl activity centers within 1.8 miles of covered lands. Fifteen were reproductive site centers and one was a single-resident site center. Only the single-resident site center was actually located on covered lands. Species-specific conservation measures are designed to protect habitat around known nest sites and minimize disturbance during the nesting season.

Benefits of Inclusion—We find that there is minimal benefit from designating critical habitat for the northern spotted owl within the Green River HCP because, as explained above, these covered lands are already managed for the conservation of the species over the term of the HCP. As discussed above the inclusion of these covered lands as critical habitat could provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands would not likely result in the destruction or adverse modification of critical habitat. However, this additional analysis to determine whether a Federal action is likely to result in the destruction or adverse modification of critical habitat is not likely to be significant not only because a Federal nexus is unlikely (these covered lands are not under Federal ownership), any Federal agency proposing a Federal action on these covered lands would likely consider the conservation value of these lands and take the necessary steps to avoid adverse effects to northern spotted owl habitat. If a Federal nexus did occur, it would most likely be in the context of a linear project such as a powerline,

pipeline, or transportation project. In the last 11 years of the permit, none have occurred.

Another factor that minimizes any regulatory benefits that might result from critical habitat designation is that the Green River HCP already provides for the needs of the northern spotted owl by protecting and preserving acres of existing suitable northern spotted owl habitat in the Green River watershed, committing to the enhancement and recruitment of additional area of suitable habitat over the term of the Green River HCP, and implementing species-specific conservation measures designed to avoid and minimize impacts to northern spotted owls. Monitoring was developed to track HCP progress over the term of the permit and provide critical feedback on management actions, which allow for management changes in response to this feedback or to larger trends outside the HCP boundaries such as climate change. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measurable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, the additional educational and informational benefits that might arise from critical habitat designation here have been largely accomplished through the public review and comment on the HCP, Environmental Impact Statement, and Implementation Agreement.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, in Washington, State forest practices regulations provide an exemption for review for lands managed under an HCP. Thus, even should the State respond to designation of critical habitat by instituting additional protections, the HCP will not be subject to those protections as the species is considered already addressed, and therefore no additional benefit would accrue through State regulations.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 3,162 ac (1,280 ha) of lands currently managed under the HCP are substantial. HCP conservation measures that provide a benefit to the northern spotted owl and its habitat have been implemented continuously since 2001 on all covered lands owned and managed under the Green River HCP. Excluding the lands managed under the Green River HCP from critical habitat designation will sustain and enhance the working relationship between the Service and the permit holder.

Excluding lands within HCPs from critical habitat designation may also support our continued ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly HCPs address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Benefits of Exclusion Outweigh the Benefits of Inclusion—In summary, we determine that the benefits of excluding the Green River HCP from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat. The regulatory and informational benefits of inclusion will be minimal. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, any benefits from the section 7 process are unlikely because Federal projects would be rare on these relatively remote forest lands. The regulatory benefits of inclusion are even more minimal in light of the fact that the Green River HCP includes species-specific avoidance and minimization measures, monitoring requirements to track success and ensure proper implementation, and forest management practices and habitat conservation objectives that benefit the northern spotted owl and its habitat, which exceeds any conservation value provided as a result of a critical habitat designation. On the other hand, the benefit of excluding these lands is that it will help us maintain an important and successful conservation partnership with a major city, and may encourage others to join in conservation partnerships as well. Therefore, we find that the benefits of exclusion of the lands covered by Green River HCP outweigh the benefits of inclusion.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 3,162 ac (1,280 ha) of lands covered under the Green River HCP will not result in extinction of the northern spotted owl because the Green River HCP provides for the needs of the northern spotted owl by protecting and preserving acres of existing suitable northern spotted owl habitat in the Green River watershed, committing to the enhancement and recruitment of additional area of suitable habitat over the term of the Green River HCP, and implementing species-specific conservation measures designed to avoid and minimize impacts to northern spotted owls. Monitoring was developed to track HCP progress over the term of the permit and provide critical feedback on management actions, which allow for management changes in response to this feedback or to larger trends outside the HCP boundaries such as climate change. The conservation measures provided by this HCP have been implemented continuously since 1998 on all covered lands owned and managed under the Green River HCP. Further, for projects having a Federal nexus and affecting northern spotted owls in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the Green River HCP, would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. The species is also protected by ESA section 9, which prohibits the take of listed

species. For these reasons, we find that exclusion of these lands within the Green River HCP will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are within the Green River HCP boundary totaling about 3,162 ac (1,280 ha).

Plum Creek Timber Central Cascades Habitat Conservation Plan

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, totaling about 33,144 ac (13,413 ha) that are covered under the Plum Creek Timber Central Cascades HCP (Plum Creek HCP) in the State of Washington. The permit associated with the Plum Creek HCP was first noticed in the **Federal Register** on November 17, 1995 (60 FR 57722), issued on June 27, 1996, and later modified in December of 1999 as noticed on February 10, 2000 (65 FR 6590). The permit has a term of 50 years (with an option to extend to 100 years if certain conditions are met) and currently covers 84,600 ac (34,236 ha) of lands in the Interstate-90 corridor in King and Kittitas Counties, Washington. The HCP includes over 315 species of fish and wildlife, including the northern spotted owl and 7 other listed species. The plan addresses forest-management activities across an area of industrial timberlands in Washington's central Cascade Mountains, and provides for management of the northern spotted owl based on landscape conditions tailored to the guidelines provided by the NWFP by providing additional protection to northern spotted owl sites near late-successional reserves. Wildlife trees are retained in buffers of natural features (e.g., caves, wetlands, springs, cliffs, talus slopes) and streams, as well as scattered and clumped within harvest units. The HCP also requires Plum Creek to maintain and grow nesting, roosting, and foraging habitat as well as habitat that can be used for foraging and dispersal. They are also required to provide forests of various structural stages across all of their HCP ownerships. This commitment of owl habitat and forest stages, in combination with wildlife trees retained within harvest units and stream and landscape-feature buffers will provide a matrix of habitat conditions that complements the owl habitat provided in the Plum Creek HCP and nearby LSRs. Stands containing scattered leave trees following harvest will be expected to become more valuable for northern spotted owls at earlier ages than those harvested using previous methods.

At the time the permit was approved, there were 107 known northern spotted owl activity centers within 1.82 miles of covered lands, which included reproductive site centers, single-resident site centers, and historic sites. A detailed description of each sites history is provided in the HCP and associated technical papers.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands is small unless it is a larger project covering adjacent Federal lands as well, in which case section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species. In addition, although the standards of jeopardy and adverse modification are different, the margin of conservation that could be attained through section 7 would not be significant in light of the benefits already derived from the HCP.

HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs, often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers similar extensive benefits as a HCP. The development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while meeting the needs of the applicant. In this case, substantial information has been developed from the research, monitoring, and surveys conducted under the Plum Creek HCP.

There is minimal incremental benefit from designating critical habitat for the northern spotted owl within the Plum Creek HCP because, as explained above, these covered lands are already managed for the conservation of the species over the term of the HCP and the conservation measures provided by the HCP will provide greater protection to northern spotted owl habitat than the designation of critical habitat, which provides regulatory protections only in the event of a Federal action. The Plum Creek HCP provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat as well as foraging and dispersal habitat over the term of the HCP in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. The HCP also provides for the ability to make ongoing adjustments in a number of forms including active adaptive forest management. The ability to change is crucial to meet new recovery challenges. The Service negotiated this plan with Plum Creek, which contains mandatory permit conditions in the form of HCP commitments, and continues to be involved in its ongoing implementation. The Service conducts compliance monitoring on the covered lands and routinely meets with Plum Creek to discuss ongoing implementation. The HCP contains provisions that address ownership changes and the outcomes expected by the Service. Monitoring was developed to track HCP progress over the term of the permit and provide feedback on management actions. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable.

However, Plum Creek is knowledgeable about the northern spotted owl and the company has made substantial contributions in research and science for the species. The additional educational and informational benefits that might arise from critical habitat designation here have been largely accomplished through the public review and comment of the HCP, Environmental Impact Statement, and Implementation Agreement, as well as the supplemental Environmental Impact Statements associated with the modification of the HCP and the I–90 Land Exchange. Through these processes, this HCP included intensive public involvement. This HCP continues to receive a high degree of scrutiny and study by academics, as well as informational releases to the general public and has resulted in improved understanding by the public. This level of exposure in local newspapers and television stations exceeds the level of education that would come from a designation that would be read by few people in the public. Moreover, the rulemaking process associated with critical habitat designation includes several opportunities for public comment, and thus also provides for public education. Through these outreach opportunities, land owners, State agencies, and local governments have become more aware of the status of and threats to the northern spotted owl and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, in Washington, State forest practices regulations provide an exemption for review for lands managed under an HCP. Thus, even should the State respond to designation of critical habitat by instituting additional protections, the HCP will not be subject to those protections as the species is considered already addressed, and therefore no additional benefit would accrue through State regulations.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 33,144 ac (13,413 ha) of lands currently managed under the HCP are more substantial. The designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the Plum Creek HCP area are designated as critical habitat, it would likely have a negative effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions (such as SHAs, HCPs, and other conservation plans, particularly those that address landscape-level conservation of species and habitats) that we would be unable to accomplish otherwise. This HCP is currently serving as a model for ongoing and future efforts. Due to the high level of visibility in the Interstate-90 corridor and the overlap with recreational lands used by many residents of the Seattle metropolitan area, this HCP received an unusual amount of scrutiny. Because it was one of the first HCPs to address species using a habitat-based approach, it set a high standard for application of the best available science. Plum Creek has been a long-standing partner and advocate for HCPs across the nation. They are viewed as leaders in their industry and as an example in the HCP community. By excluding these lands, we preserve our current private and local conservation partnerships and encourage additional conservation actions in the future.

In addition, exclusion may encourage Plum Creek to engage in further land exchanges or sales of their lands for conservation purposes. This HCP is located in a key landscape between the I–90 and other Federal lands and represents a unique opportunity in maintaining northern spotted owls at the western extreme of the Cascades, which may support dispersal between the Cascades. This HCP contributes meaningfully to the recovery of the northern spotted owl and serves as an example to other industrial companies. Since issuance of the Plum Creek HCP, Plum Creek's ownership has decreased from about 170,000 ac (68,797 ha) to about 81,000 ac (32,780 ha). This decrease is mostly due to land exchanges and sales by Plum Creek for conservation purposes. Conservation sales have been completed on a number of sensitive sites. Plum Creek has worked to find conservation buyers and has responded to requests from agencies and conservation groups. They have sold lands to a various parties using differing funding mechanisms, but sold lands have been transferred to public ownership, primarily the U.S. Forest Service. All of these lands have been placed in conservation status. If lands within the Plum Creek HCP plan areas are designated as critical habitat, it would likely have a negative effect on the willingness of various groups and funding sources to accomplish these conservation sales, and could also negatively affect Plum Creek's willingness to participate in these acquisition processes.

Benefits of Exclusion Outweigh the Benefits of Inclusion—The benefits of including these lands in the designation are small. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the HCP contains provisions for protecting and maintaining northern spotted owl habitat that far exceed the conservation benefits afforded through section 7 consultation. It provides for comprehensive measures applied across a large landscape that will benefit spotted owls. Plum Creek personnel are knowledgeable in the ecology of the northern spotted owl and have contributed to the body of scientific information about the northern spotted owl. In this instance, the regulatory and educational reasons for inclusion have much less benefit than the continued benefit of the HCP, including the educational benefits derived from the HCP.

On the other hand, the benefits of exclusion will continue the positive relationship we currently have with Plum Creek and encourage others to engage in conservation partnerships such as HCPs as well. For these reasons, we determine that the benefits of excluding the Plum Creek Cascades HCP from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 33,144 ac (13,413 ha) of lands covered under the Plum Creek HCP will not result in extinction of the northern spotted owl because the Plum Creek HCP provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl nesting, roosting,

and foraging habitat as well as foraging and dispersal habitat over the term of the HCP in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. Monitoring was developed to track HCP progress over the term of the permit and provide feedback on management actions. The Plum Creek HCP provides for the ability to make ongoing adjustments in a number of forms, including active adaptive forest management. The ability to change is crucial to meet new recovery challenges. The HCP contains provisions that address ownership changes and the outcomes expected by the Service. Further, for projects having a Federal nexus and affecting northern spotted owls in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the Plum Creek HCP, would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. We find that exclusion of these lands within the Plum Creek HCP will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are within the Plum Creek HCP boundary totaling about 33,144 ac (13,413 ha).

Washington State Department of Natural Resources State Lands Habitat Conservation Plan

Washington State lands totaling approximately 225,751 ac (91,358 ha) that are covered and managed under the Washington State Department of Natural Resources State Lands Habitat Conservation Plan (WDNR HCP), are excluded from this critical habitat designation under section 4(b)(2) of the Act. The WDNR HCP covers approximately 1.7 million ac (730,000 ha) of State forest lands within the range of the northern spotted owl in the State of Washington. The majority of the area covered by the HCP is west of the Cascade Crest and includes the Olympic Experimental State Forest. The HCP area on the east side of the Cascade Range includes lands within the range of the northern spotted owl. The permit associated with this HCP, issued January 30, 1997, was noticed in the **Federal Register** on April 5, 1996 (61 FR 15297), has a term of 70 to 100 years, and covers activities primarily associated with commercial forest management, but also includes limited nontimber activities such as some recreational activities. The HCP covers all species, including the northern spotted owl and other listed species.

The HCP addressed multiple species through a combination of strategies. The HCP includes a series of Natural Area Preserves and Natural Resource Conservation Areas. The marbled murrelet is addressed through a combination of steps culminating in the development of a long-term plan to retain and protect important old-forest habitat, which will also benefit the northern spotted owl. Riparian conservation includes buffers on fish-bearing streams as well as substantial buffers on streams and wetlands without fish, and deferring harvest on unstable slopes. Wildlife trees are retained in buffers of natural features (e.g., caves, wetlands, springs, cliffs, talus slopes) and streams, as well as scattered and clumped within harvest units. The HCP also requires WDNR to maintain and grow forests of various structural stages across all of their HCP ownerships. Specifically for northern spotted owls, they have identified portions of the landscape upon which they will manage for nesting, roosting, and foraging (NRF) habitat for northern spotted owls. These areas are known as NRF Management Areas (NRFMAs) and were located to provide demographic support that would strategically complement the NWFP's Late-Successional Reserves as well as those Adaptive Management Areas that have late-successional objectives. The NRFMAs also were situated to help maintain species distribution. Generally, these NRFMAs will be managed so that approximately 50 percent of those lands will develop into NRF habitat for the northern spotted owl over time. Within this 50 percent, certain nest patches containing high-quality nesting habitat are to be retained and grown. Since the HCP was implemented, within the NRFMAs, WDNR has carried out 5,100 ac (2,064 ha) of pre-commercial thinning and 7,800 ac (3,156 ha) of timber harvest specifically configured to enhance northern spotted owl habitat. WDNR's habitat-enhancement activities will continue under the HCP.

Some areas outside of the NRFMAs are managed to provide for dispersal and foraging conditions in 50 percent of the forests in those areas; these were strategically located in landscapes important for connectivity. The Olympic Experimental State Forest is managed to provide for northern spotted owl conservation across all of its lands. Even in areas not specifically managed for northern spotted owls, WDNR has committed to providing a range of forest stages across the landscape to address multiple species. This commitment of forest stages, in combination with wildlife trees retained within harvest units and stream and landscape-feature buffers, will provide a matrix of habitat conditions that will also provide some assistance in conserving northern spotted owls. Stands containing scattered leave trees following harvest will become more valuable for northern spotted owls at earlier ages than those stands harvested using previous methods. Northern Spotted owls across the WDNR HCP are expected to benefit from the combination of these strategies.

At the time the permit was approved, there were approximately 292 northern spotted owl site centers overlapping on WDNR covered lands, including 76 known site centers (excluding historic sites and non-territorial singles). There were approximately 484,717 ac (196,158 ha) of suitable habitat on covered lands, which comprised over 10 percent of all suitable habitat in Washington State at that time.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands is small unless it is a larger project covering adjacent Federal lands as well, in which case section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species. In addition, although the standards of jeopardy and adverse modification are different, in this case, the benefits of applying the latter standard would be minimal in light of the benefits already derived from the HCP.

HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. Funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs, often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands the same benefits as a HCP.

The development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while meeting the needs of the applicant. In this case, substantial information has been developed from the research, monitoring, and surveys conducted under the WDNR HCP.

There is minimal incremental benefit from designating critical habitat for the northern spotted owl within the WDNR HCP because, as explained above, these covered lands are already managed for the conservation of the species over the term of the HCP and the conservation measures provided by the HCP will provide greater protection to northern spotted owl habitat than the designation of critical habitat, which provides regulatory protections only in the event of a Federal action. The WDNR HCP provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat as well as foraging and dispersal habitat over the term of the HCP in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. The HCP also provides for the ability to make ongoing adjustments in a number of forms, including active adaptive forest management. The ability to change is crucial to meet new recovery challenges. The Service continues to be involved in the implementation of this HCP. The Service conducts compliance monitoring on the covered lands and routinely meets with WDNR to discuss ongoing implementation. The HCP contains provisions that address ownership changes and the outcomes expected by the Service. Monitoring was developed to track HCP progress over the term of the permit and provide feedback on management actions. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, WDNR, as the State's natural resource agency, is knowledgeable about the species and has made substantial contributions to our knowledge of the species. In addition the additional educational and informational benefits that might arise from critical habitat designation here have been largely accomplished through the public review and comment of the HCP, Environmental Impact Statement, and Implementation Agreement, as well as the supplemental Environmental Impact Statements associated with the modification of the HCP. This HCP included intensive public involvement and continues to be an example used when discussing HCPs. The HCP is frequently a topic of open and public discussion during meetings of the Washington State Board of Natural Resources, whose meetings are open to the public and frequently televised. This level of exposure in local newspapers and television stations exceeds the level of education that would come from a designation that would be read by few people in the public. Moreover, the rulemaking process associated with critical habitat designation includes several opportunities for public comment, and thus also provides for public education.

Benefits of Exclusion—A benefit of excluding lands within this HCP from critical habitat designation is that it would encourage the State and other parties to continue to work for owl conservation. Since issuance of this HCP, a number of land transactions and land exchanges with the HCP area have occurred. These transactions have included creation of additional Natural Resource Conservation Areas and Natural Area Preserves (both land designations with high degree of protection) and have also included large land exchanges and purchases that have changed the footprint of the HCP. These land-based adjustments have facilitated better management on many important parcels and across larger landscapes than would otherwise have been possible. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on the willingness of various groups and funding sources to accomplish these land-ownership adjustments because of a reluctance to acquire lands designated as critical habitat as well as a reduced willingness on the part of WDNR to accommodate the Services goals. This HCP is located in key landscapes across the State and contributes meaningfully to the recovery of the northern spotted owl.

If lands within the WDNR HCP plan area are designated as critical habitat, it would also likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and/or address landscape-level conservation of species and habitats. This HCP has served as a model for several completed and ongoing HCP efforts, including the Washington State Forest Practices HCP. By excluding these lands, we preserve our current private and local conservation partnerships and encourage additional conservation actions in the future because other parties see our exclusion as a sign that the Service will not impose duplicative regulatory burdens on landowners who have developed an HCP.

HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which in contrast to HCPs often do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers similar extensive benefits as an HCP. The development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while meeting the needs of the applicant. In this case, substantial information has been developed from the research, monitoring, and surveys conducted under the WDNR HCP. Therefore, exclusion is a benefit because it maintains and fosters development of biological information and innovative solutions.

Benefits of Exclusion Outweigh the Benefits of Inclusion—The benefits of including these lands in the designation are small. Because one of the primary

threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the HCP contains provisions for protecting and maintaining northern spotted owl habitat that far exceed the conservation benefits afforded through section 7 consultation. It provides for comprehensive measures applied across a large landscape that will benefit spotted owls. Washington State DNR personnel are extremely knowledgeable regarding the ecology of the northern spotted owl and have contributed to the body of scientific information about the northern spotted owl. In this instance, the regulatory and educational benefits of inclusion have much less benefit than the continued benefit of the HCP including the educational benefits derived from the HCP.

The WDNR HCP provides for significant conservation and management within geographical areas that contain the physical or biological features essential to the conservation of the northern spotted owl and help achieve recovery of this species through the conservation measures of the HCP. Exclusion of these lands from critical habitat will help foster the partnership we have developed with WDNR, through the development and continuing implementation of the HCP. Furthermore, this partnership may aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species.

For these reasons, we determine that the benefits of excluding the WDNR HCP from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 225,751 ac (91,358 ha) of lands covered under the WDNR HCP will not result in extinction of the northern spotted owl. The WDNR HCP protects and preserves landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat as well as foraging and dispersal habitat over the term of the HCP in strategic landscapes, and implements species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. Monitoring was developed to track HCP progress over the term of the permit and provide critical feedback on management actions. Adaptive management provides for responses to this feedback. Further, for projects having a Federal nexus and affecting northern spotted owls in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the WDNR HCP, would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. We find that exclusion of these lands within the WDNR HCP will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are within the WDNR HCP totaling about 225,751 ac (91,358 ha).

West Fork Timber Habitat Conservation Plan

The Service has excluded approximately 5,105 ac (2,066 ha) of lands from final critical habitat designation, under section 4(b)(2) of the Act, that are covered under the West Fork Timber HCP (West Fork HCP) (formerly known as Murray Pacific Corporation) in the West Cascades Central CHU in Washington. The West Fork HCP was the first multispecies HCP on forested lands in the Nation. The permit associated with the West Fork HCP has a term of 100 years and was first issued on September 24, 1993; amended on June 26, 1995; and amended again on October 16, 2001 (66 FR 52638). The HCP includes 53,558 ac (21,674 ha) of commercial timber lands managed as a tree farm in Lewis County, Washington. The HCP is situated between an area of Federal land known as the Mineral Block and the larger block of Federal lands in the Cascades. The HCP was first developed to allow for forest-management activities and provide for the conservation of the northern spotted owl; the amended HCP provides for all species, including six listed species. The HCP is designed to develop and maintain northern spotted owl dispersal habitat across 43 percent of the tree farm, and must also meet quantitative measures of amount and distribution. As a result, total dispersal habitat will more than double in amount, and wide gaps between stands of dispersal habitat will be decreased.

In addition, the West Fork HCP provides for leaving at least 10 percent of the tree farm in reserves for the next 100 years. These reserves will primarily take the form of riparian buffers averaging at least 100 feet (30 m) on each side of all fish-bearing streams, as well as other buffers and set-a-side areas. Other provisions of the HCP are designed to ensure that all forest habitat types and age classes currently on the tree farm, as well as special habitat types such as talus slopes, caves, nest trees, and den sites, are protected or enhanced. Seasonal protection is provided within ¼ mile of an active northern spotted owl nest site.

At the time the permit was approved, there were approximately 4,678 ac (1,893 ha) of suitable habitat in small stands sporadically located, comprising about 8 percent of the ownership. The HCP included 3 resident northern spotted owls and included about 20 percent of the ownership in dispersal habitat.

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands is small unless it was a larger project covering adjacent Federal lands as well, in which case section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species. In addition, although the standards for jeopardy and adverse modification are not the same, the benefits of the section 7 prohibition on adverse modification would be minimal in light of the benefits already derived from the HCP.

HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs ensure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is ensured through the Implementation Agreement. Such assurances are typically not provided by section 7 consultations, which, in contrast to HCPs, usually do not commit the project proponent to long-term, special management practices or protections. Thus, a section 7 consultation typically does not afford the lands it covers

benefits similar to those provided by an HCP. The development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while meeting the needs of the applicant.

There is minimal incremental benefit from designating critical habitat for the northern spotted owl within the West Fork HCP because, as explained above, these covered lands are already managed for the conservation of the species over the term of the HCP and the conservation measures provided by the HCP will provide greater protection to northern spotted owl habitat than the designation of critical habitat, which provides regulatory protections only in the event of a Federal action. The West Fork HCP provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl dispersal habitat over the term of the HCP in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. The HCP also provides for the ability to make ongoing adjustments in a number of forms, including active adaptive forest management. The ability to change is crucial to meet new recovery challenges. The Service continues to be involved in implementation of the HCP. It contains provisions that address ownership changes and the outcomes expected by the Service. Monitoring was developed to track HCP progress over the term of the permit and provide feedback on management actions. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, this landowner is knowledgeable about the species through its implementation of the HCP. In addition the additional educational and informational benefits that might arise from critical habitat designation here have been largely accomplished through the public review and comment of the HCP, Environmental Impact Statement, and Implementation Agreement. Through these processes, this HCP included intensive public involvement. Moreover, the rulemaking process associated with critical habitat designation includes several opportunities for public comment, and thus also provides for public education. Through these outreach opportunities, land owners, State agencies, and local governments have become more aware of the status of and threats to the northern spotted owl and the conservation actions needed for recovery.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, in Washington, State forest practices regulations provide an exemption for review for lands managed under an HCP. Thus, even should the State respond to designation of critical habitat by instituting additional protections, the HCP will not be subject to those protections as the species is considered already addressed, and therefore no additional benefit would accrue through State regulations.

Benefits of Exclusion—Compared to the minimal benefits of inclusion of this area in critical habitat, the benefits of excluding it from designated critical habitat are more substantial.

HCP conservation measures that provide a benefit to the northern spotted owl and its habitat have been implemented continuously since 1993 on all covered lands owned and managed under the HCP. Excluding these lands from critical habitat designation will sustain and enhance the working relationship between the Service and the permit holder.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within the West Fork HCP plan area are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and/or address landscape-level conservation of species and habitats. If excluded, the willingness of the landowner to work with the Service to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. We consider this voluntary partnership in conservation important in maintaining our ability to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species on non-Federal lands.

In summary, the designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of redundant government regulation. If lands within the West Fork HCP area are designated as critical habitat, it would likely have a negative effect on our continued ability to seek new partnerships with future participants can implement conservation actions (such as SHAs, and HCPs) that we would be unable to accomplish otherwise. By excluding these lands, we preserve our current private and local conservation partnerships and encourage additional conservation actions in the future.

Benefits of Exclusion Outweigh the Benefits of Inclusion—The benefits of including these lands in the designation are comparatively small. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or functionality of the habitat for the species regardless of whether critical habitat is designated for these lands. The analytical requirements to support a jeopardy determination on excluded land are similar, but not identical, to the requirements in an analysis for an adverse modification determination on included land. However, the HCP contains provisions for protecting and maintaining northern spotted owl habitat that far exceed the conservation benefits afforded through section 7 consultation. It provides for

comprehensive measures applied across a large landscape that will benefit spotted owls. In this instance, the regulatory and educational benefits of inclusion have much less benefit than the continued benefit of the HCP including the educational benefits derived from the HCP.

The West Fork HCP provides for significant conservation and management within geographical areas that contain the physical or biological features essential to the conservation of the northern spotted owl and help achieve recovery of this species through the conservation measures of the HCP. Exclusion of these lands from critical habitat will help foster the partnership we have developed with West Fork, through the development and continuing implementation of the HCP. Furthermore, this partnership may aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species.

In summary, we determine that the benefits of excluding the West Fork HCP from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 5,105 ac (2,066 ha) of lands covered under the West Fork HCP will not result in extinction of the northern spotted owl because the conservation measures identified within the HCP seek to maintain or surpass current habitat suitability for northern spotted owls. The HCP is designed to develop and maintain northern spotted owl dispersal habitat; as a result, total dispersal habitat will more than double in amount and wide gaps between stands of dispersal habitat will be decreased. In addition, the West Fork HCP provides for reserves for the next 100 years, ensuring that all forest habitat types and age classes currently on the tree farm, as well as special habitat types such as talus slopes, caves, nest trees, and den sites, are protected or enhanced. Seasonal protection is provided for active northern spotted owl nest sites. Further, for projects having a Federal nexus and affecting northern spotted owls in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the West Fork HCP, would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. We find that exclusion of these lands within the West Fork HCP will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are within the West Fork HCP boundary totaling about 5,105 ac (2,066 ha).

Other Conservation Measures or Partnerships

State of California

Mendocino Redwood Company

In this final designation, the Secretary has exercised his authority to exclude lands from critical habitat, under section 4(b)(2) of the Act, owned by The Mendocino Redwood Company (MRC, the company) and totaling approximately 232,584 total ac (94,123 ha) in Unit 3—Redwood Coast, in Mendocino and Sonoma Counties, California. This land is distributed among three critical habitat subunits as described in the following. In subunit RDC–2, we proposed approximately 209,550 ac (84,802 ha) for critical habitat designation. In subunit RDC–3, we proposed approximately 22,733 ac (9,200 ha) for critical habitat designation. In subunit RDC–4, we proposed 301 ac (121 ha) for critical habitat designation. All company lands proposed for designation within these three subunits have been excluded from critical habitat designation under section 4(b)(2) of the Act.

MRC has a long-standing voluntary partnership with the Service to protect the northern spotted owl on MRC lands. MRC initially approached the Service in 1998 to develop a combined habitat conservation plan and a State-level counterpart draft natural communities conservation plan (HCP/NCCP). Knowing that the completion of an HCP/NCCP would take an extended period of time, MRC and the Service worked together to develop a set of interim standards and measures to conserve and protect the northern spotted owl and its habitat, pending the completion of the HCP/NCCP. These written interim standards and measures are detailed and specific and have been incorporated into each of MRC's timber harvest plans since their development. These interim standards and measures are detailed in MRC's January 15, 2010, Northern Spotted Owl Resource Plan/Management Plan (SORP) (MRC 2010, pp. 1–30). The SORP was intended to serve as a bridge document to reduce resource impacts to both the northern spotted owl and its habitat until the completion of the HCP/NCCP. The SORP includes monitoring and survey requirements and northern spotted owl habitat protection measures that are implemented across the landscape. The SORP describes methodologies to locate owls, assess reproductive status, and provide a framework that includes habitat definitions and protections associated with northern spotted owl activity centers which provide measurable standards for habitat conservation. MRC and the Service meet frequently to discuss northern spotted owl study results provided by the company and this information is used by both the Service and MRC to develop measures that conserve the species through an iterative process that will assist in the development of the HCP/NCCP. In reviewing the SORP and monitoring results, we find that the SORP and protective measures therein provide substantial conservation benefits for the northern spotted owl and its habitat at a landscape scale.

The standards and measures described in the SORP are included in the ''Planning Agreement'' (dated August 5, 2009) that MRC entered into with the California Department of Fish and Game (CDFG) for preparation of the NCCP element of the HCP/NCCP. Planning Agreements are mandatory under the California Natural Community Conservation Planning Act, and inasmuch as the northern spotted owl standards and measures are included in MRC's planning agreement, they are mandatory. MRC has revised them when requested by the Service, as part of a voluntary partnership with the Service.

In addition, MRC has two State-level planning documents that are in effect now and which contain substantial long-terms benefits for northern spotted owl habitat. One is the company's 2008 Option A plan, entered into with CALFIRE, which sets sustainable long-term timber harvest levels and controls on standing forest inventory, and the other is the companion 2012 Management Plan, also entered into with CALFIRE, which outlines company-specific management practices used in conjunction with the Option A harvesting program. Together, these documents have enabled the company to maintain its forest certification through the Forest Stewardship Council (FSC) which gives the company access to certain wholesale lumber markets that promote ''green'' certified wood products. The State-level planning documents have also enabled the company to obtain registration through the California Climate Action Registry which is the designated clearinghouse for carbon-credit sellers under California's developing cap-and-trade

program. The company's long-term management direction under Option A (2008) and the Management Plan (2012) is to greatly expand their stock of standing forest inventory, with a near-doubling of that inventory over the next nine decades. While we do not consider here the northern spotted owl conservation measures in the company's proposed HCP in support of 4(b)(2) exclusion, since that plan is not yet finalized, we do note that practically all of the long-term habitat and demographic objectives in the proposed HCP are dependent on the forest inventory trajectory that is established and in effect under Option A and the Management Plan, and are partly dependent on the distribution and array of silvicultural treatments that is specified under the Management Plan. Time intervals, measurable targets, and enforcement mechanisms for forest inventory development are already in place through the State-level forest planning processes, whether or not the proposed HCP is finalized. The company's long term commitment to expanding standing forest inventory is also demonstrated by their status as a seller in the State's emerging carbon credit market. In order to sell carbon credits, the seller has to possess surplus carbon; in forest management terms, the only way to have a continuous supply of surplus carbon is to have a body of inventory that is on a continuous-net-growth trajectory. The 2012 Management Plan also explicitly documents some of the company's internal management direction on the northern spotted owl with regard to the linkages between future forest conditions and owl habitat utilization, direction on the acquisition and analysis of owl breeding site surveys, and future development of northern spotted owl habitat models.

Following are summaries of specific measures in the 2012 Management Plan that will have direct, indirect, near-term and long-term benefits for the northern spotted owl, and which are in effect currently: (1) The company, having inherited a severely depleted forest inventory from the previous owners, has a standing policy to rebuild inventories, which will result in a doubling of total standing volume by the ninth decade of the planning horizon; (2) total harvest levels through the 100-year planning horizon are constrained to a graduating percentage of periodic growth volume, from a current 48 percent to 84 percent in the tenth decade of the plan; (3) a shift in the use of uneven-aged silviculture from a current 65 percent of harvest acres to 99 percent in the fifth decade of the plan; (4) protection policies for unharvested old-growth stands and previously harvested stands containing residual old-growth trees; (5) wildlife tree and snag retention requirements that meet or exceed Service recommendations and exceed current State Forest Practice rules; (6) a minimum forest floor large woody debris (LWD) standard on general forest land of 70 cubic feet per ac (4.9 cubic meter per ha) based on minimum-sized logs 16 in (41 cm) diameter and 10 ft (3.3 m) in length, increasing to 98 cubic feet per ac (6.9 cubic meter per ha) in riparian areas; and (7) a hardwood management policy that maintains a minimum hardwood basal area of 15 square feet per ac (3.4 square m per ha) in mixed conifer-hardwood stands. Each policy outlined above will result in: (a) A long term increase in standing forest biomass per unit of land area; or (b) increased spatial continuity of vegetative types that are suitable northern spotted owl habitat; or (c) retention of specific features such as old-growth trees or stands, and retention of a minimum level of hardwoods, snags, and wildlife trees. All of these policies will either lead to maintenance or enhancement of northern spotted owl habitat suitability or lead to emergence of suitable habitat where it is currently not present, thereby benefiting the conservation of the northern spotted owl and its habitat.

The company has completed a draft of their proposed HCP/NCCP, and the northern spotted owl is one of the covered species in this document. The company has submitted the HCP application to the Service. If the HCP/NCCP is approved and permits issued, the term of the incidental take permit and counterpart State permit would be 80 years. The combined draft Environmental Impact Statement (EIS) and State draft Environmental Impact Report (EIR) is scheduled for issuance in fall of 2012, and a final HCP/NCCP and final EIS/EIR is anticipated in spring or summer, 2013. However, as noted above, we have not taken the proposed HCP/NCCP into account in determining the level of protection currently provided to the northern spotted owl on MRC land, as we have not completed processing the permit application and a final decision has not been made whether it meets issuance criteria. We cite to the development of this HCP/NCCP only in terms of evidence of MRC's commitment to partnering with the Service for the conservation of the northern spotted owl.

Benefits of Inclusion—We find there are minimal benefits to including MRC lands in critical habitat. As discussed above, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited since there is little likelihood of an action that will involve Federal funding, authorization, or implementation. In addition, since the lands under in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. Because one of the primary threats to the northern spotted owl 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 northern spotted owl, evaluate the effects of the action on the conservation or function of the habitat for the species regardless of whether critical habitat is designated for these lands. Although the standards for jeopardy and adverse modification are not the same, the additional conservation that could be attained through the section 7 prohibition on adverse modification analysis would not likely be significant in this case because of the conservation agreements already in place.

Another potential benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners, State and local government agencies, 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 northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, in this case the educational value of critical habitat is limited. As evidenced by their extensive forest management planning, this forestland owner is knowledgeable about the species.

The designation of critical habitat may also indirectly cause State or county jurisdictions to initiate their own additional requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to us that it is unlikely to

impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 232,584 ac (94,123 ha) of lands currently owned by the MRC are substantial. We have created a close partnership with the company through the development of the SORP and the resulting draft HCP/NCCP. The SORP contains provisions that will improve inventory of redwood, Douglas-fir, and other conifers across MRC's ownership and includes measures that will return forest types to those that support the northern spotted owl. In addition, the SORP stipulates a series of actions intended to increase canopy cover and move management of forest stands to uneven-aged management to promote multilayered canopies and protect old growth stands and individual trees with old-growth structural features. The SORP also contain provisions that will result in stands being grown in Watercourse and Lake Protection Zones (WLPZ) that exceed current State Forest Practice requirements and that meet the Service's recommended standards for standing tree basal area and retention of large woody debris in watercourse protection zones. All of these measures are consistent with recommendations from the Service for the conservation of the northern spotted owl, and will afford benefits to the species and its habitat.

Other MRC actions also demonstrate their commitment to the Federal-State-private partnership. The company's Management Plan in connection to their FSC forest certification is already in effect. That Plan has numerous measures within it that the company has been implementing on the ground for several years without any inducement from the cooperating Federal and State agencies. Much of the Management Plan is concerned with harvest scheduling and how the company will remedy its current deficit in standing forest inventory. The major part of that remedy is found in the 10-decade harvesting schedule in the Management Plan, which tightly constrains harvest levels in the early decades of the Plan and relaxes the constraint in later decades. The company has implemented the designed harvest schedule since 2000, which is supported in the certification audit reports of 2005 and 2010. This means that MRC has, in fact, foregone a portion of their potential short-term harvest revenues for nearly 12 years to fulfill a Management Plan that is not under Federal purview. Company policies embodied in the Management Plan will result in (a) a long term increase in standing forest biomass per unit of land area; or (b) increased spatial continuity of vegetative types that are suitable northern spotted owl habitat; or (c) retention of specific features such as old-growth trees/stands, retention of a minimum level of hardwoods, snags, and wildlife trees. All of these policies will either lead to maintenance of northern spotted owl habitat suitability or lead to emergence of suitable habitat where it is currently not present.

Excluding the approximately 232,584 ac (94,123 ha) owned and managed by MRC from critical habitat designation will provides significant benefit in terms of sustaining and enhancing the excellent partnership between the Service and the company, with positive consequences for conservation. The willingness of MRC to voluntarily undertake conservation efforts for the benefit of the northern spotted owl and work with the Service to develop new conservation plans for the species will continue to reinforce those conservation efforts and our partnership, which contribute toward achieving recovery of the northern spotted owl. We consider this voluntary partnership in conservation vital to our understanding of the northern spotted owl status of species on MRC lands and in the redwood region, and necessary for us to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species.

The designation of critical habitat could have an unintended negative effect on our relationship with non-Federal landowners due to the perceived imposition of government regulation. If lands within the area managed by MRC for the benefit of the northern spotted owl are designated as critical habitat, it could have a chilling effect on our continued ability to seek new partnerships with future participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement various conservation actions (such as SHAs, HCPs, and other conservation plans, particularly large, regional Conservation Plans that involve numerous participants and/or address landscape-level conservation of species and habitats) that we would be unable to accomplish otherwise. In addition, MRC serves as a model of voluntary conservation by a private landowner, and may aid in fostering future voluntary conservation efforts by other parties in other locations for the benefit of listed species. We consider the positive effect of excluding proven conservation partners from critical habitat to be a significant benefit of exclusion.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—We have reviewed and evaluated the exclusion of approximately 232,584 ac (94,123 ha) of land owned and managed by MRC from the critical habitat designation. The benefits of including these lands in the designation are comparatively small, since the habitat on the covered lands is already being monitored and managed under the current Management Plan and the Timber Management Plan to improve the habitat elements that are equivalent to the physical or biological features that are outlined in this critical habitat rule. We therefore anticipate little, if any, additional protections through application of the section 7 prohibition on adverse modification due to the designation of critical habitat on these lands.

The potential educational benefits of inclusion are also limited. The company has an active monitoring program on over 150 northern spotted owl activity sites and is making increasing contributions to our knowledge of the species through focused research. In addition, there is a growing local constituency for current land management direction as a result of the company's outreach efforts in the form of public informational presentations and tours of the property. In this instance, any potential educational benefits of inclusion would have much less practical effect than any of the scientific and informational activities that the company has initiated to date.

In contrast, the benefits derived from excluding this ownership and enhancing our private lands partnership with MRC are significant. We have developed a solid working relationship with MRC, and expect this beneficial conservation partnership to continue. The benefits of this partnership are significant, because MRC has demonstrated that its actions will contribute substantially to the conservation of the northern spotted owl and its habitat and influence long-term management outcomes across the entire ownership. We noted the positive conservation benefits that accrue from exclusion from critical habitat, including relief from perceived potentially duplicative regulatory burden and the increased potential of pursuing additional conservation agreements with other private landowners. As discussed above, MRC

has developed a long-standing practice of managing its lands in a sustainable nature that benefits the northern spotted owl and its habitat. We also discussed the long-term value of the partnership with MRC, and evidence of the company's commitment to that partnership through voluntary implementation and coordination of conservation actions. We will not repeat that discussion here, but point to it as the strongest among all factors we considered in the weighing of the benefits of exclusion against the benefits of inclusion.

We have determined that the additional regulatory benefits of designating critical habitat, afforded through the section 7(a)(2) consultation process, are minimal because of limited Federal nexus and because conservation measures specifically benefitting the northern spotted owl and its habitat are in place as a result of our partnership with the company and as demonstrated by the provisions of the SORP and other planning documents, as discussed above. The potential educational and informational benefits of critical habitat designation on lands containing the physical or biological features essential to the conservation of the northern spotted owl would be minimal, because MRC is making substantial contributions to our understanding of the ecology of the northern spotted owl and its habitats in the redwood region, and continues to disseminate useful information through public education events. 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 benefits of exclusion of lands owned by the MRC outweigh the benefits of designating these areas as critical habitat.

Exclusion Will Not Result in Extinction of the Species—We have determined that the exclusion of 232,584 ac (94,123 ha) from the designation of critical habitat for the northern spotted owl on lands owned and managed by MRC will not result in extinction of the species. Conservation efforts that are currently in effect through the SORP (and not taking into account the draft HCP/NCCP) will adequately protect the geographical areas containing the physical or biological features essential to the conservation of the species. For projects having a Federal nexus and affecting northern spotted owls in occupied areas, as is the case here, the jeopardy standard of section 7 of the Act, coupled with current land management measures that are not under Federal purview, 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 proposed critical habitat units or subunits that are within the Mendocino Redwood Company ownership boundary totaling 232,854 ac (92,123 ha).

State of Washington

Scofield Corporation Deed Restriction (Formerly Habitat Conservation Plan)

In this final designation, the Secretary has exercised his authority to exclude 40 ac (16 ha) of lands from critical habitat, under section 4(b)(2) of the Act, that are covered under the Scofield Corporation Deed Restriction in the East Cascades North CHU. A incidental take permit based on an HCP, was issued to Scofield Corporation in 1996 (noticed February 20, 1996 (61 FR 6381), issued April 3, 1996). The permit had a duration for only one year, but as provided in the permit terms, the lands under this HCP are now covered by a Deed Restriction for those lands in perpetuity. This HCP and deed restriction include 40 ac (16 ha) of forest lands in Chelan County, Washington. The HCP-covered forest-management activities and the associated incidental take permit included only the northern spotted owl. The HCP provided for mitigation and minimization measures by retaining a buffer of intact habitat, implementing selective timber harvest practices, and placing a perpetual deed restriction on the property permanently prohibiting further timber harvest or tree removal except with the express written consent of the Service. These measures were designed to ensure the retention of some northern spotted owl habitat and approximately 72 percent of the total number of trees after harvest.

At the time the permit was approved, the HCP-covered lands included a single northern spotted owl site with most of its habitat on adjacent Federal lands. The amount of habitat was low, due to natural eastside Cascades characteristics and recent fire. Approximately 55 percent of the mature trees in the 40-acre project area were allowed to be removed, which in the short term further reduced the availability of potential nesting, roosting, or foraging sites for northern spotted owls. However, the adverse effects on this northern spotted owl pair due to loss of habitat was likely low, because the habitat was marginal Type C (young forest marginal) at best, and surveys in the project area suggested low use by northern spotted owls. In addition, the no-harvest buffer along the highway ensured that is less than 40 ac (16 ha) was affected by the action, which is a small portion of the suitable habitat that is available for use by northern spotted owls within the median home range of that site as well as the eastern Cascades.

Under the HCP, about 55 percent of the mature trees and 28 percent of the total number of trees in the project area were allowed to be harvested. Selective harvest resulted in retention of different size and age classes of trees to contribute to stand structure and species diversity, important components to northern spotted owl habitat. Thinning the stand will allow younger age-class trees to grow, and continue to contribute to the multilayer structure of the stand. Since the project area is being allowed to grow and develop into perpetuity, suitable northern spotted owl habitat will be available in the future. This potential habitat will complement habitat that is likely to occur on adjacent national forest lands being managed as late-successional forest. In the long-term, the potential for the project area to become northern spotted owl habitat and remain in that condition is substantially greater than it would have been without the HCP. In addition, the Deed Restriction identified in the land contract provides for the permanent protection of this habitat.

Benefits of Inclusion—We find that there is minimal benefit from designating critical habitat for the northern spotted owl within the Scofield Deed Restriction because, as explained above, these lands are already managed for the conservation of the species under the deed restrictions. Section 7 is unlikely to provide additional regulatory protection, not only because Federal actions on this small 40-acre parcel are unlikely, but also because any such Federal action would have to be consistent with the Deed Restriction. Thus the existence of this Deed Restriction reduces any incremental benefits that may be provided by section 7. The Deed Restriction provides for the needs of the northern spotted owl by providing northern spotted owl dispersal habitat and improving conditions. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections. In addition, the conservation measures identified within the Deed Restriction seek to achieve conservation goals for northern spotted owls and their habitat, and thus can be of greater conservation benefit than the

designation of critical habitat, which does not require specific management actions.

A potential 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. However, the additional educational and informational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the HCP/Environmental Assessment, as well as the Implementation Agreement. In addition, through the Deed Restriction, the current landowner and any future owner are made fully aware of the needs of the northern spotted owl on this parcel.

Benefits of Exclusion—A benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. In particular, if lands within the Scofield Corporation Deed Restriction area are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs with smaller landowners who occupy key landscapes. It could be perceived as adding redundant Federal regulation on top of the HCP's requirement to protect the land in perpetuity. By excluding these lands, we may encourage additional conservation actions in the future.

Benefits of Exclusion Outweigh the Benefits of Inclusion—In summary, we determine that the benefits of excluding the Scofield Corporation lands subject to the Deed Restriction from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat. We find that including this area in the designation would result in minimal, if any, additional benefits to the northern spotted owl, as explained above. Excluding this parcel from critical habitat could result in real benefits by encouraging other small landowners to participate in northern spotted owl conservation efforts by demonstrating that we will not impose redundant regulatory burdens when they undertake meaningful conservation efforts. The management strategies of the Scofield Deed Restriction are designed to maintain and enhance habitat for the northern spotted owl. The Scofield Deed Restriction includes forest-management practices and habitat conservation objectives that benefit the northern spotted owl and its habitat, which exceeds any conservation value provided as a result of a critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 40 ac (16 ha) of lands covered under the Scofield Deed Restriction will not result in extinction of the northern spotted owl because it provides northern spotted owl dispersal habitat and improves habitat conditions, and it the possibility for the project area to become northern spotted owl habitat and remain in that condition is substantially greater than without the HCP. Further, the protection provided by the Scofield Deed Restriction would provide a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. We find that exclusion of these lands within the Scofield Deed Restriction will not result in extinction of the northern spotted owl. 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 proposed critical habitat units or subunits that are covered by the Scofield Corporation Deed Restriction totaling about 40 ac (16 ha).

Exclusion of Private Lands

State of California

Our proposed designation included 123,348 ac (49,917 ha) of privately-owned lands without existing Federal conservation agreements in the State of California that we identified as critical habitat for the northern spotted owl.

Forest management and forest practices on private lands in California, including harvesting for forest products or converting land to another use are regulated by the State under Division 4 of the Public Resources Code, and in accordance with the California Forest Practice Rules (California Code of Regulations, (CCR) Title 14, Sections 895–1115). Under this framework, the California Department of Forestry and Fire Protection (CALFIRE) is the designated authority on forest management and forest practices on private lands in California.

All private land timber harvesting in California must be conducted in accordance with a site-specific timber harvest plan (THP) that is submitted by the owner and is subject to administrative approval by CALFIRE. The THP must be prepared by a State-registered professional forester, and must contain site-specific details on the quantity of timber involved, where and how it will be harvested, and the steps that will be taken to mitigate potential environmental damage. The THP and CALFIRE's review process are recognized as the functional equivalent to the environmental review processes required under the California Environmental Quality Act of 1970 (CEQA). The policy of the State with regard to the northern spotted owl can be characterized as one of take-avoidance. The Director of CALFIRE is not authorized to approve any proposed THP that would result in take of a federally-listed species, including the northern spotted owl unless that taking is authorized under a Federal Incidental Take Permit (review process is outlined in 14 CCR 919.9 and 919.10). This latter point creates an incentive for private landowners to enter into Federal safe harbor agreements or habitat conservation plans. CALFIRE also regulates the conversion permitting process in which private forest and woodland can be converted to agricultural uses (in contrast, conversions of forest and woodlands to residential, commercial, and industrial uses are evaluated and permitted under local land use planning authorities).

Benefits of Inclusion—We find there are minimal benefits to including these lands in critical habitat. As discussed above, the principal benefit of including an area in critical habitat is the requirement that Federal agencies consult with the Service under section 7(a)(2) of the Act 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. Section 7(a)(2) also requires that Federal agencies must consult with us on actions that may affect a listed species and refrain from undertaking actions likely to jeopardize the continued existence of such species.

Our Final Economic Analysis (IEC 2012b) concludes that critical habitat designation for the northern spotted owl is unlikely to directly affect timber harvests on private lands in California because of the low likelihood that such harvests would be simultaneously connected to a Federal permitting or funding action. Without a pending Federal action, there is no basis for initiating a consultation process under section 7 of the Act. In northern California, the Service has seen very few section 7 actions resulting from Federal permitting or funding activity on private

lands. The U.S. Army Corps of Engineers (Corps) through the U.S. Environmental Protection Agency (EPA) are the Federal agencies responsible for regulating section 404 of the Clean Water Act, which deals with discharge of dredged or fill material into waters of the United States. In the areas identified as critical habitat for the northern spotted owl the Corps has not taken jurisdiction over activities associated with stream alteration or fill and has deferred to the State of California for regulating these activities. As a result many proposed actions involving water quality issues and stream disturbance are not referred to the Service for section 7 consultation. The majority of the water quality permitting actions in California are now administered by the California Department of Fish and Game (CDFG) and by Regional Water Quality Control Boards. Water quality permit reviews by the Corps are very uncommon. When Federal consultation does occur, the affected areas are typically limited to streams or roadways adjacent to streams and thus in areas not considered habitat for the northern spotted owl. CALFIRE has indicated (in its correspondence of July 6, 2012) that it has no plans to enact additional requirements for protection of the northern spotted owl in response to a possible critical habitat designation of private lands in the State.

We, therefore, conclude that the requirement that permitting and funding agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species because the possibility of a Federal nexus for a project on these lands that might trigger such consultation is limited (there is little likelihood of an action that will involve Federal funding, authorization, or implementation). In addition, since the lands in question are occupied by the northern spotted owl, if a Federal nexus were to occur, section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species through a jeopardy analysis. Because the possibility of a Federal nexus on these private lands is limited, the additional regulatory benefits to the species and its habitat through inclusion in critical habitat, if any, are anticipated to be minimal. In addition, existing State regulations provide protections for the northern spotted owl and its habitat, and these protections are in continuous effect. The protections to the critical habitat of the northern spotted owl, by contrast, come into effect only in the event of a Federal action.

Another benefit of including lands in a critical habitat designation is that it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. In the case of the northern spotted owl, any potential educational benefits that might be attributable to critical habitat designation are minimized by the existing State regulatory framework for the northern spotted owl in timber harvest planning. Private landowners who harvest timber in proximity to northern spotted owl activity sites are required to conduct surveys of owl activity and report those results in their proposed timber harvest plans that are submitted to CALFIRE for approval, so critical habitat designation will not result in any additional data collection. While the State's existing take-avoidance strategy for the northern spotted owl does not necessarily provide for long term conservation of suitable habitat, it does serve an important informational service with private landowners through the timber harvest planning process. Thus, CALFIRE's existing regulatory framework provides adequate and consistent education to the affected community regarding the northern spotted owl and its conservation needs.

Similarly, the great majority of industrial and non-industrial forest landowners, along with the in-house and consulting biologists who conduct the owl survey work, already voluntarily submit their survey results to the CDFG for entry into the California Natural Diversity Database (CNDDB), which is the State's clearinghouse for occupancy, activity, and spatial data on special status species. It is highly unlikely that inclusion in the final critical habitat designation could cause any increases in landowner and biologist participation in the CNDDB reporting. Voluntary participation rates are currently very high, and we have no evidence to suggest that inclusion in critical habitat would increase those rates any further.

In this case the educational value of critical habitat is further limited by the fact that the northern spotted owl is a high-profile species, and most forestland owners in the range of the northern spotted owl are knowledgeable about the species. The release of the Revised Recovery Plan for the Northern Spotted Owl in 2011 was preceded by outreach efforts and public comment opportunities, and provided information about the northern spotted owl and its conservation needs to a wide constituency. Furthermore, we conducted extensive outreach efforts on the proposed revision of critical habitat, including multiple public information meetings and opportunities for public comment. Through these outreach opportunities, land owners, State agencies, and local governments have become aware of the status of and threats to the northern spotted owl, and the conservation actions needed for recovery.

Another potential benefit of the designation of critical habitat is that it may indirectly cause State or county jurisdictions to initiate their own additional protective requirements in areas identified as critical habitat. These measures may include additional permitting requirements or a higher level of local review on proposed projects. However, CALFIRE has indicated to use that it is unlikely to impose any new requirements on project proponents if critical habitat is designated in areas already subject to California Forest Practice Rules. Therefore, we believe this potential benefit of critical will be limited.

Finally, there may be some ancillary benefits if the designation resulted in changed timber management practices on these private lands. These benefits could include but are not limited to: public safety benefits by increasing resiliency of timber stands, improved water quality, aesthetic benefits, and carbon storage. However, as discussed above, the possibility of a Federal nexus on these private lands is limited, so changes in timber management as a result of critical habitat, and any attendant ancillary benefits, are anticipated to be minimal.

Benefits of Exclusion—The benefits of excluding from designated critical habitat the approximately 123,348 ac (49,917 ha) of private lands in California are relatively greater.

Excluding the approximately 123,348 ac (49,917 ha) of private lands from critical habitat designation will sustain and enhance the conservation partnership between the Service and CALFIRE. The Service is currently working with CALFIRE to explore avenues for more comprehensive conservation planning for the northern spotted owl in northern California that goes beyond the existing take-avoidance strategy. Development of a landscape

scale analysis and plan (e.g., general conservation plan) would provide for greater protections to the northern spotted owl and could incorporate critical habitat conservation elements within that planning process. Current revisions and improvements to the CNDDB database would aid in the development of this plan, with the ability to evaluate status and trends across the region versus on a singular THP or Non-industrial Timber Management Plan (NTMP) level. Critical habitat designation would be viewed as another layer of regulatory process to that already overseen by CALFIRE and could impede landowner support for the development of this larger programmatic conservation plan and undercut the efforts of CALFIRE to contribute to such a discussion. We received several public comments objecting to this perceived redundancy in regulation. Excluding those private lands from the designation would avoid a chilling effect on the partnership between the Service and the affected State regulatory agencies in California regarding administration of their existing conservation programs to protect and conserve northern spotted owls on private lands. We consider the maintenance of our partnership between the Service and the affected State regulatory agencies in California to be a significant benefit of exclusion.

In addition, there are many other opportunities for private landowners to enter into conservation agreements without Federal involvement that will benefit northern spotted owls. Landowners can obtain ''green'' forest certification through the Forest Stewardship Council (FSC) or the Sustainable Forestry Initiative (SFI) that enables access to certain wholesale lumber markets. They can register their property with the California Climate Action Registry to gain access to the emerging carbon credit market in California, or they can sell conservation easement rights on their properties to a land trust. In all cases, the landowner gains immediate economic benefits in exchange for agreeing to a management program on their lands that meets the objectives of the certification or registration entity, or the land trust. All of these instruments, by design, involve the conservation and expansion of standing forest inventory and forest cover on the participating ownerships. Whether by design or not, that will lead to the long-term improvement of existing northern spotted owl habitat suitability and to the emergence of suitable habitat in areas where it is currently unsuitable. These market-based agreements have the long term potential for significantly more on-the-ground benefits for the northern spotted owl on private lands than would the limited regulatory and educational benefits that would result from critical habitat designation.

The economic incentives for landowners to enter into these agreements are independent of a critical habitat designation. We are not certain how designation might affect perceptions and priorities among the grantors in agreements (i.e., the certification and registration entities and the land trusts). For example, land trusts operate on limited funds and we do not know how critical habitat designation might influence them in prioritizing properties for easement acquisition; that is, whether it might lead them to look more or less favorably on designated lands, or treat some geographic areas preferentially over others. Thus, exclusion from designation could avoid any uncertain, and possibly detrimental, effects on both buyers (land trusts, certification entities) and sellers (landowners) in market-based conservation programs (IEC 2012b, p. 5–21).

Excluding these lands may reduce the perception that some private landowners have that they are being subjected to redundant and unnecessary regulation. As noted above, all private land timber harvesting in California must be conducted in accordance with a site-specific THP that is submitted by the owner and is subject to administrative approval by CALFIRE. The Director of CALFIRE is not authorized to approve any proposed THP that would result in take of a federally-listed species, including the northern spotted owl, unless that taking is authorized under a Federal Incidental Take Permit. The additional overlay of Federal critical habitat on these private lands may result in lack of support for the development of a programmatic conservation agreement with CALFIRE and their valuable contribution of information to the CNDDB due to their perception of duplicative and burdensome regulation specific to the northern spotted owl.

Benefits of Exclusion Outweigh the Benefits of Inclusion—We have reviewed and evaluated the exclusion of approximately 123,348 ac (49,917 ha) of privately-owned lands in the State of California from the critical habitat designation. The benefits of including these lands in the designation are comparatively small. We find there is little likelihood of a Federal nexus on these private lands that would trigger the regulatory protections of critical habitat under section 7 of the Act. We therefore anticipate little, if any, additional protections through a supplemental analysis of potential adverse modification due to the designation of critical habitat on these lands.

The potential educational benefits of inclusion are also limited. Under existing State regulations, private landowners who harvest timber in proximity to northern spotted owl activity sites are required to conduct surveys of owl activity consistent with the Service-recommended protocol and report those results in their proposed timber harvest plans that are submitted to CALFIRE for approval, so landowners are already aware of the presence of the northern spotted owl and its habitat needs, and critical habitat designation will not result in any additional data collection. The State of California's existing take-avoidance strategy for the northern spotted owl provides an important informational service with private landowners through the timber harvest planning process. Therefore, in this instance, any potential educational benefits of inclusion are minimal.

In contrast, the benefits derived from excluding private lands and enhancing our partnership with California State regulatory agencies are relatively greater. The minimal benefits of inclusion are outweighed by the benefits of fostering conservation partnerships with CALFIRE that would relieve private landowners of what they might perceive as duplicative regulations. Exclusion could also encourage the partnership and collaboration in development of the landscape conservation planning between the Service and CALFIRE by focusing efforts towards that planning effort versus applying a regulatory process that would have limited private land involvement.

We also considered the avoidance of potential issues associated with regulatory uncertainty due to critical habitat designation to be a significant benefit of exclusion. For example, there may be a significant benefit of exclusion from designation that would accrue due to the avoidance of any uncertain, and possibly detrimental, effects on both buyers (land trusts, certification entities) and sellers (landowners) in market-based conservation programs that stand to provide significant conservation benefits to the northern spotted owl.

We have determined that maintaining our partnership with California State regulatory agencies provides a greater benefit than would the regulatory and educational benefits of critical habitat designation. Therefore, in consideration

of the factors discussed above, we have determined that the benefits of exclusion of private lands in California outweigh the benefits of designating these areas as critical habitat.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of 123,348 ac (49,917 ha) of private lands in northern California that are not currently under a Federal agreement from critical habitat for the northern spotted owl will not result in the extinction of the species. Habitat protection provisions in the current California forest practice regulation on private forestlands provide some level of protection for the species and its habitats. We reiterate here that under the California State Code (14 CCR 919.9 and 919.10), the Director of CALFIRE is not authorized to approve any proposed THP that would result in take of a federally-listed species unless that taking is authorized under a Federal Incidental Take Permit. For projects having a Federal nexus and affecting northern spotted owls in occupied areas, as is the case here, the jeopardy standard of section 7 of the Act, coupled with current land management measures that are not under Federal purview, would provide assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation. Further, the exclusion of these lands from the final critical habitat designation does not preclude advances in our scientific knowledge of the species and using that knowledge to effectively advocate future improvements in State forest practice policies and procedures. Based on the preceding analysis, the Secretary is exercising his discretion under section 4(b)(2) of the Act to exclude private lands totaling 123,348 ac (49,917 ha) from the final critical habitat designation.

State of Washington

In Washington we proposed 133,895 ac (54,186 ha) of private lands within Spotted Owl Special Emphasis Areas (SOSEAs) as critical habitat; all of these lands were identified as under consideration for exclusion. However, as described in Changes from the Proposed Rule, many of the small, private parcels were removed from the final designation upon a determination that they did not meet the definition of critical habitat, leaving. The remaining areas of private lands in Washington contained in this designation covered by HCPs or SHAs and are private industrial forest lands; these private lands are not currently covered by HCPs or SHAs but are covered under the WDNR Forest Practices Rules (FPR) and largely located in SOSEAs. We have excluded areas covered by HCPs and SHAs because, for the reasons discussed above, the benefits of excluding them outweigh the benefits of including them in critical habitat. We sought to make our designation of private lands in Washington as consistent as possible with Washington State regulations governing forest practices on private lands. Most of the remaining private lands are located only within SOSEAs, areas designated by the State to provide for demographic and/or dispersal support as necessary to complement the northern spotted owl protection strategies on Federal land within or adjacent to the SOSEAs. We find that for these lands, too, the benefits of excluding them in critical habitat outweigh the benefits of including them.

In Washington, any private timber harvest must obtain a permit from, and comply with, the Washington Forest Practices Act (RCW 76.09) as well as the Washington Forest Practices Rules (WAC 222). In the absence of a federally-approved HCP covering northern spotted owls or a State-approved special wildlife management plan, suitable northern spotted owl habitat in State-designated SOSEAs on non-federal lands is protected by the special Washington Forest Practices Rules in State-designated SOSEAs. Within SOSEAs, the Forest Practices rules provide protection for suitable northern spotted owl habitat. The Washington Forest Practices Rules maintain the viability of each northern spotted owl site center by protecting: (a) All suitable spotted owl habitat within 0.7 mile of each spotted owl site center; and (b) a total of 2,605 acres of suitable spotted owl habitat within the median home range circle with a radius of 1.8 miles. Under the rules, proposed forest practices likely to adversely affect spotted owl habitat in either category (a) or (b) above are likely to have significant adverse impacts to the northern spotted owl, and such activities would require a Class IV special forest practices permit and an environmental impact statement per the State Environmental Policy Act. The overarching policy goal of the Washington Forest Practices Rules is to complement the conservation strategy on Federal lands, and as such the SOSEAs are adjacent to Federal lands. SOSEAs are designed to provide a larger landscape for demographic and dispersal support for northern spotted owls. The long-term goal is to support a viable population of northern spotted owls in Washington.

In Washington, the Forest Practices Board (the State regulatory rule-making body) has a long-standing relationship with the Service and collaborates extensively on northern spotted owl conservation. The Service provided extensive technical assistance in the development of the Board's existing northern spotted owl rules. The Board was recognized in Recovery Action 18 in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, p. III–57) for its ongoing owl conservation efforts and encouraged to continue to use its existing processes ''to identify areas on non-federal lands in Washington that can make strategic contributions to spotted owl conservation over time. The Service encourages timely completion of the Board's efforts and will be available to assist as necessary.'' The Board convened the Northern Spotted Owl Implementation Team (NSOIT). The NSOIT has been tasked to develop incentives for landowners to conserve northern spotted owl habitat, identify the temporal and spatial allocation of conservation efforts on non-federal lands, and make recommendations to the Board, should any rules need to be updated. The NSOIT is also conducting a pilot project testing different thinning prescriptions in northern spotted owl habitat. These efforts have evolved over years of collaboration and are designed to change the dynamic away from fear and resistance to partnership and participation. On November 13, 2012, the Board took another step for northern spotted owl conservation and expanded the scope of the NSOIT to investigate and recommend, in coordination with the Service, voluntary programmatic tools for private landowners to support northern spotted owl conservation and provide regulatory certainty for landowners (WDNR *in litt.*). This step further demonstrates Washington's willingness to use its authority and processes to support northern spotted owl conservation. The Service has and continues to provide funding to support the work of the NSOIT.

Benefits of Inclusion—The areas of private land retained in our final designation at issue here support both essential demographic and dispersal needs of spotted owls, and highlight the important conservation roles of private lands in Washington. Designation of these private lands may raise public awareness of conservation actions needed for spotted owl recovery, although the educational benefit of the designation is somewhat limited currently since these areas have already been identified as SOSEAs, since 1997.

We find there are minimal benefits to including these lands in critical habitat. The designation of critical habitat

invokes the provisions of section 7. Our Final Economic Analysis (IEC 2012b, p. ES–17) concludes that critical habitat designation for the northern spotted owl is unlikely to directly affect timber harvests on private lands in Washington because of the low likelihood that such harvests would be simultaneously connected to a Federal permitting or funding action. Without a pending Federal action, there is no basis for initiating a consultation process under section 7 of the Act. As discussed previously, the designation of critical habitat invokes the provisions of section 7. However, in this case, we find the requirement that Federal agencies consult with us and ensure that their actions are not likely to destroy or adversely modify critical habitat will not result in significant benefits to the species. The possibility of a Federal nexus for a project on these lands is small unless it was a larger project covering adjacent Federal lands as well, in which case section 7 consultation would already be triggered and the Federal agency would consider the effects of its actions on the species. In addition, most of the habitat on these private lands would be assumed to be occupied, further minimizing to some extent the margin of conservation that could be attained through section 7. Any incremental benefits would be further minimized because of the protections already in place In addition, it would be small in comparison to the benefits already derived under the WDNR FPR.

There is minimal incremental benefit from designating critical habitat for the northern spotted owl within private lands covered by the WDNR Forest Practices Rules (FPR) because these lands are already managed for the conservation of the species through the WDNR FPR. The conservation measures provided by that process will provide greater protection to northern spotted owl habitat than the designation of critical habitat, which provides regulatory protections only in the event of a Federal action. In addition, the final rule designation would provide for protection of fewer acres than the existing FPR. The WDNR FPR provides for the needs of the northern spotted owl by protecting and preserving landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat as well as foraging and dispersal habitat in strategic landscapes, and implementing species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. The WDNR FPR also contains provisions that address ownership changes and provides for the ability to make ongoing adjustments in a number of forms, including active adaptive forest management. The ability to change is crucial to meet new recovery challenges. The Service continues to be work with WDNR to provide technical assistance in the implementation of these rules. The WDNR FPR contains provisions that address ownership changes and the outcomes expected by the Service. Therefore, designation of critical habitat would be redundant on these lands, and would not provide additional measureable protections.

Including lands in a critical habitat designation does serve to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by identifying areas of high conservation value for northern spotted owls. Designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act, which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas. Any information about the northern spotted owl and its habitat that reaches a wider audience, including parties engaged in conservation activities, is valuable. However, WDNR, as the State's natural resource agency, is knowledgeable about the species and has made substantial contributions to our knowledge of the species. The additional educational and informational benefits that might arise from critical habitat designation here have been largely accomplished through the public review and comment during reviews of the FPR and associated with the modification of the FPR, and through implementation of the FPR by landowners. The existing public process for FPR development provides for extensive opportunities for engagement in the development and refinement of the rules. The FPR includes intensive public involvement and is frequently a topic of open and public discussion during meetings of the Washington State Forest Practices Board, whose meetings are open to the public and frequently televised. This level of exposure in local newspapers and television stations exceeds the level of education that would come from a designation that would be read by few people in the public. Moreover, the rulemaking process associated with critical habitat designation includes several opportunities for public comment, and thus also provides for public education.

Finally, there may be some ancillary benefits if the designation resulted in changed timber management practices on these private lands. These benefits could include but are not limited to: public safety benefits by increasing resiliency of timber stands, improved water quality, aesthetic benefits, and carbon storage. However, as discussed above, the possibility of a Federal nexus on these private lands is limited, so changes in timber management as a result of critical habitat, and any attendant ancillary benefits, are anticipated to be minimal.

Benefits of Exclusion—With regard to the benefits of exclusion from designation, although the final economic analysis (FEA) noted that one possible outcome of the critical habitat designation would be that the State could revise its regulations, and in a worst case scenario such revision could result in some private acres no longer being harvestable, we note that the likelihood of such revision actually occurring is characterized as speculative (IEC 2012b, p. 5–20). The FEA notes two possible outcomes of critical habitat designation, one being no change in Forest Practices Rules, the other is that State would revise their regulations and designate all suitable habitat overlapping with Federal critical habitat as ''critical habitat state.'' However, Washington DNR representatives only offered examples of potential responses to Federal designation of critical habitat in Washington, and did not comment upon the likelihood that any of these scenarios would occur (IEC 2012b, p. 5–11). The FEA also makes note of the potential indirect effects of critical habitat on private lands, in terms of private landowners possibly reacting by changing their timber harvest practices in response to perceived regulatory uncertainty as a result of critical habitat (IEC 2012b, p. 5–19).

In particular, a benefit of excluding lands covered under the WDNR FPR from critical habitat designation is that it would encourage the State and other parties to continue to work for owl conservation. If lands within the WDNR FPR area are designated as critical habitat, it would also likely have a negative effect on our ability to continue to partner with the WDNR on this conservation. In particular, the WDNR comment letter (WDNR 2012) states that if inclusion of private land is warranted, then WDNR requests that the Service ''create and bolster incentive based conservation opportunities for private landowners''. This recognizes the potential negative effects to their

existing collaborative approach. By excluding these lands, we preserve our current private and local conservation partnerships and encourage additional conservation actions in the future because other parties see our exclusion as a sign that the Service will not impose duplicative regulatory burdens on landowners who are already have a regulatory responsibility under the WDNR FPR. As described in Changes from the Proposed Rule, many of the small, private parcels were removed from the final designation upon a determination that they did not meet the definition of critical habitat. The remaining areas of private lands (40,732 ac; 16,483 ha) in Washington contained in this designation are private industrial forest lands; these private lands are not currently covered by HCPs or SHAs but are covered under the WDNR Forest Practices Rules (FPR). Of these, 37,000 ac (14,974 ha) occur within the spotted owl circles currently regulated by the existing FPR. It is unlikely that the benefit of overlaying an additional regulatory burden within the SOSEAs to protect an additional 4,000 ac (1,619 ha) would be a significant benefit within the range of the owl. Excluding these private lands from the designation would avoid a chilling effect on the partnership between the Service and the affected State regulatory agencies regarding administration of their existing conservation programs to protect and conserve northern spotted owls on private lands. We consider the maintenance of our partnership between the Service and the affected State regulatory agencies to be a significant benefit of exclusion.

Benefits of Exclusion Outweigh the Benefits of Inclusion—The benefits of including these lands in the designation are small. The WDNR FPR contains provisions for protecting and maintaining northern spotted owl habitat that provides for comprehensive measures applied across a large landscape that will benefit spotted owls. WDNR personnel are extremely knowledgeable regarding the ecology of the northern spotted owl and have contributed to the body of scientific information about the northern spotted owl. The landowners subject to these State regulations are also informed by them. In this instance, the regulatory and educational benefits of inclusion have much less benefit than the continued benefit of the WDNR FPR including the educational benefits derived from the FPR.

The WDNR FPR provides for significant conservation and management within geographical areas that contain the physical or biological features essential to the conservation of the northern spotted owl and help achieve recovery of this species. Exclusion of private lands already covered under the WDNR FPR will help foster the partnership we have developed with WDNR. Furthermore, this partnership may aid in fostering future cooperative relationships with other parties in other locations for the benefit of listed species.

In summary, we determine that the benefits of excluding private lands already covered under the WDNR FPR from the designation of critical habitat for the northern spotted owl outweigh the benefits of including this area in critical habitat. We find that including these lands would result in minimal, if any, additional benefits to the northern spotted owl, as explained above. The WDNR FPR includes species-specific avoidance and minimization measures, rule enforcement procedures, and forest-management practices and habitat conservation objectives that benefit the northern spotted owl and its habitat, which exceeds substantially minimizes the incremental any conservation value provided as a result of a critical habitat designation. Given the active and ongoing efforts of the State of Washington to address northern spotted owl conservation, we have determined that maintaining our partnership with WDNR, in conjunction with the conservation measures under the WDNR FPR, provides a greater benefit to the northern spotted owl than would the regulatory and educational benefits of critical habitat designation. We also have determined that the potential incremental educational and ancillary benefits of critical habitat designation on lands containing the physical or biological features essential to the conservation of the northern spotted owl would be minimal, because WDNR has already made significant contributions to our understanding of the ecology of the northern spotted owl, and continues to do so through implementation of Recovery Action 18 and through participation in range wide demographic studies.

Exclusion Will Not Result in Extinction of the Species—We have determined that exclusion of approximately 40,732 ac (16,483 ha) of private lands covered under the WDNR FPR will not result in extinction of the northern spotted owl. The WDNR FPR protects and preserves landscape levels of suitable northern spotted owl nesting, roosting, and foraging habitat as well as foraging and dispersal habitat in strategic landscapes, and implements species-specific conservation measures designed to avoid and minimize effects to northern spotted owls. The Board has adopted a Wildlife Work Plan that requires rule review and revision should new information warrant that. We find that exclusion of private lands currently covered under the WDNR FPR will not result in extinction of the northern spotted owl. Therefore, the Secretary is exercising his discretion under section 4(b)(2) of the Act to exclude these private lands from this final critical habitat designation that are currently covered under the WDNR FPR totaling about 40,732 ac (16,483 ha).

Congressionally Reserved Natural Areas and State Park Lands

Our decision to exclude congressionally reserved natural areas and State park lands from this rule is based on the unique circumstances associated with this critical habitat designation. Before making a final decision of whether to exclude congressionally and State reserved natural areas, we weighed the relative benefits and costs a designation of these lands would confer and compared them to the costs and benefits of no designation. Our final decision is that these areas are essential to the conservation of the northern spotted owl, but a designation of these areas in this particular case would confer no current or potential regulatory benefit and a very minor education benefit. The primary habitat threat to the northern spotted owl is from commercial timber harvest. Since commercial timber harvest is not allowed on these lands, there would be little benefit to additional section 7 consultation on effects to critical habitat. We also agree with the National Park Service that a designation would impose some, albeit relatively small, additional administrative costs to land managers who would need to consult with the Service if their actions or programs might affect northern spotted owl critical habitat. Likewise, we find that State Park lands could experience some additional minor administrative costs as a consequence of this designation, especially those State Parks jointly managed with Redwood National Park and those that may use Federal funding for research and monitoring or program and capital improvements. However, we find that even these minimal costs would outweigh the minor informational benefits of including these areas in the critical habitat designation.

Benefits of Inclusion—The proposed critical habitat rule published on March 8, 2012 (77 FR 14062), as part of ''Possible Outcome 3'' in Table 1 (p. 14068), proposed to exclude 2,631,736

ac (1,065,026 has) of congressionally reserved lands and 164,776 ac (66,682 ha) of State Park lands from final critical habitat. These Federal reserved lands include all National Parks and Monuments, Wilderness Areas, Wild and Scenic Rivers, National Scenic Areas, and other congressionally designated areas identified in the proposed rule. State Parks lands included Iron Horse State Park in Washington, and all or portions of 30 State Parks in California, including Jedediah Smith, Del Norte Coast, Prairie Creek, Grizzly Creek, Humboldt Redwoods, DeWitt Redwoods, Richardson Grove, Reynolds Wayside, Smithe Redwoods, Standish-Hickey, Wm. Standley, Russian Gulch, Mendocino Headlands, Mendocino Woodlands, Van Damme, Montgomery Woods, Navarro Redwoods, Hendy Woods, Mailliard, Salt Point, Austin Creek, Armstrong State Reserve, Tomales Bay, Samuel P. Taylor, Mount Tamalpais, Robert Louis Stevenson, Bothe—Napa Valley, Sugarloaf Ridge, Jack London, and Annadel State Park.

A primary purpose of these congressional and State reserved natural areas is to conserve natural ecosystems, including those of the northern spotted owl and its habitat, and educate the public regarding the conservation of these areas. Unlike other Federal and State lands that have multiple use mandates that include commercial harvest of timber in the range of the spotted owl, such as National Forests, State Forests, and forests managed by the BLM, these reserved natural areas are unlikely to have uses that are incompatible with the purposes of critical habitat because the primary threat to spotted owl critical habitat—commercial timber harvest—is prohibited on these lands. These natural areas are managed under explicit Federal and State laws and policies consistent with the conservation of the northern spotted owl, and there is generally little or no timber management beyond the removal of hazard trees or fuels management to protect structures, roads, human safety, and important natural attributes. For example, the Wilderness Act provides conservation for the northern spotted owl because it prohibits commercial activities unrelated to wilderness recreation. Thus, not only is commercial timber harvest directly barred on these Federal lands, but the Wilderness Act also precludes the construction of roads and most uses of mechanical equipment. 16 U.S.C. 1133. The fundamental purpose of the National Park System, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. *See* 16 U.S.C. sections 1–4.

Similarly, all of the State Parks lands proposed for exclusion occur in California except for 104 ac (42 ha) in Washington. California State Parks are managed by the California Department of Parks and Recreation. This Agency's mission is to ''administer, protect, provide for recreational opportunity, and develop the State Park System * * *'' We are unaware of any commercial timber harvests in California or Washington State Parks.

Therefore, any habitat-disturbing activities that might occur as the land managers carry out their conservation programs (e.g., trail maintenance, education and outreach, operations and maintenance, etc.) are likely to be relatively minor and are unlikely to be regulated by a critical habitat designation. On the Federal reserved lands, the section 7 prohibition on the destruction or adverse modification of critical habitat would be redundant and unlikely to add any protection to these important habitat areas. Likewise, many of these State Parks have close working relationships with Federal agencies and may experience, through those Federal partners, a section 7 nexus or other administrative costs if the States utilize Federal funds or require a Federal permit for their activities. For example, several State Parks in California (i.e., Del Norte Redwoods, Prairie Creek Redwoods, and Jedediah Smith Redwoods) are jointly managed with Redwood National Park through an agreement signed in 1994. In the San Francisco Bay Area, the National Park Service manages an inventory and monitoring program that includes actions by State Parks and other Federal partners such as the U.S. Geological Survey. Further, land managers monitor spotted owl territories within these reserved areas as part of long term population monitoring efforts, and barred owl populations are also monitored as part of spotted owl recovery efforts. For example, spotted owl territories in Crater Lake National Park have been monitored since 1992, and there are multiple spotted owl monitoring and conservation efforts occurring in many these parks throughout the species' range. A critical habitat designation on these State Parks may introduce some additional administrative costs but confer no increase in regulatory protection. Therefore, we believe there would be no regulatory benefits to inclusion of these lands in critical habitat.

We also believe that a critical habitat designation for these specific natural areas would confer minimal additional educational benefit toward spotted owl conservation. These areas are generally well known for their value to the conservation of listed species due to the education and communication programs of the natural area management agencies during the time since the listing of the spotted owl. Educational materials are distributed and other communication programs occur regarding the conservation of late successional forests and the species that inhabit them such as the spotted owl (see, e.g., Olympic National Park Web site featuring spotted owl information at *http://www.nps.gov/olym/naturescience/animals.htm,* or *http://www.nps.gov/muwo/naturescience/life-of-spotted-owls.htm* for NPS lands in central California). We also note that the management agencies overseeing these congressionally and State reserved natural areas have a positive history of over 20 years of conserving northern spotted owls and supporting research and conservation of the owl on their protected lands. While in other cases we have found benefits where critical habitat would highlight the importance of the habitat to owl conservation for future planning and management purposes, in the case of these lands, management is already consistent with habitat protection. Therefore, it is unlikely that designation of critical habitat of these areas would provide any significant informational benefits to the land managers or the public.

Benefits of Exclusion—We attempted to quantify the potential increase in administrative costs for the Service associated with a proposed designation of critical habitat in congressionally reserved land allocations. There is generally little or no timber management beyond removal of hazard trees or fuels reduction to protect structures and road maintenance, in addition to fire-management activities. Management guidelines for congressionally reserved lands are generally protective, so we do not anticipate requesting any changes of proposed management as a result of a critical habitat designation, and we would not anticipate reaching an adverse modification determination. In reserve areas where we do consult, the designation of critical habitat would likely add an adverse-modification analysis to an existing consultation.

Total incremental effects would likely be about 4–6 hours of staff time per action for both the action agency and the Service, although this estimate could vary widely depending on the size and scope of the action.

The final economic analysis (FEA) (IEC 2012b) quantified this potential for an increase in administrative costs, and they described the potential indirect impacts due to time delays for project processing and regulatory uncertainty. The analysis states, ''While critical habitat is not expected to generate changes to forest management practices or to testing or training missions on NPS or DOD lands, these areas may be subject to new or increasingly complex section 7 consultations as a result of critical habitat designation. Activities that may involve section 7 consultations include the construction or maintenance of visitor facilities on NPS lands and access roads to projects or military training including the use of vehicles, explosives, and soldiers. DOD and NPS will likely experience an additional administrative burden to provide biological assessments for projects in consultations with the Service as a result of critical habitat designation'' (IEC 2012b, p. 4–4). The FEA forecast an additional 16 informal consultations with NPS on planned or ongoing recreation and habitat management projects (IEC 2012b, p. 4–27). (Although the text refers to the NPS lands, the same rationale generally applies to other federally reserved lands in the proposed exclusion.) The FEA did not quantify the potential for direct incremental economic impacts on State Park lands, but it does identify the potential for indirect impacts due to time delays and regulatory uncertainty. Again, it is expected that these impacts would be relatively minor, but they nevertheless are not offset by a proportional increase in conservation benefits that would accrue as a consequence of this critical habitat designation on these lands.

Benefits of Exclusion Outweigh the Benefits of Inclusion—In sum, we find there are no regulatory benefits and such minimal educational benefits to including these lands in the designation that they are outweighed by the minor increase in administrative costs. We reach this conclusion for several reasons: (1) A critical habitat designation of these reserved areas in the range of the spotted owl would provide no additional regulatory benefits beyond what is already on these lands due to their permanent status as fully protected lands and, importantly, the fact that commercial timber harvest is not permitted on these lands under Federal and State law and policy; (2) the designation of these reserve areas would confer little additional educational benefits associated with the conservation of the spotted owl, as these educational messages are already being communicated in many of these areas under existing programs; and (3) as identified by the economic analysis and the NPS, there is the potential for a small but measureable increase in administrative costs, time delays, and regulatory uncertainty for the Service and Federal and State land managers if these lands were designated, without any offsetting positive conservation benefits to justify the increased administrative costs.

After weighing these relative costs and benefits, the Secretary has chosen to exercise his discretion under Section 4(b)(2) of the Act to exclude these lands from final critical habitat. As part of this review we have determined the Federal agencies are managing these reserved natural areas under statutes that already impose a clear conservation mandate consistent with the specific needs of the northern spotted owl, and a critical habitat designation would confer no additional conservation benefits to the spotted owl that offset the potential increase in administrative costs. In making this decision, we also note the historic role of congressionally and State reserved natural areas as part of northern spotted owl critical habitat. In 1992, the Service concluded that certain congressionally reserved parks and wilderness areas were essential to spotted owl conservation, but we declined to include these lands in the final designation of critical habitat because their current classification and management was deemed adequate to meet spotted owl conservation goals (January 15, 1992; 57 FR 1796, p. 1806). Likewise, in 2008, the Service revised northern spotted owl critical habitat and again concluded that congressionally reserved natural areas would not be included in final critical habitat for the same reasons as those identified in the 1992 decision (August 13, 2008; 73 FR 47325, p. 47334). Although not a factor in this section 4(b)(2) weighing, this determination will maintain the consistent management approach for spotted owls that has occurred on these lands over the last 20 years and should minimize the potential for confusion among land managers and the public.

This analysis is based in large part on the particular conservation requirements of the northern spotted owl and is specific to this designation. Thus, our determination that the benefits of exclusion outweigh the benefits of inclusion in this case does not necessarily have a bearing on future critical habitat designations.

Exclusion Will Not Result in Extinction of the Species—We conclude that this exclusion of congressionally and State reserved natural areas would not result in the extinction of the species. As described above, all of these areas are managed under State and Federal law to provide for the conservation of species and their natural habitat, including the northern spotted owl. A critical habitat designation would not enhance or incrementally improve this dedicated management or increase the protections of these lands, nor would its absence somehow fail to provide protections that otherwise would not be present. Therefore, this exclusion of lands from final critical habitat would not result in any appreciable risk of extinction to the species because these lands will continue to be managed to provide for the conservation of the spotted owl.

Cumulative Analysis—Exclusion Will Not Result in Extinction of the Species

We have determined that exclusion of approximately 4,056,759 ac (1,641,777 ha) of lands from this final designation of critical habitat will not result in extinction of the northern spotted owl. We have excluded these areas based, in part, on the significant conservation benefits afforded to the northern spotted owl and its habitat on these lands through the positive conservation measures provided through SHAs, HCPs, or other agreements with private landowner partners with a proven track record of conservation actions. Each of these agreements, as discussed here, provides significant conservation benefits to the species in terms of maintaining, enhancing, or recruiting additional suitable habitat for the northern spotted owl, and implementing species-specific conservation measures designed to avoid and minimize impacts to northern spotted owls. Further, for projects having a Federal nexus and affecting northern spotted owls in the excluded areas, all of which are occupied by the species, the jeopardy standard of section 7 of the Act provides a level of assurance that this species will not go extinct as a result of excluding these lands from the critical habitat designation. The species is also protected by section 9 of the Act, which prohibits the take of listed species. Congressionally and State reserved natural areas excluded are managed under State and Federal law and policy to provide for the conservation of species and their natural habitat, including the northern spotted owl. These lands will continue to be

managed under a clear conservation mandate, and exclusion of these lands from critical habitat will not deprive the species or its habitat of any protections that are not already present. Although we did not assume that all private lands without specific conservation agreements would continue to fully provide for the conservation of the owl, we determined that the exclusion of these lands would not lead to the extinction of the species, due to existing State protections and the fact that the areas excluded constitute such a small percentage of the overall designation. For these reasons, we conclude that the exclusion of these areas under section 4(b)(2) of the Act will not cumulatively result in the extinction of the species.

Consideration of Indian Lands

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (November 6, 2000, and as reaffirmed November 5, 2009); and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on Indian lands may be better managed under Indian authorities, policies, and programs than through Federal regulation where Indian management addresses the conservation needs of listed species. In addition, such designation may be viewed as unwarranted and an unwanted intrusion into Indian self-governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

In developing the proposed revised critical habitat designation for the northern spotted owl, we considered inclusion of some Indian lands. As described in the above section Criteria Used to Identify Critical Habitat, and detailed in our supporting documentation (Dunk *et al.* 2012b, entire), we evaluated numerous potential habitat scenarios to determine those areas that are essential to the conservation of the northern spotted owl. In all cases, we assessed the effectiveness of the habitat scenario under consideration in terms of its ability to meet the recovery goals for the species. Furthermore, the habitat scenarios under consideration included a comparison of different prioritization schemes for landownership; we prioritized areas under consideration for critical habitat such that we looked first to Federal lands, followed by State, private, and Indian lands. Indian lands are those defined in Secretarial Order 3206 ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997), as: (1) lands held in trust by the United States for the benefit of any Indian tribe or individual; and (2) lands held by any Indian Tribe or individual subject to restrictions by the United States against alienation. In evaluating Indian lands under consideration as potential critical habitat for the northern spotted owl, we further considered the directive of Secretarial Order 3206 that stipulates ''Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services 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.''

Although some Indian lands identified in our habitat modeling demonstrated the potential to contribute to the conservation of the northern spotted owl, our analysis did not suggest that these areas were essential to conserve the northern spotted owl. This determination was based on our relative evaluation of the various habitat scenarios under consideration; if the population performance results from our habitat modeling indicated that we could meet the recovery goals for the species without relying on Indian lands, we did not consider the physical or biological features on those lands, or the lands themselves, to be essential to the conservation of the species, therefore they did not meet our criteria for inclusion in critical habitat. Our evaluation of the areas under consideration for designation as critical habitat indicated that we could achieve the conservation of the northern spotted owl by limiting the designation of revised critical habitat to other lands. Therefore, no Indian lands are included in the revised designation of critical habitat.

XII. Summary of Comments and Responses

We requested written comments from the public on the proposed revised designation of critical habitat for the northern spotted owl during an initial 90-day public comment period, which opened with the publication of the proposed revised rule on March 8, 2012 (77 FR 14062), and closed on June 6, 2012. On June 1, 2012, we published the notice of availability of the draft economic analysis and draft environmental assessment associated with the proposed revised designation of critical habitat (77 FR 32483), and extended the comment period for the proposed rule an additional 30 days, through July 6, 2012, thereby providing a total comment period of 120 days. In addition, we held two public information meetings in Redding, California on June 4, 2012; two in Tacoma, Washington, on June 12, 2012; one in Portland, Oregon on June 20, 2012; and two in Roseburg, Oregon, on June 27, 2012. We also held a public hearing in Portland, Oregon, on June 20, 2012. In addition, we contacted appropriate Federal, State, County, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule, draft economic analysis, and draft environmental assessment during these comment periods. In addition, in response to requests from several Counties, and to ensure that all affected Counties and State fish and wildlife agencies in Washington, Oregon, and California were able to thoroughly review and comment as provided by section 4(b)(5)(A)(ii) of the Act, the Service provided an additional opportunity for those entities to comment until August 20, 2012.

During the comment period(s), we received over 33,000 comments (many of which were form letters), directly addressing the proposed revised critical habitat designation. During the June 20, 2012, public hearing, eight individuals or organizations provided comments on the proposed revised designation. All substantive information provided by commenters has either been incorporated directly into this final designation or addressed below. Comments received were grouped into general categories specifically relating to the proposed revised critical habitat designation, and are addressed in the following summary, and incorporated into the final rule as appropriate. We received a number of highly technical comments regarding the modeling process used to develop critical habitat. These technical questions are addressed in the final Modeling Supplement (Dunk *et al.* 2012b) rather than in the following section. We also received several comments regarding perceived effects attributed to the original listing of the northern spotted owl (June 26, 1990; 55 FR 26114), but are not addressing those comments because

they do not apply to this rulemaking, which is limited to the revised designation of critical habitat for the northern spotted owl.

Comments From Peer Reviewers

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from 40 knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from 15 of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the northern spotted owl. The peer reviewers generally supported the modeling process used to inform the identification of critical habitat and the resulting size and distribution of the proposed revised designation. Reviewers were divided on the risks posed by climate change and forest health, and whether active management should be applied within critical habitat.

We asked reviewers to address a number of specific questions with regard to the proposed rule. The questions posed to the peer reviewers and a summary of their responses are provided below; peer reviewer comments, clarifications, and suggestions have been incorporated into the final rule as appropriate. Our responses to issues raised by the peer reviewers are presented in the subsequent summaries of comments and responses.

Question 1a: Given the assumptions about barred owl effects, does this critical habitat network provide a sufficient amount and distribution of habitat for the northern spotted owl?

Peer Review Response: Of the seven reviewers who provided a response to this question, four indicated that it was impossible to determine whether the critical habitat network was adequate with barred owls present across the area. Two reviewers believed the network was adequate, and one believed it was too small given barred owl impacts.

Question 1b: Have the physical or biological features that are essential to the conservation of the owl been properly described? Do the areas identified as proposed critical habitat adequately capture these features? Are there areas we identified that should not be included in the designation?

Peer Review Response: Of the five reviewers who addressed this question, all believed the physical or biological features were properly described. A number of these reviewers did have suggestions for revising descriptions of these features in specific forest types and we have incorporated these suggestions into the final rule.

Question 2: Does the critical habitat network adequately encompass the geographic range of the northern spotted owl and represent the range of habitat types used by the species?

Peer Review Response: Only three reviewers specifically addressed this question. All agreed that the network encompassed the geographic range and habitat types used by owls. One reviewer expressed concern that additional lands in the southwest Washington lowlands should be included to improve landscape connectivity, and a second reviewer indicated that maintaining areas of marginal habitat where northern spotted owls could persist in the face of encroachment by barred owls may be particularly important. See our response to *0* for a detailed discussion regarding inclusion of lands in southwest Washington and inclusion of marginal habitat.

Question 3: We have identified areas on Federal lands in the ''Matrix'' classification (i.e., areas designated for timber harvest under the NWFP) as proposed critical habitat, as well as some State and private lands where Federal lands are lacking. Do you agree or disagree with this approach? Why or why not?

Peer Review Response: Eight reviewers addressed this question, and all agreed that inclusion of matrix lands in critical habitat was supported. One reviewer noted that the barred owl issue needs to be addressed (see response to *0* for detailed discussion of this issue), and another reviewer was surprised that all habitat-capable lands in the western portion of the species' range were not included in critical habitat (see *0* for a more detailed discussion of this issue).

Question 4a: Does the proposed rule appropriately cite the scientific literature on ecological forestry to recommend restoration of ecological processes and the conservation of late-successional forests while also providing sufficient habitat conservation for northern spotted owls?

Peer Review Response: Ten reviewers addressed this issue. Most supported the idea that land managers consider the application of ecological forestry principles. Five believed the rule cited appropriate literature, and several other expressed general support, but recommended consideration of additional published research. Three reviewers disagreed with some of the science that was cited, or the interpretation of that science, and noted that the discussion did not adequately address studies that have documented negative effects of timber management on northern spotted owls and their prey. Several reviewers recommended that active management should be conducted in an adaptive management framework. We addressed these issues in revisions to the section *An Ecosystem-based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat.*

Question 4b: Do the proposed guidelines for vegetation management, including forest fuels treatments and restoration of fire regimes, represent an appropriate application of ecological science?

Peer Review Response: Responses to this question were varied. Eight reviewers expressed overall support for the concept, although several recommended providing more specific management information. Four reviewers indicated that parts of the document were unclear on whether ecological science was applied appropriately, and highlighted the lack of understanding about how such management actions may affect owls and their prey. Two reviewers specifically indicated that they did not think that approach is appropriate. Several recommended conducting active management activities in an adaptive management framework, until the science becomes clearer regarding how northern spotted owls are affected by projects intended to restore forest health or apply ecological forestry principles. We addressed active adaptive forest management in the section *An Ecosystem-based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat.*

Question 4c: Do you believe the proposed rule appropriately balances the potential risks of taking action with the potential risks of a passive (i.e., ''no action'') management approach, especially in the face of ongoing climate change and the need to manage for the entire forest ecosystem, not just northern spotted owls?

Peer Review Response: Peer reviewers were split in their opinions on this question, and responded with varying degrees of specificity. Eight reviewers generally supported the suggestion that land managers consider an active management approach in managing forest landscapes, although not all stated whether the discussion of this concept in the proposed rule balanced the respective tradeoffs. Five reviewers believed that the risks were not appropriately balanced, that the

discussion was too vague in weighing the tradeoffs, or that there is too little specific scientific understanding of the explicit tradeoffs to conduct an informed discussion. Several of these reviewers indicated that there was too much emphasis on active management in the preamble to the proposed rule given the lack of understanding about how ecological forestry and restoration management might affect owls. In contrast, one reviewer noted that the consequences of not applying management in some areas (e.g., fire-prone areas) were not sufficiently addressed. We have addressed the need to conduct additional research in an adaptive management framework in the section *An Ecosystem-based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat.*

Question 5a: Is there relevant information available we did not incorporate into the critical habitat modeling process (thoroughness), and have we interpreted the existing scientific information in a reasonable way (scientific consistency)?

Peer Review Response: The 15 reviewers generally agreed that we did include the appropriate information and interpreted it in a reasonable way. Recommendations to incorporate more realistic barred owl encounter rates, use individual home ranges rather than pair ranges in the modeling process, and analyze the effects of proposed exclusions were suggested. We address these issues in our responses to *Comment (11), Comment (38),* and *Comment (139).* One reviewer questioned the accuracy of GNN data for identifying northern spotted owl habitat. We address the question regarding the accuracy of GNN data in our response to *Comment (19*). In addition, some reviewers asked for more detail regarding the modeling process. Many of the responses to comments provided here present such detail, and we have incorporated additional discussion in our separate Modeling Supplement (Dunk *et al.* 2012b).

Question 5b: The modeling process attempted to incorporate both scientific uncertainty and demographic (stochastic) variation. Were methods used to incorporate uncertainty and variability appropriate?

Peer Review Response: Six reviewers addressed this question specifically. Most had suggestions for improving our methods including addressing temporal variation in demographic rates, providing confidence intervals on estimates, and conducting sensitivity analyses. We address specific comments in more detail in the Modeling Comments section below, as well as in our separate Modeling Supplement (Dunk *et al.* 2012b).

Question 5c: Does the proposed critical habitat rule correctly express the key assumptions and uncertainties underlying the scientific and technical information it used, particularly in regard to northern spotted owl habitat, demographic trends, and influence of barred owls on northern spotted owls?

Peer Review Response: In general, the reviewers agreed that the rule did address key assumptions and uncertainties; however, most identified specific areas these could be improved. We address these comments in more detail in the Modeling Section below, as well as in our separate Modeling Supplement (Dunk *et al.* 2012b).

Question 5d: Was the combination of analytical methods (MaxEnt, Zonation, HexSim) with professional judgment (please see Criteria Used to Identify Critical Habitat, pp. 14096–14101 in the proposed rule (March 8, 2012; 77 FR 14062) for details) appropriate for identifying critical habitat? Are there additional analyses you would recommend?

Peer Review Response: Of the 15 peer reviewers, 1 thought that HexSim was not an appropriate model given its complexity, and 2 expressed concern about the utility of the MaxEnt model for identifying habitat. The majority of peer reviewers thought that the combination of analytical methods we used was appropriate. We address the question regarding the use of HexSim and MaxEnt in our responses to *Comments (20, 21, 22, 26, and 43)* as well as in our separate Modeling Supplement (Dunk *et al.* 2012b).

A number of peer reviewers had additional comments about the concept of active management. Since the preambles to the proposed and final rules discuss this concept, we have addressed their comments below. However, we emphasize that this rule does not take any action or adopt any policy, plan or program in relation to active forest management. The discussion is provided only for consideration by Federal, State, and local land managers, as well as the public, as they make decisions on the management of forest land under their jurisdictions and through their normal processes.

Additional peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Comments on Lands Included in Critical Habitat and Exclusions

Comment (1): Several reviewers commented that proposed critical habitat failed to include habitat that linked the Olympic peninsula to other regions, and also did not include low-elevation habitat along the margins of the Willamette Valley, Puget Trough, Umpqua Valley, and Rogue River Valley. Some reviewers indicated that they thought this was a fault of the modeling methods used.

Our Response: There are multiple reasons why the areas described in the above comments were not included in the revised critical habitat. First, the habitat model using MaxEnt was at the 500-ac (200-ha) scale, and was thus unlikely to identify small, isolated habitat fragments. This is not a failure of the modeling, but rather a consequence of these areas (identified in the comments) having very little northern spotted owl habitat; such small, fragmented areas do not meet our criteria for critical habitat, and are therefore not included in final the critical habitat designation. Second, to incorporate additional information such as connectivity and unique forest situations, the Service also utilized expert knowledge and current owl location data (among other factors) to determine what is essential for conservation of the species. In Phase 3 of the critical habitat development process, as described in Dunk *et al.* 2012b, we evaluated areas where connectivity appeared to be deficient, and added in habitat to strengthen connectivity. However, most of the areas identified in these comments (particularly in western Washington) consist largely of cutover industrial timberlands, are not occupied by northern spotted owls, do not contain the primary constituent elements for critical habitat, and are not otherwise essential to the conservation of the species because they do not provide high-quality habitat or areas where restoration of habitat is need to provide essential connectivity or demographic support. These areas were not included in the 1992 or 2008 critical habitat designations for the same reasons. Without additional information about the location and habitat conditions of specific parcels in the areas mentioned in this comment, we are unable to further evaluate the benefits of including them in the revised designation.

Comment (2): One reviewer questioned the fact that portions of several late-successional reserves (LSRs) including a portion of the Okanogan-

Wenatchee National Forest in the eastern Washington Cascades and lands in the Western Klamath region that were affected by the Biscuit Fire were not included in the critical habitat proposal.

Our Response: Both of the areas described in this comment generally exhibit low relative habitat suitability (RHS) values. The portion of the Okanogan-Wenatchee LSR that was not included contains much high-elevation forest and dry forest seldom occupied by the northern spotted owl. The Biscuit Fire area described by the reviewer is composed of low RHS due to a combination of fire effects and ultramafic soils.

Comment (3): One peer reviewer and several public commenters were concerned about congressionally reserved areas not being included in proposed critical habitat.

Our Response: All congressionally reserved lands that met the criteria for critical habitat were included in the proposed revised designation. We sought public comment on whether they should be excluded from the final critical habitat designation. Based on further analysis and public comment, they are excluded in the final revised critical habitat designation. Our final decision is that these areas are essential to the conservation of the northern spotted owl, but as these areas are managed under a conservation mandate that provides for the needs of the northern spotted owl, we could find no benefits to the designation that outweighed the minor administrative costs associated with including these areas. Therefore the benefits of exclusion outweighed those of inclusion, and since such exclusion will not result in the extinction of the species, these congressionally reserved areas have been excluded from the final designation.

Comment (4): Several reviewers highlighted the importance of keeping State lands, congressionally reserved lands, and some private lands without HCPs or other agreements in critical habitat.

Our Response: We agree that these lands are important for the conservation of northern spotted owls. However, Federal parks and wilderness areas (and any other congressionally reserved lands) including State parks, as well as private lands, have been excluded in the final revised designation of critical habitat for the northern spotted owl. Some State lands are included in the final critical habitat designation, unless such lands had an HCP, SHA, or other conservation measures in place that led to their exclusion under section 4(b)(2) (see Exclusions).

Comment (5): Several reviewers indicated that the largest reserve designs may be the best for northern spotted owl conservation.

Our Response: Designation of critical habitat is constrained by the statutory language in section 3(5) of the Act, which states that critical habitat must either have been occupied by the species at the time it was listed and contain the physical or biological features essential to the conservation of the species, or, if unoccupied at the time of listing, be essential to the conservation of the species. Furthermore, section 3(5)(c) of the Act specifies that except in rare circumstances, critical habitat should not include the entire geographical area which can be occupied by the species. We concur that in areas where high-quality habitat is lacking, designating all areas capable of developing in to suitable habitat in the future might provide more robust networks. However, the addition of large areas of currently unsuitable habitat as suggested in this comment would likely not meet the intent and mandate of the statute. If occupied at the time of listing, such lands would not provide the requisite essential features. If unoccupied at the time of listing, such lands would only be included in critical habitat if we found them to be essential to the conservation of the species. Our evaluation of various potential habitat networks as we developed this critical habitat designation demonstrated that these lands are not likely to contribute substantially more owls to the rangewide population than the area designated as final critical habitat, thus we did not consider them to be essential to the conservation of the species.

Comment (6): One reviewer stressed the need to retain Recovery Action 10 and 32 lands in critical habitat.

Our Response: Recovery Action 10 and Recovery Action 32 do not constitute specific areas of mapped lands that could be included in critical habitat designation. Rather, they are broad landscape-level conservation recommendations contained in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) for identification and conservation of important habitats that apply to all land ownership categories and Federal land management allocations, including designated critical habitat. While consistency with these and other recovery actions is not required, Federal land management agencies generally try to conduct activities in a manner consistent with the guidance provided in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011).

Comments on Competition From the Barred Owl

Comment (7): One reviewer indicated that recovery efforts need to focus on barred owl management in addition to critical habitat.

Our Response: Barred owls and loss or degradation of habitat are primary factors impacting northern spotted owls. As we noted in the proposed critical habitat rule, habitat protection is necessary, but not sufficient alone, to recover the northern spotted owl. This revised designation of critical habitat is only one of many conservation actions that will contribute to the recovery of the northern spotted owl. The Service is currently working on a final environmental impact statement under NEPA for experimental barred owl removal to address the threat posed to northern spotted owls by the barred owl. Nonhabitat-based threats, such as barred owls, are specifically addressed in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), and do not fall within the scope of this critical habitat rule. The Revised Recovery Plan, not this critical habitat rule, should be considered the comprehensive recovery document for the northern spotted owl.

Comments Regarding the Northwest Forest Plan (NWFP)

Comment (8): Several reviewers indicated that the relationship between proposed critical habitat and the Northwest Forest Plan was unclear.

Our Response: We have attempted to clarify the language regarding the relationship between critical habitat and the Northwest Forest Plan (NWFP). The NWFP provides land management guidance for most of the Federal lands identified as critical habitat, and we anticipate that the Standards and Guidelines for the NWFP will continue to direct management actions on these lands, unless amended sometime in the future. We emphasize that critical habitat does not replace or supersede the Standards and Guidelines of the NWFP. Active management is discussed in the preamble of this rule only to encourage land managers to consider the range of management flexibility already contained in the NWFP. We acknowledge the importance of the NWFP as a management strategy for conserving northern spotted owls and late-successional forest habitat, and our suggestions for special management considerations needed to address the threats to the physical or biological features essential to the conservation of the northern spotted owl (see Special Management Considerations or

Protections, above) are consistent with the directives of the NWFP.

Comment (9): One reviewer noted that LSR areas and locations on the East Cascades were designed under the assumption of static landscapes, not the dynamic landscapes we now recognize.

Our Response: We have recognized that the Standards and Guidelines for management under the NWFP differ across eastern and western forests, and that eastern forests are very dynamic. This condition was recognized in the NWFP, and the Standards and Guidelines of the NWFP allow for active management in such areas (USDA and USDI 2004, pp. C–12—C–13).

Comments on the Modeling Process

Here we provide a summary of general comments received on the modeling process that we used, in part, to identify revised critical habitat for the northern spotted owl. The habitat modeling framework we utilized was originally developed for the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), and Appendix C of the Revised Recovery Plan provides a detailed description of the modeling framework and the extensive testing and cross-validation that was done at each stage of development. In addition, we note that the modeling framework that we applied here to assist in the identification of critical habitat for the northern spotted owl was independently the subject of prior peer review and public comment for the recovery plan. Particularly detailed or technical comments on the habitat modeling that we received in relation to this critical habitat rule are addressed separately in our Modeling Supplement, Dunk *et al.* 2012b, in an effort to reduce the length and improve the readability of this rule.

Comment (10): One reviewer suggested that the modeling of habitat networks and scenarios should consider a wider range of options or composites with greater emphasis on sustainability of owl populations, not efficiency. The present document is biased in favor of efficiency, not conservation of old forest habitat.

Our Response: We evaluated each of the potential critical habitat networks with respect to the guiding principles we developed, which were based on the statutory definition of critical habitat and informed by the recovery criteria for the northern spotted owl as established in the 2011 Revised Recovery Plan. The recovery criteria for the northern spotted owl are aimed at achieving sustainable northern spotted owl populations across the range of the species. In terms of identifying critical habitat, we use the term ''efficient'' to convey that we sought to include the highest-quality habitat with the greatest potential contribution to recovery and minimize as much as possible the amount of relatively lower quality habitat in determining what is essential to conservation of the species. In areas of insufficient high-quality habitat, lower quality habitat may still provide the PCEs and may be essential in terms of providing sufficient habitat overall to sustain the population. We also sought to rely on public lands to the extent possible.

Efficiency never trumped owl performance in our selection process; the population performance of the northern spotted owl in response to the scenarios evaluated was our first concern. However, given two or more nearly equal population performance outcomes, we did look for efficient solutions; that is, given the choice between two nearly equivalent habitat networks in terms of northern spotted owl population performance, we chose the network that achieved roughly the same level of performance provided by a relatively greater proportion of public lands or smaller overall designation. Old forest habitat and areas of high RHS are nearly identically represented in the largest networks we evaluated (Z70, Composites 1, 3, 4, and 7).

Comment (11): One reviewer suggested the use of individual, rather than pair home range size estimates in the HexSim model.

Our Response: Because our spotted owl population model is a females-only model, it was most appropriate to use individual home range sizes. Thus our model will not simulate the resource constraints that could result from male owl's consumption of limited food resources. We strove to construct the simplest model structure that captured the essential ecological processes; doing so made our northern spotted owl model more straightforward to develop and easier to understand. We evaluated how well the HexSim model was calibrated to actual populations, by comparing simulated spotted owl populations from our model with actual densities of northern spotted owls as measured within demographic study areas (Appendix C, p. C–73). We found that simulated populations were quite similar to actual populations, suggesting that the females-only model produced reasonably accurate estimates. Finally, because we used the HexSim model to compare the relative differences in population size resulting from different reserve design assumptions, any biases that may have been introduced into the process from the use of a females-only model would essentially be zeroed out, since that bias would be the same across all populations; in such a case, the net relative difference would still be accurately reflected between populations.

Comment (12): One reviewer noted that we did not include baseline scenarios that provide clear insight concerning the contributions that State, private, and Indian lands might make in the long run. They note that excluding consideration of some large areas by virtue of land ownership may have attendant effects on demographic results by inadvertently imposing ''pinch points'' along the north-south axis of the critical habitat area. The main concern was that northern spotted owl recovery may be quite limited by the initial assumptions made about excluding State, private, and Indian lands based on their current conditions; remaining alternatives considered may all be poorer as a result.

Our Response: We did not make initial assumptions about the population contributions potentially made by State, private, and Indian lands, or about the feasibility of including those lands in proposed critical habitat. Our initial comparisons of Zonation-derived reserve designs included both ''ALL lands'' and ''PUBLIC lands'' scenarios (Appendix C, p. C–49–52); these habitat networks did not restrict our evaluation to particular land ownerships, but allowed us to evaluate all lands regardless of ownership. Thus, we evaluated the contribution of all land ownerships before narrowing down the habitat network designs based on policy and cost-benefit analyses (meaning the weighing of relative population performance versus total area in the designation), as fully described in our Modeling Supplement (Dunk *et al.* 2012b). As discussed in this rule and in that supplement, we sought to maximize the reliance on public lands to the extent possible, but only if it did not compromise the population metrics essential to conservation of the northern spotted owl. In addition, as described in the section Consideration of Indian Lands, we conducted this analysis in accordance with the Secretarial Order 3206 directive to consider ''the extent to which the conservation needs of the listed species can be achieved by limited the designation to other [non-Indian] lands.'' As we did not identify any Indian lands that were essential to the conservation of the northern spotted owl, we did not include any such lands in the designation.

Comment (13): One reviewer asked whether foraging habitat was considered

separately from nesting/roosting habitat in the Step 1 modeling, or if suitable habitat was modeled as nesting/roosting/foraging?

Our Response: Foraging habitat was separate from nesting/roosting habitat, as explained in Appendix C to the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, p. C–24).

Comment (14): One reviewer noted a potential failure to acknowledge the importance of winter migration behavior to spatial and habitat requirements of territorial northern spotted owls.

Our Response: We attempted to incorporate some degree of winter habitat requirements by using annual home ranges in HexSim. To our knowledge, the data we could use in HexSim to incorporate broader movements does not exist throughout the northern spotted owl's range. To the extent that northern spotted owls move away from their territories during the nonbreeding period, and if habitat use differs appreciably in the breeding season and nonbreeding season, it is possible that our approach did not include all areas that may be important to northern spotted owls. However, we are unaware of a consistent methodology that we could use to overcome this potential shortcoming.

Comment (15): One reviewer requested that we consider the effects of fire in the modeling process used to define critical habitat, and how critical habitat should be protected from the effects of fire.

Our Response: Our process incorporated several different possible vegetation growth and loss scenarios, and modeled a variety of potential northern spotted owl responses to differing management strategies. These scenarios were based on observed rates of habitat change measured between 1996 and 2006. As such, they incorporate habitat loss to fire and other causes, and project it into the future as a rate of change. We considered explicitly modeling fire probabilities and fire effects into the scenarios, but the complexity and high degree of uncertainty made this unfeasible. Incorporating fire impacts would have had a similar proportional effect to the relative outputs of each modeled scenario, thereby not elucidating real differences between the effectiveness of the modeled scenarios. The question of protecting critical habitat from the effects of fire is beyond the scope of this rulemaking.

Comment (16): One reviewer suggested that estimating the rate of population change (λ, or lambda) at 10-year intervals makes interpretation more difficult, especially with respect to the results from demographic studies, where λ is estimated as an annual interval.

Our Response: Our use and estimate of the finite rate of population change was not intended to be compared to estimates from demographic study areas or the meta-analysis (e.g., Forsman *et al.* 2011). We used lambda as one basis for comparison between the various alternative potential critical habitat networks considered to determine what is essential to the conservation of the northern spotted owl, using different assumptions related to the barred owl and the amount of suitable habitat. Thus, our use of lambda at 10-year intervals was appropriate for our intended use of relative population performance between habitat scenarios under consideration.

Comment (17): One reviewer indicated that one aspect that seemed to be lacking in the designation of critical habitat was whether the model correctly predicted areas currently occupied by northern spotted owls based on relative habitat suitability. The reviewer suggested that one way to accomplish this would be to examine the spatial distribution of critical habitat in relation to the existing demographic study areas and other areas with a history of surveys for northern spotted owls.

Our Response: To evaluate how well the modeling process identified areas likely to be occupied by northern spotted owls, we tested the predictive ability of the model by comparing our RHS model outputs with the distribution of known northern spotted owl locations (independent data sets) from the years 1996 and 2006, and in both cases found a high predictive accuracy. The results of this comparison are presented on pages C–38 to C–41 in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011).

Comment (18): One reviewer indicated that the models are likely to be ''overfit'' (an overfit model that is overly sensitive to small fluctuations in data inputs, and will consequently have poor predictive results), even though cross-validation results by modeling region showed that all models were relatively robust to prediction (Table C19, Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011)). The reviewer indicated that this point needs to be more clearly disclosed. Several commenters expressed concern about the number of covariates in the RHS models, and the potential for overfitting.

Our Response: We carefully evaluated the modeling procedures we used to identify spotted owl habitat and test the resulting models using both cross-validation and independent data sets. Based on the results of our evaluations, we disagree that our models are overfit. We have clarified the procedures used and results of model testing in the final Modeling Supplement (Dunk *et al.* 2012b). MaxEnt is designed to reduce the effects of the potential model overfitting through its use of regularization. The main consequence of overfitting that we wished to guard against was that of having models so tightly fit to the training data that they were not generalizable (i.e., that they did not work well at classifying test data or data that did not contribute to the model's development). Our extensive cross-validation (randomly removing 25 percent of the data, each of 10 times within each modeling region) and evaluation of each model's full and cross-validated performance revealed that the models were not overfit (see Table C–16). Furthermore, where we had adequate independent data, the models performed almost identically on them as on the training data (see Table C–17). We share the reviewers concerns with overfitting models, and we directly evaluated whether the consequences of overfitting were realized and found that they were not. Thus, the conclusions on page C–41 of the Revised Recovery Plan (USFWS 2011) under ''Model evaluation summary'' remain valid.

Comment (19): Some reviewers and commenters suggested that the GNN database used to develop the relative habitat suitability (RHS) map is inappropriate for use in designating critical habitat because it does not depict what actual vegetative components exist on the ground but is a computer simulation of what might exist. The reviewer stated that since the base vegetation layer does not accurately represent stand conditions on the ground, it is impossible to show what stands contain PCEs and which do not. Several reviewers suggested that a formal accuracy assessment of the GNN data is needed and suggested that model predictions of habitat conditions should be verified. One reviewer indicated that inaccuracies in the GNN database probably led to errors with MaxEnt predictions of owl distributions. The reviewer suggested that there is little science to support the assumptions that GNN data for vegetative variables believed to be important to northern spotted owls were equally accurate across modeling regions, and there is little certainty that relevant processes were sufficiently captured so as to reliably predict owl population performance. The reviewer further

claims the Service did not assess the accuracy of the GNN data. Finally, the reviewer states that Dr. Larry Irwin, National Council for Air and Stream Improvement (NCASI) conducted an analysis of how well the GNN–LT data correlated with actual measurements on the ground, and concluded that there is a very low correlation between GNN–LT predictions and reality. Further, the reviewer states that GNN–LT was developed for mid- to large-scale spatial analysis, not the designation of critical habitat.

Our Response: We concur that the RHS models and subsequent modeling steps are dependent on the reliability of the GNN vegetation layer. A description of our use of GNN and accuracy assessments for the GNN variables used in our RHS models are presented in detail on pages C–16 to C–19 of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). Based on our data needs, these accuracy assessments, and independent verification of the performance of GNN estimates, we have determined that GNN represents the best scientific information available for habitat modeling throughout the range of the northern spotted owl.

As described in detail in Appendix C, we selected the GNN vegetation database for a number of reasons; most importantly it is the layer developed for use in the Northwest Forest Plan monitoring program. In addition, it is the only vegetation layer available that covers all land ownerships across the entire range of the northern spotted owl. Past efforts to model, map, and quantify habitat selection by northern spotted owls at regional scales have often suffered from lack of important vegetation variables, inadequate spatial coverage, or coarse resolution of available vegetation databases (Davis and Lint 2005). To develop rangewide models of relative habitat suitability for northern spotted owls, we required maps of forest composition and structure of sufficient accuracy to allow discrimination of attributes used for nesting, roosting, and foraging by northern spotted owls (the essential physical or biological features). GNN, developed for the NWFP's effectiveness monitoring program, provides detailed maps of forest composition and structural attributes for all lands within the NWFP area (coextensive with the range of the northern spotted owl). Although the GNN approach is a method for predictive vegetation mapping, it is based on input of empirical forest attribute data from inventory plots (Forest Inventory and Analysis, current vegetation analysis, etc.) and modeled relationships between plots and predictor variables from Landsat thematic mapper imagery, climatic variables, topographic variables, and soil parent materials.

The GNN maps come with a large suite of diagnostics detailing map quality and accuracy; these are contained in model region-specific accuracy assessment reports available at the LEMMA Web site (*http://www.fsl.orstu.edu/lemma/*). Accuracy assessments apply to the GNN model(s), rather than the satellite imagery. We provide Pearson correlation coefficients of GNN structural variables used in Table C–1 of the Revised Recovery Plan (USFWS 2011, pp. C–18 to C–19), and local accuracy assessments (kappa coefficients) for individual species' variables in Table C–2. For developing models of northern spotted owl habitat, we generally selected GNN structural variables with plot correlation coefficients greater than 0.5 for an individual modeling region (42 percent had correlation coefficients greater than 0.7). On a few occasions when expert opinion or research results suggested a particular variable might be important, we used variables with plot correlations from 0.31 to 0.5. For species composition variables, we attempted to use only variables with kappas greater than 0.3. However, because we combined species' variables into groups that expert opinion and research suggested may represent influent community types, we occasionally accepted variables with kappas greater than 0.2 and less than 0.3 for individual variables within a group.

The GNN vegetation database was specifically developed for mid-to large-scale spatial analysis, suggesting that accuracies at the 30-m pixel scale may be less influential to results obtained at larger scales. Because we were interested in the utility of GNN at our analysis area (500 ac (200 ha)) spatial scale, we additionally conducted less formal assessments where we compared the distribution of GNN variable values at a large sample of actual locations (known northern spotted owl nest sites and foraging sites) to published estimates of those variables at the same scale. In addition, we received comparisons of GNN maps to a number of local plot-based vegetation maps prepared by various field personnel. Based on these informal evaluations, we determined that GNN represents a dramatic improvement over past vegetation databases used for modeling and evaluating northern spotted owl habitat, and used GNN maps as the vegetation data for our habitat modeling.

Our primary objective in Step 1 of the modeling process was to develop MaxEnt models that perform well at predicting northern spotted owl habitat by developing models that had good discrimination ability, were well calibrated, were robust, and had good generality. Our detailed evaluations of model performance, cross-validation, and comparison with independent data sets (described in pages C–30 to C–41 in Appendix C of the Revised Recovery Plan) demonstrate that at the scale MaxEnt models were developed and evaluated, we met these objectives. Acknowledging that all vegetation databases will exhibit some degree of error, if the GNN layer was inadequate for predicting northern spotted owl habitat, we would not expect the reliable predictive models that we obtained. Thus, as described above, given our data needs, we believe the GNN database represents the best available information for the purposes of identifying critical habitat for the northern spotted owl. We are unaware of any alternative existing scientific information, and no viable suggestions were offered by reviewers or commenters.

Comment (20): One reviewer indicated that inaccuracies in the GNN database and inherent problems with MaxEnt probably led to errors with MaxEnt predictions of owl distributions. The reviewer suggested that there is little science to support the assumptions that GNN data for vegetative variables believed to be important to northern spotted owls were equally accurate across modeling regions, and there is little certainty that relevant processes were sufficiently captured so as to reliably predict owl population performance.

Our Response: As noted earlier, no vegetation database will be free of error; the important question is whether the database used is accurate enough to support the intended analysis objectives. We acknowledge that there may be some errors in the GNN database, yet the MaxEnt models we developed performed very well at predicting habitat suitability for northern spotted owls (one would not expect reliable predictive models if the underlying databases were highly inaccurate—one would expect poorly performing models). Our evaluation of the MaxEnt models developed indicate that the models for all modeling regions were well calibrated and showed quite similar patterns in terms of strength of selection (Figure C–5, USFWS 2011). Cross-validation results showed that all models were robust (i.e., equally accurate when applied to different

subsets of the spotted owl sample; USFWS 2011, Table C–19), and comparison of model results with independent test data showed the models had good ability to predict known northern spotted owl locations (USFWS 2011, Table C–20). Overall, these evaluations suggest our models of relative habitat suitability were robust and have good generality (are good at predicting northern spotted owl habitat in areas other than areas that provided the data for development of the model). As detailed in our response to *0* based on our data needs, accuracy assessments, and independent verification, amongst other information, we believe the GNN database represents the best available scientific data for our purposes.

We are uncertain about what ''inherent problems with MaxEnt'' the reviewer may be referring to; MaxEnt has been thoroughly evaluated in the scientific literature and found to perform very well for predicting species distributions and habitat suitability. Peer-reviewed papers by Elith *et al.* (2006), Wisz *et al.* (2008), Graham *et al.* (2008), Phillips *et al.* (2009), and Willems and Hill (2009) all compared MaxEnt to other modeling tools on identical data sets (sometimes hundreds of species), sample sizes, and geographic areas. MaxEnt always performed very well and was consistently a top-performing model. Based on the accurate performance of the model and the thorough, independent scientific evaluations of MaxEnt on a number of taxa, geographic regions, and sample sizes, we believe we have utilized the best available scientific information to model habitat suitability for the northern spotted owl. We note that 13 out of the 15 peer reviewers agreed that the use of MaxEnt was appropriate for our purposes.

Comment (21): One reviewer stated that although the Service claimed in the proposed rule that the modeling process defined areas that contain the physical and biological features essential for conservation of the species, that in reality MaxEnt provides no scientific support for the PCEs described in the proposed rule, and the proposed rule cites no other scientific basis for them. The reviewer indicates that MaxEnt simply ranks pixels in an area based on the ''best'' habitat definition supplied to it, and that the habitat definitions chosen by MaxEnt do not represent what the spotted owl needs and do not delineate the physical or biological features essential for the conservation of the species.

Our Response: The comment mischaracterizes the relationship between our habitat modeling and the identification of PCEs for the northern spotted owl. We did not use the habitat modeling to define the PCEs for the species. As stated in the proposed rule (March 8, 2012; 77 FR 14062, p. 14082), and reiterated in this rule, the physical or biological features essential to the conservation of the species (and associated primary constituent elements (PCEs)) of critical habitat for the northern spotted owl, are identified based on ''* * * studies of the habitat, ecology, and life history of the species as described in the final listing rule published in the **Federal Register** on June 26, 1990 (55 FR 26114), the Revised Recovery Plan for the Northern Spotted Owl released on June 30, 2011, the Background section of this proposal, and the following information.'' The following section of the proposed rule, titled Physical or Biological Features, provided an expansive discussion of the scientific basis for the identification of the essential physical or biological features of critical habitat for the northern spotted owl, accompanied by numerous supporting citations from the scientific literature, which informed our description of the PCEs. The modeling was not used to describe the PCEs of critical habitat; rather, it was used to identify the areas most likely to contain the PCEs and the areas most likely to have been occupied by northern spotted owls based on habitat suitability at the time of listing, as well as identify the specific areas essential to the conservation of the species. This is an important distinction. The habitat models were constructed from a rigorous assessment of current knowledge of the physical and biological features that influence northern spotted owl habitat suitability, and are supported by a solid scientific basis. We recognize that there may have been some poorly worded statements in the proposed rule that led to some confusion regarding the intersection of the PCEs and the modeling framework. We have clarified the language in this final rule to make it clear that we did not use models to define the PCEs for the northern spotted owl, but that we used the PCEs to develop maps of relative habitat suitability across the range of the northern spotted owl as one step in the identification of critical habitat for the species.

Comment (22): One reviewer recommended that the Service: (a) evaluate the rate at which MaxEnt may misclassify locations that do not contain spotted owls; and (b) provide evidence that MaxEnt accurately incorporates the factors that reflect the best environmental conditions for optimal population performance among northern spotted owls.

Our Response: Our models were developed to identify areas likely occupied at the time of listing based on relative habitat suitability (RHS), not to identify areas that do not contain owls. Furthermore, the presence of owls on territories can vary across space and time. There any many possible reasons that an organism (northern spotted owl in this case) may not occupy apparently suitable habitat for a period of time (e.g., death, competition, population is not at equilibrium with its environment). We did not use the RHS values to predict the number of years a site would be occupied or the reproductive rates at territories. The RHS layers we developed have been subjected to rigorous cross-validation and testing with independent data, as explained in Appendix C of the Revised Recovery Plan (USFWS 2011). Our assessment of the estimated on-the-ground conditions at high, intermediate, and low RHS values corresponds very closely to the published literature on northern spotted owl habitat use and selection, thus addressing (b). See also our responses to *Comments (19), (20),* and *(21),* among others.

Comment (23): One reviewer stated that comparisons with other evaluations of northern spotted owl habitat demonstrate the flaws in the modeling. In comparison with NWFP land use allocations, the modeling process includes 2.7 million ac (1.1 million ha) of lands that, up until now, had not been viewed as being needed for the recovery of the spotted owl. Overlaying the proposed critical habitat designation with USDA Pacific Northwest Research Station's 2011 data on old growth forests shows that only 36 percent of proposed critical habitat comprises late-successional old growth forest. Overlaying the proposed designation with USDA Pacific Northwest Research Station's 2011 report allocating spotted owl habitat into unsuitable, marginal, suitable and highly suitable shows that 50 percent of proposed critical habitat is either unsuitable or marginal habitat, and only 24 percent of the acres are classified as highly suitable.

Our Response: The designation of critical habitat is guided by the statutory language of the Act, and is highly species-specific in terms of its direction to identify specific areas that provide the physical or biological features essential to the conservation of the listed species in question—in this case, the northern spotted owl. Late-successional reserves under the NWFP, on the other hand, were established for

the conservation of multiple species of varying taxa (birds, mammals, amphibians, fishes, etc.) and, in some areas, encompass forest types not used by northern spotted owls. For these reasons, the comparison of critical habitat with NWFP land use allocations is inappropriate, because they are intended to serve different purposes. The 2.7 million ac (1.1 million ha) of lands the reviewer refers to are presumably the congressionally reserved natural areas (wilderness areas and national parks) that are now excluded in this designation. These lands have consistently been viewed as essential to the recovery of the northern spotted owl since the species was listed. However, they were not included in previous designations due to our interpretation of the definition of critical habitat under section 3(5)(A) of the Act at that time and because their current classification and management was deemed adequate to meet northern spotted owl conservation goals. A primary purpose of these congressionally reserved natural areas is to conserve natural systems, including threatened and endangered species and their habitats, including the northern spotted owl. These areas are managed consistent with the conservation of the northern spotted owl, and we could find no benefit of inclusion that would outweigh the potential administrative costs associated with the designation of critical habitat on these lands.

Based on our modeling process, we found that northern spotted owl population performance under a habitat network represented by the 1994 NWFP was relatively poor compared with several other reserve designs (Dunk *et al.* 2012b). This result is not surprising considering the influence of barred owls and continued habitat loss to wildfire. Similarly, the results of this commenter's comparison of proposed critical habitat to maps of old growth forest and the nesting habitat model from the 2011 NWFP monitoring report would be anticipated, because the NWFP models represent only a portion of the habitat elements and spatial extent used by northern spotted owls. In particular, the classification of habitat into unsuitable, marginal, suitable, and highly suitable pertains only to forest structure used for nesting at the pixel scale, whereas our models are based on landscape-level habitat selection and incorporate the broader array of habitats used by northern spotted owls (including non-old growth). We believe the commenter is attempting to make ''apples and oranges'' type comparisons of habitat, and for the reasons described above, we disagree with the statement that such comparison demonstrate flaws in our modeling.

Comment (24): One reviewer stated that the Zonation model was not designed to develop a conservation network and that this model does not make a judgment as to what is essential for the conservation of the species. As characterized by the reviewer, Zonation does not use the presence or absence of PCEs as input so it does not show where the PCEs are essential. According to the reviewer, what it does is take the relative habitat suitability index of the MaxEnt model (which itself does not depict the presence or absence of PCEs), further smooth them by assigning new values at the home range size of 3,424 ac, (1,386 ha) and determines how little land is required to capture some percent of habitat values based on the parameters provided by the Service. It does this by removing the areas with the lowest habitat values first until the specified percentage of the habitat values are left. The reviewer contends that the Service used Zonation outputs that captured 70 percent of the habitat values as the basis for the proposed revision of critical habitat, and that this in no way supports the premise that these areas are essential for the conservation of the species. The reviewer claims that Zonation only shows a computer's calculation of the minimum amount of land needed to encompass 70 percent of the habitat value, which is a purely artificial data point created from smoothed indices of a relative habitat suitability index based on biased spotted owl locations overlaid on a hypothetical landscape using conglomerated data. The reviewer states there is no way to determine if the areas captured by these solutions actually contain the PCEs, and the Service has no idea how accurate the model is in predicting use by spotted owls.

Our Response: We disagree with the reviewer's statement in that it mischaracterizes the intended purpose of Zonation, the way the model works, and how the Service used it. The Zonation model was designed specifically for the purpose of developing conservation networks (Moilanen and Kojala 2008). However, we did not simply employ the Zonation model to provide a critical habitat network. As described in our response to *Comment (21)*, and as detailed at length in our Modeling Supplement (Dunk *et al.* 2012b), we used the PCEs for the northern spotted owl to develop maps of relative habitat suitability for the species across its range; this step then informed the development of the spotted owl habitat conservation planning model (Zonation), thus the presence of PCEs is the foundation of the entire habitat modeling framework, and is fundamental to our identification of critical habitat for the northern spotted owl. We used Zonation to provide a series of alternative networks that were then compared in terms of relative simulated spotted owl population performance (using HexSim). After comparing a wide range of Zonation-derived scenarios, the top-performing alternatives for each modeling region were assembled into composite maps for further evaluation in HexSim. Development of composite maps also involved modification of reserve designs based on expert opinion and policy. In many modeling regions, the proposed critical habitat deviates substantially from the strictly Zonation-derived reserve designs, because use of the modeling was only one step in the process of identifying critical habitat. Finally, the Service verified that the resulting proposed critical habitat met the statutory criteria of critical habitat by evaluating the proportion of proposed critical habitat that was occupied by known northern spotted owl home ranges at the time of listing and that provides the essential physical or biological features, and by evaluating any areas that may have been unoccupied at the time of listing to determine whether they are essential to the conservation of the species. In addition, to address any uncertainty regarding occupancy, we evaluated all of the critical habitat under the higher standard of section 3(5)(a)(ii) of the Act. Please see Criteria Used to Identify Critical Habitat for further information.

Comment (25): One reviewer stated that the process used by the Service to define what constitutes nesting, roosting, and foraging habitats in the proposed rule produced results in staggering differences compared to historical definitions. According to this reviewer, not only are they totally different from what has been viewed as valid definitions for almost 20 years, but they are also totally unrecognizable on the ground. The reviewer claims the proposed rule utilizes habitat definitions derived from analysis of the hypothetical GNN–LT vegetation layer coupled with abiotic factors, which only make sense in computer modeling. The reviewer states that MaxEnt does not use these definitions to identify NRF (nesting/roosting/foraging) habitat but rather assigns an RHS value based on how many of the factors are present. Finally, the reviewer says that the Service claims to be using these factors

to determine if stands contain the PCEs when, in fact, they do not.

Our Response: We are unsure of the basis for this comment, since the definitions of nesting, roosting (NR) and foraging (F) habitats used in this critical habitat rule are very similar to definitions used in past assessments, including previous designations of critical habitat for the northern spotted owl, and the definitions we use are based primarily on the information found in the published scientific literature. In fact, all NR and F models tested were derived from literature reviews and expert opinion, including input from timber industry scientists and managers. The relative habitat suitability models incorporate these NR and F definitions (submodels), as well as broader environmental features such as elevation and slope position, that are also well-described in the northern spotted owl literature. The remainder of the comment mischaracterizes our habitat suitability modeling; a thorough explanation of that modeling is found in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). In addition, please see our response to *Comment (19)* for details on how the PCEs were defined and incorporated into the process of mapping RHS.

Comment (26): One reviewer stated that the Service modified input variables given to HexSim to produce ''composites,'' and the Service cannot show that these contain the PCEs and that they are essential, and there is no statistical difference between the different composites. By only displaying mean values, the reviewer claims the Service creates a false appearance that the difference between these alternatives is real. The Service does not show that the differences result in any real difference in achieving recovery objectives, they merely state it as a matter of fact. This is a misuse of modeling data, the reviewer states, and not best available science.

Our Response: This comment misunderstands the process used to develop composite maps, and the subsequent comparison of HexSim results. Composite maps are maps where different reserve designs were selected for each modeling region based on their ability to achieve recovery goals. These region-specific designs were combined across the range of the owl to create a ''composite map.'' We evaluated composite maps in an iterative manner to identify the design that best met recovery goals and our guiding principles. Composites were not created by modifying HexSim input variables; rather, they represent a range of reserve design alternatives that were subsequently tested in HexSim. Appendix C and Dunk *et al.* (2012b) provide ample evidence that all of the composites contain the physical and biological features used by the owl; comparison of HexSim results is the process by which the Service evaluates what amount and distribution of these features is essential to the conservation of the northern spotted owl. As stated in our proposed rule, this final rule, and in Dunk *et al.* 2012b, we assessed various composites by comparing the relative (emphasis added) performance of various habitat scenarios. That is, we used metrics such as relative differences in extinction risk and population size (which include upper and lower confidence intervals) to evaluate the ability of different composites to achieve recovery objectives for the northern spotted owl. In fact, we expressly stated ''simulations from these models are not meant to be estimates of what will occur in the future, but rather provide information on trends predicted to occur under different network designs'' (March 8, 2012; 77 FR 14062, p. 14097). There were statistically significant differences in population performance, both at the modeling region and range-wide scales among our composites (see Appendix C, USFWS 2011 and the Modeling Supplement (Dunk *et al.* 2012b) for additional details). We therefore disagree with the commenter's claims about misuse of modeling data and best available science.

Comment (27): One reviewer stated that the boundaries of the proposed revision of critical habitat are impossible to identify on the ground. They can only be defined by use of global positioning satellite receivers that have had the boundaries created by the Zonation computer model inputted to them.

Our Response: Critical habitat is defined by the features as discussed in this final critical habitat designation and shown on accompanying maps. Specific coordinates and descriptions that define the boundaries of critical habitat are available online at *http://www.fws.gov/oregonfwo,* at *http://www.regulations.gov* at Docket No. [FWS–R1–ES–2011–0112], and from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**); maps are available online at *http://criticalhabitat.fws.gov/crithab/.*

Comment (28): One reviewer states that the Service did not use pixel by pixel data, but conglomerated the pixel data into indices that represent the 500-ac (200-ha) circle around each pixel, which increased the error associated with the predictions. The reviewer claims this wipes out all the actual stands that might actually be used by spotted owls and instead assigns each pixel a conglomerate value for each habitat variable based on averages. Therefore, the reviewer asserts there are many areas that do not contain the PCEs.

Our Response: This comment mischaracterizes the method used to evaluate habitat quality, and the basic definition of habitat for northern spotted owls. As described in Appendix C of the Revised Recovery Plan (USFWS 2011), habitat suitability consists of several factors including, but not limited to, the actual forest ''stands'' used by owls. Our relative habitat suitability models are based on the amount, edge, and core of actual stands classified as nesting/roosting habitat and amount of foraging habitat; i.e., the PCEs identified in this rule. We therefore do not ''wipe out'' the actual stands as suggested by the reviewer, but rather measure their relative importance given additional landscape features such as elevation and slope position. This allowed us to better identify the landscape features where owls could establish a viable territory. Simply mapping out ''the actual stands that might be used'' would have provided a highly fragmented habitat network consisting of many ''stands'' not likely to be used by spotted owls. The comment also ignores the fact that we extensively tested the RHS model and found it accurately predicts spotted owl habitat, and we evaluated the proposed critical habitat network and found that the areas proposed were predominantly occupied by known spotted owl sites at the time of listing. See also our responses to *Comment (19)* through *Comment (24).*

Comment (29): One reviewer stated that Phase 1 results suggested that the Redwood Coast modeling region was among the most stable, but questioned how this could be when there are very few remaining northern spotted owls in Redwood National Park, where barred owls are now the predominate species. The reviewer states this was also not reflected in the Phase 2 modeling results (Table 6) (Dunk *et al.* 2012a).

Our Response: We obtained recent (2006) verified northern spotted owl location data from many sources in the Redwood Coast modeling region. These data strongly suggest that the high densities of barred owls observed within Redwood National Park are not occurring in the remainder of the modeling region, where large numbers of northern spotted owl territories persist. We therefore used demographic data from the Green Diamond

monitoring study to parameterize (put variables into) HexSim for the region.

Comment (30): One reviewer suggested that we include an appendix that shows each of the decision points in the development of the proposed critical habitat network in systematic detail, and suggested this would be an adequate remedy and make the entire modeling process open and transparent, and repeatable by persons external to this process.

Our Response: We attempted to make explicit the key assumptions and decision points used in the modeling process, and the guiding principles we followed for application of professional judgment in refining reserve networks were included in the proposed rule. Much of what the reviewer asks for is presented in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). In addition, we have tried to make assumptions and decision points more explicit in our final Modeling Supplement (Dunk *et al.* 2012b) that is available to the public at *http://www.regulations.gov.*

Comment (31): One reviewer suggested that a major flaw in the modeling is that the habitat is held constant for 350 years and any area with an RHS value less than 35 is assumed to be non-habitat. The reviewer states that by holding the habitat constant and not allowing it to grow, the Service greatly overestimates the amount of land needed to reach relative population levels. The reviewer claims this also results in a double standard for areas currently classified by MaxEnt as having low RHS values—in the modeling process they are excluded and not allowed to grow into habitat, yet they are included as critical habitat because the Service claims they will be necessary for population growth.

Our Response: The reviewer misunderstands the method we used to simulate habitat change through time. Habitat was not held constant during the HexSim simulations; we measured the rates of change in habitat quality (RHS) between the 1996 and 2006 GNN layers and projected those rates into the future. This allowed for losses in habitat quality caused by timber harvest, wildfires, and other causes as well as gains due to forest growth to occur through time in a plausible fashion. Because the remainder of this comment is based on this faulty premise, the other points in this comment are, in turn, unfounded.

Comment (32): One reviewer noted that throughout the modeling process, means of the response variables (e.g., Table 8 of Dunk *et al.* 2012a) should be accompanied by either standard errors or 95 percent confidence intervals. Otherwise, the reviewer states, it is difficult to determine how precise these estimates were, especially when comparing different scenarios.

Our Response: We agree, and this was an oversight that we have corrected in the final version of our Modeling Supplement (Dunk *et al.* 2012b).

Comment (33): One reviewer thought more could have been done to evaluate uncertainty in the original habitat suitability models by running replicate samples in MaxEnt and then capturing the range of variation in resulting habitat designations.

Our Response: Table C–19 in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) presents results from the cross-validation results, in terms of performance differences between models based on replicate samples. Those results showed that there was very little difference between the performance of the models when replicate samples were evaluated, giving us confidence in the generality of our model (that is, the model worked reliably well across a range of situations tested).

Comment (34): One reviewer requested additional sensitivity analysis to quantify the influence of different parameter settings within HexSim on modeled population performance, which would have been particularly useful for evaluating the implications of scientific uncertainty.

Our Response: We agree and in the final Modeling Supplement (Dunk *et al.* 2012b) we have incorporated the results of sensitivity analyses conducted on nine HexSim parameters.

Comment (35): One reviewer noted that the original supplement on habitat modeling that accompanied our proposed rule (Dunk *et al.* 2012a) did not report measures of variance in the population estimates or pseudo-extinction thresholds used to compare habitat network scenarios. The reviewer noted that reporting standard errors or ranges of those population estimates would help in the comparison of the efficacy of different network designs.

Our Response: Our failure to report measures of variation in population estimates was an oversight that we have corrected in the Modeling Supplement (Dunk *et al.* 2012b). The estimated extinction risk thresholds that we reported were the total number of simulations in which that threshold was exceeded (i.e., the population fell below the extinction threshold). It would not be appropriate to provide measures of variation around these. The measure itself is interpreted as the ''probability of exceeding pseudo-extinction threshold X.''

Comment (36): One reviewer noted that model results showed that the barred owl encounter rate can have a disproportionately large influence on persistence outcomes of the HexSim model. The reviewer states that the Service evaluated four barred owl scenarios (Dunk *et al.* 2012a), but none of these considered the more critical survival parameter and the major reductions in adult survival that barred owls generate in the model. Thus, the reviewer states that one is unable to assess the relative contributions of barred owl encounter rates versus barred owl survival reductions to persistence of simulated northern spotted owl populations.

Our Response: In the northern spotted owl HexSim model we used, barred owls only affected northern spotted owl survival, not occupancy or reproduction. Thus, the impact of barred owls in HexSim results is only from their reduction of northern spotted owl survival. Based on advice we obtained from species experts, we limited barred owl impacts on northern spotted owls to survival alone. We did not simulate barred owl impacts on reproduction, territory establishment, site fidelity, or movement behavior. We also did not simulate barred owl predation on northern spotted owl nestlings. This recommendation (to simulate barred owl impacts only on northern spotted owl survival) was a reflection of limitations on rangewide data availability regarding these factors.

Comment (37): One reviewer suggested that we allow the barred owl effect in the HexSim model to vary with resource acquisition class. For example, the barred owl effect on survival might be more severe when an owl is in the ''low'' resource class but incrementally reduced in the medium and high resource classes (i.e., as resources become less limiting so do the negative effects of competition with barred owls).

Our Response: Resource acquisition classes are a component of the HexSim model. In the model, resources available to an owl are a function of the mean RHS value of habitat within its home range and fall into three categories: High, medium, or low (USFWS 2011, p. C–60). This is a good suggestion, and could potentially help refine the HexSim model for the northern spotted owl. It would not, however, improve the model's ability to identify those specific areas that contain the physical or biological features essential to the conservation of the northern spotted owl, or that are essential to the conservation of the species (section

3(5)(a) of the Act). The relative performance of various composite potential critical habitat networks would be unlikely to change if we were to change the analysis as the reviewer suggests, because the proposed change would affect all potential critical habitat networks in the same way. The relative performance of the habitat networks under consideration, which is what we were able to assess (as opposed to absolute outcomes), would therefore remain the same, and our ultimate determination of the critical habitat network that provides what is essential to the conservation of the northern spotted owl in the most efficient design would be unchanged.

Comment (38): One reviewer suggested that modeling of habitat networks should incorporate more realistic encounter rates between northern spotted owls and barred owls, so that estimates of sustainability of northern spotted owl populations are not overly optimistic.

Our Response: As we have noted in both the proposed rule and this rule, the designation of critical habitat is only one of many conservation actions that may contribute to the recovery of the northern spotted owl. The designation of critical habitat is intended to help address habitat-based threats to a listed species; it is not expected to independently lead to recovery absent other actions to ameliorate additional, non-habitat based threats. We are also bound, however, by the statutory definition of critical habitat, which requires that we identify those areas that provide the physical or biological features essential to the conservation of the species, or are otherwise essential (if not occupied at the time of listing). The task of identifying where on the landscape these essential areas lay was complicated by the barred owl, a non-habitat based threat. In some cases, the negative influence of the barred owl on the simulated performance of our modeled northern spotted owl populations completely masked the potential contribution of varying areas of relative habitat suitability, thus rendering it impossible to determine which specific areas provide the essential physical or biological features. Our HexSim modeling suggested that if barred owl encounter rates within each modeling region were to be maintained at their currently estimated rates (from Forsman *et al.* 2011), there was little variation in northern spotted owl population performance among any of the potential critical habitat networks (even doubling the size of the habitat network produced no discernible difference). The only avenue that allowed us to discriminate between potential networks and isolate and evaluate the contribution of specific areas of habitat that are essential to the conservation of the northern spotted owl, as directed by the statute, was to adjust the encounter rates with barred owls to some reasonable level, as might potentially be achieved through management actions. This harkens back to our statement earlier that we do not assume critical habitat will provide for the recovery of the species in a vacuum; rather, we must assume that other recovery actions will occur in coincidence with the protections provided by critical habitat. We assumed changes in barred owl encounter probabilities in our comparisons of potential critical habitat networks that, in our judgment, represented changes that could realistically be achieved with management aimed at reducing encounter rates (and without prescribing the nature of that management). In most cases, only relatively modest changes to the currently estimated encounter probabilities between barred owls and northern spotted owls were required to allow us to discern the underlying differences between varying habitat network designs, and to enable the identification of the specific areas essential to the conservation of the species. In fact, for Phase 2 and 3 modeling (MaxEnt and HexSim; see Dunk *et al.* 2012b for details), we decreased barred owl encounter probabilities in only 3 of 11 modeling regions, and increased encounter probabilities in 8 of 11 modeling regions. The mean absolute value of change (from currently estimated encounter probabilities to what we assumed in Phases 2 and 3) among modeling regions was 0.081 (range = 0.005 (in the KLE) to 0.335 (in the OCR)). Our population performance results do not suggest that the habitat scenarios considered were overly optimistic in regard to sustainability of northern spotted owl populations (Dunk *et al.* 2012b).

Comment (39): One reviewer suggested incorporating the relative probability of controlling barred owls as part of the designation of various critical habitat units. The reviewer noted that to be able to assess habitat factors in the modeling process, the barred owl effect had to be set below known values in selected areas, suggesting that these designated critical habitat units will not contribute to northern spotted owl conservation in the absence of barred owl control. The reviewer further stated that the apparent sensitivity of the HexSim model to the barred owl covariate indicates that barred owl management will be the overriding factor in the success of critical habitat being able to achieve the northern spotted owl recovery goals. The reviewer suggested that if the Service wants to capture uncertainty in this modeling exercise, the probability of controlling barred owl numbers should be factored into the modeling process based on logistical, ownership, and social factors.

Our Response: We agree with the reviewer's suggestions in theory. However, we are unaware of currently available scientific information that would enable us to reliably estimate the influence of ''logistical, ownership, and social factors'' on the probability of effective barred owl control across the range of the northern spotted owl (over 50 million ac (20 million ha)). Lacking any such specific data, such exercise would be arbitrary and speculative, and would likely introduce greater uncertainty into the modeling. We appreciate that the reviewer recognizes the sensitivity of the model to barred owl encounter rates, and the reason why we had to make slight adjustments to those rates in some areas to identify critical habitat for the northern spotted owl (see our response to *Comment (38),* above).

Comment (40): One reviewer indicated that basing the demographic trends on the last meta-analysis (Forsman *et al.* 2011) is overly optimistic since these results are already badly outdated. The reviewer states that the last meta-analysis was conducted after the 2008 field season, with survival rates estimated through 2007 and realized rate of population change through 2006. The reviewer states that, according to personal communications with researchers in other demographic study areas, many of the study areas shown as stable in the 2008 meta-analysis are now in precipitous decline due to rapid increases in barred owl populations. The reviewers suggests that, although it would only be qualitative, the Service could contact the leads from the various northern spotted owl demographic study areas to see if there have been substantial changes in barred owl versus northern spotted owl numbers.

Our Response: This is a good point, and we heard similar comments from several field researchers and principal investigators of the northern spotted owl demographic studies. In Step 3 of the modeling process, we obtained the most recent annual reports from the demographic study areas and evaluated

the more recent estimates of barred owl densities, and included a scenario representing high barred owl densities such as those described in this comment. Because we used more recent estimates of barred owl encounter rates, spotted owl population trends simulated in HexSim showed a more rapid decline than that estimated in the recent meta-analysis; this was especially evident in the Tyee demographic study area. We therefore believe that our modeling process incorporated the idea expressed in this comment.

Comment (41): One reviewer indicated that bounding experiments with HexSim are needed to suggest the sort of spatial, temporal, and population controls that may be needed for the barred owls to create a high likelihood of success for critical habitat. The reviewer suggests the Service has thus far determined the barred owl encounter rates that were needed to achieve reasonably stable northern spotted owl population dynamics.

Our Response: This is a good suggestion, but not necessary to identify lands meeting the definition of critical habitat. Because we evaluated northern spotted owl population performance across a gradient of barred owl encounter probabilities ranging from 0.0 to 0.7, our modeling already revealed that northern spotted owls are likely to do very poorly at high barred owl encounter probabilities. This provided a general understanding of the influence of various barred owl encounter rates and demonstrated the range of values (bounds) where population performance that met recovery criteria was possible. This is why we set 0.375 as a ceiling to barred owl encounter probabilities. The reviewer's suggestion is more relevant to the specifics of potential barred owl control efforts, such as have been recommended by the Revised Recovery Plan on an experimental basis (USFWS 2011). The Service is currently considering such efforts and has published an environmental impact statement on experimental barred owl removal options. That is a separate recovery effort, however, is not connected to this rulemaking.

Comment (42): Several reviewers expressed concern that the way that barred owl encounters were represented in the model as homogeneous probabilistic reductions in northern spotted owl survival may fail to capture important spatial patterns of interaction between the species within subregions, and it may overestimate (one reviewer) or underestimate (second reviewer) the negative impacts of barred owls on northern spotted owl population persistence. The reviewers suggested the uncertainty surrounding the specific impacts of barred owls, and the analysis in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl further justify the need for an intensive barred owl removal experiment to understand the overall impact that barred owls are having on northern spotted owls.

Our Response: This point is well taken by the Service. As the reviewer mentioned, ''empirical information required for a realistic representation of barred owl interaction effects across the range of the northern spotted owl is not available at this time.'' The Service did evaluate several different barred owl encounter probabilities, which largely differed among the 11 modeling regions, but were identical within modeling regions. The modeling framework we used is capable of including a spatially explicit barred owl effect, if such specific data should become available. Given the uncertainties about variation in barred owl impacts within modeling regions, it is possible that our modeling overestimated or underestimated negative barred owl impacts. However, because we used HexSim to compare relative population performance among alternative potential critical habitat networks, and used the best available estimates of barred owl effects, we believe the representation of barred owl impacts we used allowed us to accurately evaluate which networks, on a comparative basis, best met the objectives in our guiding principles for identifying lands meeting the definition of critical habitat for the northern spotted owl.

Comment (43): One reviewer believed that the HexSim model was not an appropriate choice for this modeling process because the reviewer indicated it was overly complex, too individually based, and included variables where there was no, little, or very incomplete data, such as territory searching behavior, and floater dynamics, etc. In addition, the reviewer expressed skepticism that the modeling approach used would be repeatable, because of its complexity.

Our Response: We disagree. We have articulated our rationale for using the HexSim model in Appendix C to the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, pp. C–53–C–56) and again in our Modeling Supplement (Dunk *et al.* 2012b). We acknowledge that there are many possible approaches to identifying and evaluating alternative potential critical habitat networks. However, we contend that our approach represents the best available science and is appropriate for identifying areas meeting the definition of critical habitat because it enabled us to evaluate numerous possible networks of habitat and compare simulated population responses of northern spotted owls to environmental conditions in a spatially-explicit manner that enabled us to determine those areas that meet the definition of critical habitat for the species. Our approach is detailed in the section Criteria Used to Identify Critical Habitat, but in brief, the use of HexSim enabled us to evaluate which of the habitat scenarios under consideration had the greatest potential to meet the recovery objectives for the northern spotted owl, based on relative population performance.

To identify the areas that meet the definition of critical habitat for the northern spotted owl, we elected to use a spatially explicit, individual-based modeling approach. We did so because we required an approach that enabled comparison of a wide range of spatially explicit conditions such as variation in habitat conservation networks. Individual-based models allow for the representation of ecological systems in a manner consistent with the way ecologists view such systems as operating. That is, emergent properties such as population increases or declines are the result of a series of effects and interactions operating at the scale of individuals. Individuals select habitat based on what is available to them, disperse as a function of their individual circumstance (age), compete for resources, etc.

Grimm and Railsback (2005) noted that individual-based models need to be simple enough to be practical, but have enough resolution to capture essential structures and processes. We are fortunate to have a tremendous quantity and quality of data available for the northern spotted owl; the species is therefore ideally suited for a spatially-explicit, individual-based model, such as HexSim. While not developed specifically for the northern spotted owl, HexSim (Schumaker 2011) was designed to simulate a population's response to changing on-the-ground conditions by considering how those conditions influence an organism's survival, reproduction, and ability to move around a landscape. We developed a HexSim spotted owl scenario based on the most up-to date demographic data available on spotted owls (Forsman *et al.* 2011), published information on spotted owl dispersal and home range sizes, as well as a variety of other parameters. Evaluation and calibration of the HexSim output included comparison with owl numbers in demographic study areas and

dispersal histograms. Based on our assessment of the model, we are confident it performs as intended, in terms of allowing us to reliably assess the relative performance of alternative habitat conservation networks. We further note that the majority of peer reviewers supported the modeling framework we applied in the identification of critical habitat for the northern spotted owl.

Comments on Active Forest Management

Comment (44): Five peer reviewers and numerous public commenters indicated that active forest management should be conducted in areas that are not currently high value for northern spotted owls and in an adaptive management framework given the uncertainties regarding how such management practices will impact northern spotted owls and their prey.

Our Response: The Service expects to support and design, in concert with the BLM, USFS, and researchers, scientific studies on the effects of ecological forestry projects in northern spotted owl critical habitat, to gain a better understanding of the short-term and long-term impacts of these silvicultural treatments on northern spotted owls, their prey and forest vegetative structure. We are currently designing and funding just such a study through Oregon State University for the pilot project in the Middle Applegate Watershed. We expect these types of research studies to inform the design of future ecological forestry projects within the range of the northern spotted owl.

A key difference between using active adaptive forest management to evaluate risks associated with ecological forestry and the Service's ongoing efforts to address risks associated with expanding barred owl populations is that, for barred owls, a single experiment has the potential to address many of the most important uncertainties pertinent to future management, allowing the Service to define a schedule for progress. Addressing uncertainties about ecological forestry will likely require multiple research efforts, each tailored to specifics of different geographic areas and different ecological interactions. Collaboration among programs, similar to the collaboration supporting long-term demographic studies of northern spotted owls, will likely be needed to conduct adaptive management studies of habitat treatments. Integrative initiatives, such as the USFS's Collaborative Forest Landscape Restoration Program, may also play an important role. Adaptive management of ecological forestry techniques will take time, and will require continuation of the ongoing dialogue between researchers and forest management practitioners regarding how to simultaneously meet the goals of forest restoration and northern spotted owl conservation. Coordination among research projects also will be essential to generating reliable information about diverse interactions as efficiently as possible.

Comment (45): One reviewer and a public comment suggested that the emphasis of management within northern spotted owl critical habitat should be on ecological restoration rather than ecological forestry.

Our Response: In general, in northern spotted owl critical habitat, we would like to see land managers consider activities to restore and maintain northern spotted owl habitat and the natural ecological processes (e.g., fire regime, natural vegetational succession patterns, etc.) of the owl's forest ecosystems. However, we also recognize that ecological restoration, in and of itself, is often not the management goal of all lands included in critical habitat. This critical habitat rule does not dictate what land managers do on Federal State, or private lands. However, in areas where land managers are considering competing land management goals (e.g., northern spotted owl habitat conservation vs. commercial timber harvest), we encourage them to consider an ecological forestry approach to better meet the needs of the northern spotted owl, the goals of the land managers, and long-term forest health. As described in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), the field of ''ecological forestry'' is emerging as a dominant paradigm of forest management; related to this emergence are concepts such as ''natural disturbance emulation'' and ''retention forestry'' (see, e.g., Gustafsson *et al.* 2012, entire; Franklin *et al.* 2007, entire; Kuuluvainen and Grenfell 2012, entire; North and Keeton 2008; Long 2009, entire; Lindenmayer *et al.* 2012; entire). The Service believes that application of these ecological forestry goals and principles, including those generally described in Johnson and Franklin (2009, entire; 2012, entire), may result, in some situations, in fewer adverse impacts to northern spotted owl critical habitat when compared to application of traditional silviculture as currently applied or permitted on private, State, and Federal matrix lands.

Comment (46): Several reviewers commented that studies have demonstrated negative effects of forest thinning on northern spotted owls and their prey, and expressed concern that negative effects of these practices may be further exacerbated by barred owls. These reviewers were uneasy with such types of activities occurring near owl territories, and recommended that if conducted, these actions be done at small scales and be subject to rigorous scientific scrutiny.

Our Response: We are not recommending that commercial thinning or other treatments be conducted near active owl territories or in good quality owl habitat. We also encourage an active adaptive forest management approach to improve the understanding about effects of ecological forestry approaches on northern spotted owl, barred owls, and other species of concern.

Comment (47): Three reviewers recommended that we give full consideration to recent publications of Hessburg *et al.* (2007) and Baker (2012) for guidance on how to restore and manage dry forests in the eastern Cascades.

Our Response: Both this final critical habitat rule and the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) cite Hessburg *et al.* (2007, p. 21), and we continue to recommend land managers consider their findings and recommendations regarding dry forest management within the range of the northern spotted owl. Since publication of the proposed critical habitat rule, we have reviewed Baker (2012, entire) as well as many other recently published studies addressing forest health and the risk of wildfire in the Pacific Northwest. We acknowledge some of the conclusions of Baker (2012, p. 21) and Williams and Baker (2012, p. 9) that portions of the dry forests of the Pacific Northwest experienced high-severity fires as well as mixed and low-severity fires. However, we also acknowledge the conclusions of many other researchers that large areas within the range of the owl that once burned frequently with low-moderate intensity regimes are currently outside of historical conditions (cited below). A variety of management measures (e.g., prescribed fire, mechanical treatment, etc.) can be considered in such areas where the goal is to influence wildfires to reduce adverse impacts of climate change, manage forest carbon levels, reduce fire severity and retain desirable forest conditions (i.e., conserve older trees), or protect high-value wildlife habitats (including northern spotted owls), riparian areas, and biodiversity (Davis *et al.* 2012, entire; Stephens *et al.* 2009, p.310–318; Stephens *et al.* 2012a, p. 12; Stephens *et al.* 2012b, entire; Chmura *et al.* 2012, p. 1134; Syphard *et al.* 2011,

p. 381; Safford *et al.* 2012, pp. 26–27; Roloff *et al.* 2012, pp. 7–9, Roberts *et al.* 2011, p. 617, Messier *et al.* 2012, pp. 67–70; Franklin *et al.* 2008, p. 46; Ager *et al.* 2007, pp. 53–55).

Such management considerations are completely consistent with the intent of the NWFP (Standards and Guidelines, p. C–12—C–13). We continue to recommend that land managers carefully distinguish and target areas that are high priority for ecological restoration (e.g., Franklin *et al.* 2008, p. 46; Schoennagel and Nelson 2011, entire; Ager *et al.* 2012, p. 280), and that they also minimize short-term impacts to northern spotted owls to the greatest possible extent. We suggest using a process such as provided by Spies *et al.* (2012, entire) to help prioritize actions and consider tradeoffs such as northern spotted owl conservation, restoration of ecological conditions, and other land management goals. Given the wide geographic area of this critical habitat designation and the variety of landscape conditions and fire regimes, more precise planning and implementation should be done at the appropriate landscape scales such as the National Forest scale, consistent with the goals of the Northwest Forest Plan.

Comment (48): One reviewer and a public comment recommended that the Johnson and Franklin (2009) ecological forestry framework should not be used because it is based on the wrong reference framework.

Our Response: While we recognize that there is some scientific disagreement about the specific ecological forestry practices recommended by Drs. Johnson and Franklin,we believe the commenters may have misinterpreted our references to this unpublished report. First, Johnson and Franklin (2009) is only referenced three times in the final critical habitat rule: Once as a general reference for ecological forestry, once in relation to how active management is generally not necessary to maintain old growth conditions in moist forests, and again to highlight that alteration of fuel loads in moist forest could have undesirable ecological consequences and thus should be discouraged. Second, we continue to encourage forest land managers to consider the application of ecological forestry principles to their commercial timber harvest (see response to peer review question 4a-c, above), and we believe that application of these principles in many instances may result in better long-term ecological conditions for northern spotted owls and other forest wildlife when compared to the application of traditional silviculture methods. The methods presented by Johnson and Franklin (2009) are one example of how ecological forestry can be applied. We recognize that there are a variety of approaches, and the best management practices for any area are highly dependent on site-specific conditions.

Comment (49): One reviewer recommended a zoning process for determining where active management would be appropriate. Such a zoning process would include identification of areas where management is not needed or should be avoided, areas where future habitat could be enhanced by treatment, and areas where management is needed to meet broader landscape goals. In addition, monitoring and reporting of progress towards desired goals is essential if this strategy is to be successful.

Our Response: The Service supports the concept of land managers identifying areas where active management would be appropriate on the lands under their jurisdiction. However, it is not appropriate for this critical habitat rule to attempt to do this; it should be done by land managers consistent with their planning procedures. As the reviewer also suggested, these details will need to be worked out at regional scales and planning levels (see response to peer review comment 4, above). Several examples of strategies for prioritizing landscapes for management treatment in eastern Washington include Davis *et al.* (2012, entire) and Franklin *et al.* (2008, pg. 46).

Comment (50): One reviewer encouraged the Service to recognize the highly transient nature of grand fir on the eastern Cascades.

Our Response: We have recognized this in the rule. While we did not explicitly identify all forest types in all regions, we have recognized the patchy and transient nature of east Cascades forests.

Comment (51): One reviewer asked that we identify which (specific) ecological processes will be enhanced by management and how management will be coordinated across large landscapes.

Our Response: We agree that additional guidance and coordination among management agencies would be helpful to coordinate landscape-level planning; however, such guidance and coordination is beyond the scope of this rulemaking. To the extent possible we have provided additional detail regarding restoration and management of ecological processes in revisions to the following sections of this rule: *An Ecosystem-based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat, Special Management Considerations or Protections,* and *Determination of Adverse Effects and Application of the ''Adverse Modification'' Standard.*

Comment (52): There were a number of general comments about analysis of fire risk and ecological benefits of contemporary fire regimes in dry and mixed-severity forests.

Our Response: The issue of forest health and fire risk in the Pacific Northwest is complex, and there is a wide variety of legitimate scientific viewpoints on forest management in the face of uncertainty. Although some scientists do not believe management intervention is appropriate and advocate a mostly passive (i.e., hands-off) approach to forest ecosystem management, many others believe science-based intervention is necessary to restore and maintain important ecological processes and components of biodiversity, including the northern spotted owl.

We agree with the majority of scientists who suggest that forest ecosystems at global, national, and regional levels are undergoing significant changes due to climate change and past management activities (Collins *et al.* 2012, pp. 8–12; Miller *et al.,* 2012, p. 201; Miller *et al.,* 2009, p. 28; Moritz *et al.* 2012, entire; Westerling *et al.* 2011, p. S459; Marlon *et al.* 2012, p. E541). Impacts from wildfire, changes in precipitation, insect and invasive weed outbreaks, and forest disease appear to be increasing when compared to historic patterns and are putting some components of native biodiversity at risk (Perry *et al.* 2011, p. 712). Although some researchers disagree on the magnitude of these changes and what to do about them (e.g., Hanson *et al.* 2009, p. 5; Baker 2012, p. 21; Williams and Baker 2012, p. 9; Dillon *et al.* pp. 18–20), our review of the recent scientific literature found that most researchers believe that changes in wildfire frequency, severity, and total burned area are occurring or are expected to varying degrees in the Pacific Northwest. Most of these researchers recommend consideration of certain types of active management responses to achieve goals such as increasing forest resilience to climate change, conserving extant biodiversity, and reducing wildfire severity (e.g., Stephens *et al.* 2009, pp. 316–318; Safford *et al.* 2012, pp. 26–27; Messier *et al.* 2012, p. 69; Hessburg *et al.* 2007, entire; Chmura *et al.* 2012, p. 1134; Stephens *et al.* 2012b, pp. 557–558; Fule *et al.* 2012, p. 76; Halofsky *et al.,* pp. 15–16; Reinhardt *et al.* 2008, pp. 2003–2004; Heyerdahl *et*

al. 2008, p. 47; Latta *et al.* 2010; Littell *et al.* 2009, pp. 1018–1019, Littell *et al.* 2010, p. 154; Spies *et al.* 2010, entire). Several of these studies identify the potential for degraded ecological conditions and increased fire risk to affect northern spotted owls (Buchanan 2009, pp. 114–115; Healey *et al.* 2008, pp. 1117–1118; Roloff *et al.* 2012, pp. 8–9; Ager *et al.* 2007, pp. 53–55; Ager *et al.* 2012, pp. 279–282; Franklin *et al.* 2009, p. 46; Kennedy and Wimberly 2009, pp. 564–565). We recommend that these issues related to active management in dry forests be considered by Federal land managers as they follow the direction on pages C–12 and C–13 of the Northwest Forest Plan Standards and Guidelines.

Comment (53): One reviewer recommended that the Service prepare a draft environmental impact statement (DEIS) under NEPA with regard to active management in northern spotted owl critical habitat.

Our Response: This rule revises the critical habitat designation for the northern spotted owl by identifying those specific areas that meet the definition of critical habitat for the species. It does not take any action or adopt any policy, plan, or program related to active forest management. The only effect of critical habitat is that Federal agencies must consult with the Service on their activities that may affect designated northern spotted owl critical habitat, and our discussion of active forest management is not intended in any way to prescribe or mandate the types of activities Federal agencies must submit for consultation. It is provided only for Federal, State, local, and private land managers to consider as they make decisions on the management of forest land under their jurisdictions and through their normal processes.

Comment (54): One reviewer criticized the proposed rule for promoting ecological forestry for economic and political reasons rather than basing recommendations on sound science.

Our Response: We disagree. We have included a discussion of ecological forestry principles because, in many instances, it may represent a reasonable and solid scientific approach to managing forest ecosystems where multiple—and sometimes competing—management goals need to be reconciled or accommodated (see, e.g., Gustafsson *et al.* 2012, entire; Franklin *et al.* 2007, entire; Kuuluvainen and Grenfell 2012, entire; North and Keeton 2008, entire; Long 2009, entire; Lindenmayer *et al.* 2012, entire). Our primary goal in this critical habitat designation is to identify the specific areas that meet the definition of critical habitat for the northern spotted owl. In addition, we identify those types of measures that promote the conservation of critical habitat, identify special management measures that may be needed within critical habitat, and identify activities that may affect or adversely modify critical habitat. Our overall emphasis in this designation is clearly on the maintenance and restoration of northern spotted owl habitat, but we also provide general guidance for consideration by land managers on what types of activities may affect northern spotted owl habitat and how to minimize the adverse impacts of those activities. Reference to the principles of ecological forestry as a suggestion for land managers to consider is a scientifically appropriate way to help achieve this goal, and is consistent with the recommendations of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), as well as the Standards and Guidelines of the NWFP (e.g., USDA and USDI 1994, p. A–1, Standards and Guidelines, pp. C–12, C–13).

Comment (55): A number of reviewers submitted line-specific edits and revisions.

Our Response: These revisions have been made to the text, where appropriate.

Comments From Federal Agencies

Comment (56): The USFS and several public commenters supported the inclusion of congressionally reserved areas including Wilderness Areas, National Parks, and similar lands for a variety of reasons, including accurately reflecting the area contributing toward recovery, highlighting the conservation value and role of this minimally managed habitat, and to encourage barred owl and other needed management activities.

Our Response: National parks, wilderness areas, and similar lands provide large areas of high-quality habitat for the northern spotted owl. All congressionally reserved lands (e.g., wilderness areas, national parks) proposed for designation have been excluded in this final designation of critical habitat. We agree that such areas play an important role in the conservation of the northern spotted owl under their current management. However, their current conservation value is so great that we could not find any minimal benefits of including them in that outweighed the relatively minor administrative costs of including them in critical habitat, therefore the benefits of excluding them outweighed the benefits of including them. In addition, exclusion of these lands will have no negative conservation impact on their future management and they will continue to function as intended for spotted owl recovery.

Comment (57): The Bureau of Land Management (BLM) and several public commenters identified specific concerns with the proposed critical habitat maps, including revisions to land ownership or management on both public and private land, and questions regarding the mapping scale and resolution. Several commenters submitted revised or corrected maps for the Service to consider in developing the final rule.

Our Response: We thank the commenters for the information provided. We have replaced the NWFP ownership designations used on the proposed critical habitat map with an updated BLM ownership map to correct many errors. In cases where mapping errors may have been made in our proposed critical habitat, such errors were corrected.

Comment (58): The BLM requested we provide maximum clarity with regard to the Act's section 7 consultation process in an effort to reduce the cost and burden of the consultation process.

Our Response: We have provided background and information to help the Federal action agencies assess whether their projects ''may affect'' proposed northern spotted owl critical habitat, the standard to determine whether consultation is required. If further clarification is needed, the Service is glad to provide action agencies with technical assistance to help determine whether or not their proposed action has the potential to affect critical habitat.

Comment (59): The BLM requested additional clarification about how the proposed critical habitat sought to ''ensure sufficient spatial redundancy in Critical Habitat within each recovery unit,'' and the purpose and expectations for these inclusions.

Our Response: In the development of habitat conservation networks, the intent of spatial redundancy is to increase the likelihood that the network and populations can sustain habitat losses by inclusion of multiple populations unlikely to be affected by a single disturbance event. This is essential to the conservation of the northern spotted owl because disturbance events such as fire can potentially remove large areas of habitat with negative consequences for northern spotted owls. Redundancy provides a type of ''emergency back-up'' system to sustain populations in the wake of such events. While the modeling and

evaluation process used by the Service did not formally analyze redundancy, we incorporated spatial redundancy at two scales: By (1) making critical habitat subunits large enough to support multiple groups of owl sites; and (2) distributing multiple critical habitat subunits within a single geographic region. This was particularly the case in the fire-prone Klamath and Eastern Cascades portions of the range.

Comment (60): The BLM provided additional data and mapping layers as well as an alternative approach for designating critical habitat on public lands.

Our Response: Through a series of meetings and work sessions, the Service has reviewed the materials provided by the BLM, and we evaluated and incorporated many of their suggested changes, where appropriate and consistent with our criteria for identifying critical habitat, in developing the final critical habitat designation. Based on BLM's suggestions, we removed relatively small areas of lower quality habitat that had been included in proposed critical habitat and added in relatively small areas of high-quality habitat that improved connectivity or created larger habitat blocks.

Comments From State Agencies

Comment (61): Washington DFW requested that the rule clarify the extent to which management actions with short-term negative impacts to northern spotted owl habitat is consistent with the recovery needs of the northern spotted owl, particularly in areas of Washington State where northern spotted owl populations are greatly depressed.

Our Response: Each situation should be considered on a case-by-case basis, but, generally, actions that have short-term negative impacts may be consistent with the recovery needs of northern spotted owl when the intent of the action is (1) to improve long-term conditions for the species or (2) to improve the overall condition of the ecosystem. It could be argued either that where populations are greatly depressed there is more need for these actions or, conversely, that there is less flexibility to conduct these actions depending on the specifics of the action and the habitat needs of the owl in that area. These are issues that must be addressed in consultation and through the level one team process; assessing that level of detail is beyond the scope of this rulemaking. We have revised the rule (see section: An Ecosystem-based Approach to the Conservation of the Northern Spotted Owl and Managing Its Critical Habitat) to provide additional suggestions regarding what management actions may benefit northern spotted owls and what actions are unlikely to do so. Additional guidance is available in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011).

Comment (62): The Washington Department of Fish and Wildlife supported a coordinated and strategic management plan for dry forest landscapes and expressed a need for the critical habitat rule to consider coordination to implement effective management, reduce conflict, and explore the possibility of Federal funding for landscape strategies.

Our Response: The landscape assessment approach for the East Cascades provides the best basis for development of strategies to manage dry forest landscapes. Products of the landscape assessment can be used to describe the rationale for management actions. The Service is available to work with land managers to assist in the development and implementation of landscape assessments, but this rule does not mandate any specific management within the critical habitat network, which would be beyond the scope of this rulemaking.

Comment (63): Several State and public commenters disagreed with the need to include private lands (and in some cases State lands) in the final rule for a variety of reasons. The commenters did not provide specific information on any particular lands, but provided general reasons that they thought the broad categories of private and State lands should be excluded from the final designation, including concerns of economic issues, uncertainty, private land stewardship, added regulatory burdens (including a disproportionate burden on small landowners), reduction in land value, State land overlays, consistency with existing laws and policy, potential disincentives for conservation or negative impacts to habitat, the need to maintain partnerships with landowners, the need to develop incentives for conservation partnerships, the need to compensate for lack of land use, the need to focus protections on public lands, the lack of notification of private landowners by the Service about the proposed rule, concern that designation penalizes landowners who have retained suitable habitat, and a lack of need for or benefits from additional protections. One commenter suggested that Congress intended the Federal agencies to acquire any private or State lands that are designated as critical habitat.

Our Response: We recognize that the greatest benefit of critical habitat may be realized on actively-managed Federal lands, since the regulatory effect of critical habitat is the requirement that Federal agencies ensure that any actions that they carry out, fund, or authorize do not destroy or adversely modify designated critical habitat. In addition, Federal agencies have a mandate under section 7(a)(1) of the Act to carry out programs for the conservation of endangered species and threatened species. For these reasons, we looked first to Federal lands for the critical habitat essential to the conservation of the northern spotted owl, as described in the section Criteria Used to Identify Critical Habitat and supporting methodology (Dunk *et al.* 2012b).

Section 3(5)(A) of the Act states that critical habitat is defined as (1) the specific areas within the geographical area occupied by the species at the time it was listed that provide the physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it was listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Further, section 4(b)(2) of the Act mandates that such determinations shall be made on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

The language of the Act does not restrict the designation of critical habitat to specific land ownership such as Federal lands; thus, lands of all ownerships are considered if they meet the definition of critical habitat. Areas may be excluded from the final designation if the Secretary finds that the benefits of exclusion outweigh the benefits of inclusion under section 4(b)(2) of the Act, or if we determine, based on public comment or other information received following the issuance of the proposed rule, that such areas do not meet the definition of critical habitat (for example, areas that were occupied at the time of listing but do not provide the essential physical or biological features, or areas that may not have been occupied at the time of listing and were proposed for designation, but are not essential to the conservation of the species).

As described in the proposed rule (March 8, 2012; 77 FR 14076, p. 14099), we evaluated critical habitat scenarios that prioritized Federal lands first as well as scenarios without regard to land ownership in determining what is

essential to the northern spotted owl. In all cases, if the scenarios under consideration provided equal contribution to recovery, we chose the scenario that prioritized publicly owned lands. State and private lands were included only if they were essential to the conservation of the species (i.e., were determined to have been occupied at the time of listing and contain the physical or biological features essential to northern spotted owl conservation or may have been unoccupied at the time of listing but are essential to the conservation of the owl). However, based on information received during the public comment period, in several cases we refined the critical habitat boundaries to remove areas of private lands that we determined do not meet the criteria and therefore do not meet the definition of critical habitat. In other instances, the Secretary has chosen to exert his discretion to exclude lands, including private lands, based on a careful weighing and balancing of the benefits of inclusion versus the benefits of exclusion, as provided in section 4(b)(2) of the Act, including consideration of conservation agreements, such as HCPs or SHAs, and the Service's desire to support existing and effective State conservation programs (see Exclusions). However, such exclusion does not indicate that these areas are not essential for the conservation of the species, only that the benefits of exclusion outweigh those of inclusion.

We retained some State-owned lands in all three states included in this critical habitat designation. In general we retained these lands because we found they provided essential contributions to the conservation of spotted owls, especially in terms of complementing the distribution of habitat on Federal lands or filling gaps in Federal ownership. We also found that the benefits of inclusion associated with public education and raising State and local agency awareness of the conservation needs of spotted owls outweighed anticipated minor increases in regulatory requirements, when Federal involvement occurred. See Changes from the Proposed Rule for more information on State lands retained in the final critical habitat designation.

The Service does not compensate private or State landowners for perceived limitations on land use associated with critical habitat designation. Designation of private or other non-Federal lands as critical habitat has no regulatory impact on the use of that land unless there is Federal involvement in proposed management activities. Identifying non-Federal lands that are essential to the conservation of a species alerts State and local government agencies and private landowners to the value of habitat on their lands, and may promote conservation partnerships. There is no indication that Congress intended the Service to acquire all private and State property that is essential to the conservation of listed species and designated as critical habitat.

We provided advance public notice of the proposed rule to revise critical habitat for the northern spotted owl through several avenues. Notice was provided with publication of the proposed rule in the **Federal Register** on March 8, 2012 (77 FR 14062) as well as through numerous local press releases at that time. In addition, notice of public information meetings in each of the three States affected by the proposed rule, as well as a public hearing, was published in the **Federal Register** on May 8, 2012 (77 FR 27010) and again on June 1, 2012 (77 FR 32483); the meetings and hearing were also announced in newspapers of local circulation in the affected areas.

Comment (64): Numerous commenters (State and public) requested that the final rule exclude lands already covered by conservation agreements, such as habitat conservation plans and safe harbor agreements, for a variety of reasons, including concerns about additional or duplicative Federal overlays and regulatory burdens, a lack of need for inclusion, policy consistency, the potential for designation to jeopardize existing agreements or remove incentives for additional conservation, and a recognition of the past conservation benefits of these voluntary agreements. In addition, it is argued that there is no need for an additional Federal overlay on lands that already have conservation designations or governing regulations such as parks, wilderness areas, HCPs, SHAs, and State forest practices rules.

Our Response: Please see our response to *Comment (63),* above. As described, we individually evaluated each conservation agreement in place within the proposed critical habitat designation, including State and private lands with HCPs, SHAs, conservation easements, or other established conservation partnerships. Following a careful weighing of the benefits of exclusion versus inclusion, the Secretary has chosen to exert his discretion to exclude lands covered by such agreements. In addition, the Secretary has chosen to exclude all congressionally-reserved natural areas (wilderness areas, national parks), State parks, and private lands from the final designation. Please see the Exclusions section of this document for details of the analyses that led to the exclusion of these areas from the final designation.

Comment (65): Numerous State commenters (CALFIRE, Oregon Department of Forestry, Washington Department of Fish and Wildlife, Washington Department of Natural Resources), Federal (USFS, BLM), and public commenters disagreed with the need to include public lands including Federal lands (e.g., ''matrix'' land, adaptive management areas, experimental forests, O&C Lands, and congressionally reserved wilderness areas, national scenic areas, and national parks), State lands (e.g., State parks, State forests, State forest trust lands), and county lands in the final rule for a variety of reasons, including additional and redundant regulatory burdens and requirements, economic and social impacts, potential inconsistency with existing laws and policy, existing protections, a lack of additional conservation benefits, limits on research or needed management activities (e.g., fuel reduction, restoration, or insect control), mapping errors, insufficient justification supporting inclusion, and potential disincentives for preserving habitat.

On the other hand, numerous commenters (both from other State agencies, as well as the public) supported the inclusion of public lands including Federal lands, State lands, tribal lands, and county lands for a variety of reasons, highlighting the conservation the value of this habitat, consistency with the best available science, the need for increased protections in some lands, and the realization there would be limited to no impacts to management.

Our Response: The critical habitat designation includes those lands that meet the definition of critical habitat in the Act, and which the Service has determined are essential to provide for the conservation of the northern spotted owl. In designating these lands, we have further considered their ownership, management, contribution to northern spotted owl conservation, existing protections, economic impacts, and other relevant factors, and determined it is appropriate and necessary to include them in the final critical habitat network to best ensure successful northern spotted owl conservation.

Where possible we prioritized the inclusion of Federal lands over other land ownerships, but where Federal lands were sparse or nonexistent we incorporated other ownerships in order

to design and designate an effective critical habitat network. As noted in our response to *Comment 64,* in cases where our analysis of the benefits of exclusion outweighed those of inclusion, such as when conservation agreements and partnerships have been developed with the Service, we have excluded State or other public lands from the final designation (see Exclusions).

Our proposed rule (77 FR 10462; March 8, 2012) identified several different possible outcomes of that proposed revision, depending on various areas considered for exclusion. Among the exclusions of public lands under consideration were all congressionally-reserved natural areas and all State lands. Of the congressionally-reserved natural areas under consideration, we have excluded all congressionally-reserved natural areas and State Parks from this final designation (see Exclusions). In addition, private lands were also excluded, following a careful analysis of the benefits of inclusion versus exclusion. In other cases, lands were retained in the final designation for a variety of reasons; for lands that were considered or proposed for exclusion, but not excluded in this final designation, those decisions are described in the section Changes from the Proposed Rule.

We recognize the concern over the inclusion of certain Federal lands in the designation of critical habitat for the northern spotted owl, and particularly of lands in the matrix land use allocation or the O&C lands. As described in the section Criteria Used to Identify Critical Habitat and elsewhere in this rule, we looked to Federal lands first for the conservation of the northern spotted owl, in part because Federal agencies have a statutory mandate to contribute to the conservation of listed species. Secondly, because the protections of critical habitat are triggered only in the case of a Federal nexus, those protections are always in place on Federal lands; thus the benefit of including Federal lands in critical habitat can potentially be significant. Finally, we only included lands in the designation if they meet the definition of critical habitat; that is, if they play a truly essential role in the conservation of the species. In some areas, for example the O&C lands, our modeling results indicated that those Federal lands make a significant contribution toward meeting the conservation objectives for the northern spotted owl in that region, and that we cannot attain recovery without them. Likewise, in addition to our modeling results, peer review of both the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) as well as our proposed rule to revise critical habitat, suggested that retention of high quality habitat in the matrix is essential for the conservation of the species. Population performance based on reserves under the NWFP, for example, fared very poorly compared to this final designation of critical habitat. As described in the section Changes from the Proposed Rule, we tested possible habitat networks without many of these matrix lands, which resulted in a significant increase in the risk of extinction for the northern spotted owl.

Similarly, for the reasons outlined above, we have retained experimental forests on Forest Service lands in critical habitat. This designation includes areas within seven Forest Service experimental forests: H.J. Andrews Experimental Forest, Pringle Falls Experimental Forest, South Umpqua Experimental Forest, and Cascade Head Experimental Forest in Oregon; Wind River Experimental Forest and Entiat Experimental Forest in Washington; and Yurok Redwood Experimental Forest in California. Three of these seven experimental forests are already included in the 2008 critical habitat designation. Our evaluation of these seven experimental forests demonstrates that these areas contain high value occupied habitat for northern spotted owls within their borders. In many cases, the habitat in these experimental forests represents essentially an island of high value habitat in a larger landscape of relatively low value habitat; this is especially true in the Coast Range, a region where peer reviewers particularly noted a need for greater connectivity and preservation of any remaining high quality habitat. These considerations, in conjunction with the inherent benefits of critical habitat on Federal lands, described above, lead us to conclude that there are significant benefits to the inclusion of these experimental forests in critical habitat. As discussed earlier in this document, we recognize the valuable role of these experimental forests, and we encourage continued research and adaptive management on these forests. All of these forests are occupied by the northern spotted owl and we are already consulting with the Forest Service in these areas under the jeopardy standard. The incremental impact of critical habitat is therefore limited to the cost of consultation for the additional adverse modification analysis and any potential project modifications to avoid adverse modification or destruction, if needed; we did not consider the benefit of avoiding these costs through exclusion to outweigh the benefits of inclusion for these areas. As noted in this document, we fully support the research activities in these experimental forests and intend to continue working cooperatively with the Forest Service to ensure the successful continuation of their scientific mission in these areas.

In sum, the best scientific information available indicates that the Federal lands we have included in this final designation are essential to the conservation of the species, and we have retained such areas in the final designation.

Comment (66): Several State and public commenters noted that the northern spotted owl critical habitat designation includes areas of younger forest that may not include the PCEs, and questioned whether this was an artifact of the modeling process or an intentional inclusion of lands for the future development of PCEs and expansion of the northern spotted owl population, as stated in the rule.

Our Response: The essential conservation goal of the critical habitat network is to provide for a stable or increasing northern spotted owl population trend, which we determine will result from, in part, the retention of existing high-value habitat and the development of additional habitat to support more northern spotted owls than currently exist. Some areas of younger forest that do not currently contain all of the PCEs are essential for this purpose. In such cases, we evaluated these areas as if they were unoccupied at the time of listing, and included them in the designation only if we determined that they are essential to the conservation of the species.

Comment (67): Several commenters (State and public) identified specific concerns with the proposed critical habitat maps, including revisions to land ownership or management on both public and private land, noting the inadvertent inclusion of some lands that did not meet the definition of critical habitat and questions regarding the mapping scale and resolution. Several commenters submitted revised or corrected maps for the Service to consider in developing the final rule.

Our Response: We thank the commenters for the information provided. Numerous edits and changes were made to the maps in the final rule, where appropriate, including assessment of specific lands identified to determine whether they met the definition of critical habitat. For example, in the State of Washington, we determined that many small woodlot

owners possess lands that do not provide the PCEs for the northern spotted owl, or that the lands initially identified in the proposed rule are too fragmented or isolated to be essential to the conservation of the species (see *Comment (107)*); such lands were removed from the final designation because they do not meet the definition of critical habitat. In several cases, landowners contacted us and asked for the exclusion of their lands, but we determined that those landowners were not included in the proposed critical habitat. In some cases, changes have been addressed narratively (e.g., the clarification that no private lands in Oregon met the definition of critical habitat and, therefore, were not included in the proposed rule and are not included in the final designation). In cases where mapping errors may have been made in our proposed critical habitat, such errors were corrected.

Comment (68): Several State, Federal (USFS and BLM), and public commenters requested clarification on the implementation of, or modification of, the 500-ac (200-ha) circle we recommended for assessing the effects of an action to critical habitat.

Our Response: Based on both public and agency comment and requests for clarification, the final rule does not identify the 500-acre (200-ha) circle as a recommended scale for determining the effects of an action, but does reference it as a potentially useful scale that could be used in the section 7consultation process. How to best apply it, or other potential scales, will be determined during the consultation process initiated by Federal action agencies proposing projects that may affect areas designated as critical habitat by this rule.

Comment (69): Several State and public commenters questioned the relationship of the impact of barred owl competition on the northern spotted owls, and amount of habitat needed in the critical habitat designation and whether recovery can be achieved without addressing the impacts of the barred owl. Some of these commenters believe barred owl management should occur prior to designation of additional critical habitat areas.

Our Response: The survival of northern spotted owls depends in large part on the protection of habitat. This protection remains crucial to the recovery of the northern spotted owl regardless of whether barred owls are present or not. However, given that barred owls and northern spotted owls are now occupying similar habitats, it is essential to maintain sufficient habitat that meets the needs of northern spotted owls. The extent to which northern spotted owls persist (sometimes undetected) on areas with high barred owl densities is unclear; however, with a second species competing for similar habitat, providing more of that habitat is predicted to increase the ability for northern spotted owls to persist in the presence of barred owls. We identified critical habitat for the northern spotted owl with this essential need in mind. The potential management of barred owls is beyond the scope of this rulemaking, which is limited to the identification of critical habitat for the northern spotted owl. If management of barred owls is implemented and assessed, as is currently occurring under a separate process, the Service may reconsider this critical habitat designation and revise as appropriate.

Comment (70): Two comments suggested the definition of northern spotted owl habitat and patterns of habitat use were inadequate.

Our Response: Northern Spotted owls require areas that are primarily closed canopy with sufficient roost sites and small mammal populations to provide prey. Descriptions of these habitats vary across the range of the species, beyond the simple categories of moist and dry forest, making a specific definition at the landscape scale problematic. In developing the final critical habitat designation for the species, we have provided what we believe are the most specific and useful descriptions of the PCEs for northern spotted owls possible, based on the best scientific information available at this time. We have and will continue to seek new, more detailed information on habitat use over time.

Comment (71): A number of comments (State and public) encouraged an ecosystem approach to land management.

Our Response: The designation of critical habitat for the northern spotted owl is consistent with the NWFP and the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), both of which take an ecosystem approach to management and recovery actions. The requirement of any such management approach, however, is beyond the scope of this rulemaking, which is limited to the identification of critical habitat for the northern spotted owl.

Comment (72): Several comments (State and public) suggested approaches that provide incentives for landowners to conserve habitat.

Our Response: The Service administers several programs promoting incentive-based conservation efforts on non-Federal land (e.g., Safe Harbor Agreements, Habitat Conservation Plans, and Partners for Fish and Wildlife agreements). We highly encourage landowners to explore opportunities to participate in these and other conservation programs.

Comment (73): The Washington Department of Natural Resources suggested the Service better align designated critical habitat with the agency's management objectives, to more efficiently manage for northern spotted owl conservation.

Our Response: California, Oregon, and Washington have their own natural resource management paradigms; we intend to work with each State within the context of their management objectives to protect northern spotted owl critical habitat and work together toward the recovery of the species.

County Comments

Comment (74): Jefferson County, Washington, requested that we apply critical habitat protections to a considerable amount of owl habitat, and suggested considering additional habitat designations between the Olympics and the Cascade Mountains, in order to increase connectivity and ensure owl recovery.

Our Response: In our process of identifying areas that meet the definition of critical habitat for the northern spotted owl, we identified a critical habitat network that provides the essential life-history functions for the northern spotted owl, including demographic support and connectivity between populations. Our modeling results indicate the spatial extent of the critical habitat designation throughout the range, including between the Olympic Peninsula and the Western Cascades in Washington is sufficient to meet essential recovery requirements. Other areas outside the designation, such as those suggested by the county, do not meet the definition of critical habitat because they are not essential to the conservation of the species, even though we agree with the county that these lands are important and will increase connectivity.

Comment (75): Wasco County, Oregon, commented that it was in the interest of the community to minimize regulatory burdens from designated critical habitat.

Our Response: We recognize that the designation of critical habitat is often perceived as a potential regulatory burden. However, we wish to reiterate that the regulatory effect of critical habitat is the requirement for Federal agencies to consult with the Service on actions they carry out, fund, or authorize that may affect the designated critical habitat of threatened species or

endangered species. Critical habitat does not directly impose regulatory restrictions on State land managers or on private landowners where there is no such Federal nexus. We do not believe the designation of critical habitat will result in a significant regulatory burden on Federal land activities because of (1) the cooperative nature of our consultation process under the Act with the Forest Service and BLM, and (2) because of the existing requirement that these agencies have to consult on the effects of proposed actions on northern spotted owls. Our approach was to design a critical habitat network that provides for essential northern spotted owl recovery needs but designate as small an area as possible, and to rely primarily on public lands. We have excluded all congressionally-reserved natural areas (wilderness areas, national parks), State parks, and private lands from this final designation of critical habitat.

Comment (76): Del Norte County, California, expressed concern that the proposed critical habitat designation will create a regulatory hurdle that will impede the construction of vital infrastructure projects (roads, bridges, power lines, and other utilities).

Our Response: Chapter 7 of the DEA discusses the potential economic impacts to road and bridge construction and maintenance, and installation and maintenance of power transmission lines and other utility pipelines. The analysis concludes that all potential conservation efforts associated with linear projects are expected to result from the presence of the northern spotted owl, not the designation of critical habitat, and are thus considered baseline impacts (see paragraphs 315 through 320 of the DEA). Incremental costs attributable to critical habitat are limited to the administrative costs of additional staff time spent by Federal agency staff and the Service to include critical habitat effects analyses in the section 7 consultation on these projects. Therefore, we do not believe that the designation of critical habitat for the northern spotted owl will result in significant regulatory burden to these projects.

Comment (77): Del Norte County, California; Wasco County, Oregon; and Klickitat and Skamania Counties, Washington, requested exclusion of all lands including Federal, State, and private lands within these counties in the final rule. They expressed concern regarding economic issues, a lack of appropriate northern spotted owl habitat within the counties, a lack of evidence that including these lands would actually help the species recover or avoid extinction, and a lack of need for or benefits from additional protections due to existing standards and guidelines.

Our Response: The critical habitat designation includes those lands the Service determined are essential to provide for the conservation of the northern spotted owl through a state-of-the-art modeling process that incorporated the latest expert knowledge on the habitat needs of northern spotted owls. In designating these lands we have considered their ownership, management, contribution to northern spotted owl conservation, existing protections, economic impacts, etc., and determined it is appropriate and necessary to include them in the final critical habitat network to best ensure successful northern spotted owl conservation. Each of these counties contains habitat that supports northern spotted owl populations that are essential to the conservation of the species.

We recognize that the greatest benefit of critical habitat is realized on Federal lands since the regulatory effect of critical habitat is the requirement that Federal agencies ensure that any actions that they carry out, fund, or authorize do not destroy or adversely affect designated critical habitat. In addition, Federal agencies have a mandate under section 7(a)(1) of the Act to carry out programs for the conservation of endangered species and threatened species. For these reasons, we looked first to Federal lands for the critical habitat essential to the conservation of the northern spotted owl, as described in Criteria Used to Identify Critical Habitat, above, and supporting methodology (Dunk *et al.* 2012b).

Section 3(5)(A) of the Act states that critical habitat is defined as (1) the specific areas within the geographical area occupied by the species at the time it was listed that contain the physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it was listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Further, section 4(b)(2) of the Act mandates that such determinations shall be made on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat.

The language of the Act does not restrict the designation of critical habitat to specific land ownership such as Federal lands; thus, lands of all ownerships are considered if they satisfy the scientific criteria indicating that they meet the definition of critical habitat for the specific species. Areas may be removed from the final designation should the Secretary exercise his discretion to exclude such areas subsequent to a weighing of the benefits of exclusion versus inclusion under section 4(b)(2), or if we should determine, based on public comment or other information received following the issuance of the proposed rule, that such areas do not meet the definition of critical habitat (for example, areas that were occupied at the time of listing but do not provide the essential physical or biological features, or areas that may not have been occupied at the time of listing and were proposed for designation, but are not essential to the conservation of the species).

As described in the proposed rule (March 8, 2012; 77 FR 14076, p. 14099), we evaluated critical habitat scenarios that prioritized Federal lands first as well as scenarios without regard to landownership. In all cases, if the scenarios under consideration provided equal contribution to recovery, we chose the scenario that prioritized publicly owned lands. State and private lands were included only if they were essential to achieve conservation of the species after considering the contribution of Federal lands. Based on information received during the public comment period, in several cases we refined the critical habitat boundaries to remove areas of private lands that do not meet our criteria for critical habitat (for example, new information indicating that the areas in question lack the PCEs, due to recent timber harvest, stand-replacing fires, or other such events). In others, the Secretary has chosen to exclude lands from the designation. In such cases, exclusion does not signal a determination that these areas are not essential to the conservation of the species, but only that the Secretary has determined that the benefits of exclusion outweigh those of inclusion. All congressionally-reserved natural areas (wilderness areas, national parks), State parks, and private lands have been excluded from this final designation of critical habitat for the northern spotted owl (see Exclusions).

We reduced critical habitat in all four of these counties across all ownerships as we refined our proposal. In response to comments, we used additional information sources to very carefully identify and retain areas that were best suited to meeting the unique

conservation needs for northern spotted owl conservation that are associated with the geographic location of these counties.

The Columbia River, which forms the southern boundaries of Skamania and Klickitat counties, presents a formidable obstacle to dispersal of northern spotted owls. Maintaining demographic exchange between northern spotted owl populations in Washington and Oregon requires both maintenance of a robust population of potentially dispersing owls, and quality habitat as near to the Columbia River as possible to increase the likelihood of dispersing owls successfully crossing the river. Critical habitat in Skamania and Klickitat counties plays a key role in preventing the demographic isolation of Washington spotted owls, and preventing isolation is widely recognized as an essential feature of sustaining wildlife populations. The designated lands in Wasco County, Oregon, contribute to this cross-Columbia River connection, as well as providing sites for northern spotted owl reproduction. In Del Norte County, California, designated lands contribute to demographic support to the overall northern spotted owl population, but also function for connectivity across the landscape and for habitat that can be colonized by young owls. In short, the designated lands in all these counties are part of a network that supports northern spotted owl sites for reproduction, habitat available for colonization by young, and habitat that connects populations across the range of the species, all of which are, in concert, essential to provide for the conservation of the species.

Our economic analysis indicated that Del Norte and Skamania counties may be more sensitive to future changes in timber harvests, industry employment, and Federal land payments, due to recent socioeconomic trends. Timber harvest changes related to critical habitat designation are one potential aspect of this sensitivity. Between 1989 and 2009, timber industry employment declined by 70 percent or more in Del Norte and Skamania counties. These counties also experienced the greatest declines in timber harvests and timber industry employment. Skamania County is also highly reliant on Federal payments to counties, with these payments representing between 26 and 50 percent of total revenues. We considered all these factors while evaluating comments from these counties.

The potential impact of the designation of critical habitat on timber harvest levels, and whether that change will be positive or negative, is uncertain. Therefore, how critical habitat designation may impact the timber industry in terms of future harvest levels, employment, and revenue-sharing payments to counties is also uncertain. As outlined in the economic analysis timber harvest may increase, decrease or stay substantially the same as recent timber harvest levels depending on how the Forest Service and BLM decide to manage their lands within the designation. Furthermore, timber industry employment is affected not only by harvest trends but also by fluctuations in national and international markets; changes in land ownership; and increasing mechanization and productivity in the industry. Our economic analysis also indicated the potential for beneficial economic and ancillary effects of spotted owl conservation due to critical habitat designation, but monetizing effects such as improved water quality and aesthetic improvements remains challenging. Finally, our analysis of the incremental impacts of critical habitat designation suggested that the annual administrative costs associated with designation were likely to be relatively low.

Our weighing of the relative benefits of inclusion in critical habitat integrated (1) the relative sensitivity of counties to economic impacts associated with critical habitat designation, (2) uncertainty regarding potential economic effects, (3) our expectation that incremental administrative costs may be minor, and (4) modeling results that indicated essential conservation functions of habitat in these counties. Based on these factors the Secretary has chosen not to exert his discretion to exclude these lands from critical habitat.

Comment (78): Del Norte County, California, requested that the Service exclude all congressionally reserved areas from critical habitat.

Our Response: All congressionally reserved natural areas have been excluded from this final designation of critical habitat, as described in the Exclusions section of this document.

Comment (79): One commenter stated that the O&C Act limits the authority of the Service in designating critical habitat.

Our Response: The O&C Act (pertaining to lands in Oregon and California) does not limit the Service's authority to designate critical habitat for the northern spotted owl. The designation of critical habitat is not a land use allocation and does not impose management prescriptions. Under section 7(a)(2) of the Act, each Federal agency must insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the designated ''critical habitat'' of the species. 16 U.S.C. 1536(a)(2). To help action agencies comply with this provision, section 7 of the Act and the implementing regulations set out a detailed consultation process for determining the impacts of a proposed activity on species listed as threatened or endangered, or its designated ''critical habitat.'' 16 U.S.C. 1536; 50 CFR part 402. In *Seattle Audubon Society* v. *Lyons* (''*Lyons*''), 871 F. Supp. 1291 (W.D. Wash. 1994), the district court held that ''the O&[C Act] does not allow the BLM to avoid its conservation duties under NEPA or the Act * * *'' *Id.* at 1314. The critical habitat designation does not preclude the sustained-yield timber management of O&C lands consistent with the above requirements of the Act.

Comment (80): One commenter stated that the Service failed to explain why revising the designation of critical habitat for the northern spotted owl is ''exempt'' under sections 2 and 3 of the Executive Order 13132 on Federalism.

Our Response: We have complied with E.O. 13132 by explaining why the rule does not have federalism implications, impose substantial direct compliance costs on State and local governments, or preempt State law so that a federalism summary impact statement pursuant to section 6 of the executive order is not required. The designation of critical habitat directly affects only the responsibilities of Federal agencies through section 7(a)(2) of the Act. The Act does not directly impose other duties with respect to critical habitat on either States or local governments and as a result does not have substantial direct effects on the States and local governments, the relationship between the national government and the States, or the distribution of powers and responsibilities among the various levels of government. Sections 2 and 3 of E.O. 13132 set out Fundamental Federalism Principles and Federalism Policymaking Criteria, respectively. Within the framework of the Act, which requires the Service to designate critical habitat to the maximum extent prudent and determinable, we have adhered to the concepts discussed in these sections. For example, even though the rule does not have federalism implications, we strongly urged the States and county governments to provide comments to us and provided

them an additional period for comment to ensure they had an opportunity for thorough review. Our economic analysis examined potential indirect impacts of the rule on all who may participate in section 7 consultations, and that was available for comment by the States and counties as well. In addition, we have also taken into account State law protections for northern spotted owl critical habitat in our decisions whether to exclude areas under section 4(b)(2) of the Act.

Comment (81): Several counties, including Del Norte County, California, and Wasco County, Oregon, expressed concerns about the impact of barred owls on the northern spotted owl, and questioned whether recovery can be achieved without addressing the impacts of the barred owl. Some of these commenters believe barred owl management should occur prior to designation of additional critical habitat areas.

Our Response: The survival of northern spotted owls depends in large part on the protection of habitat—this protection remains crucial to the recovery of the northern spotted owl regardless of whether barred owls are present or not. Given that barred owls and northern spotted owls are now occupying similar habitats, it is essential to maintain sufficient habitat that meets the needs of northern spotted owls. The extent to which northern spotted owls persist (sometimes undetected) on areas with high barred owl densities is unclear. With a second species competing for similar habitat, providing more of that habitat may increase the ability for northern spotted owls to persist in the presence of barred owls. If management of barred owls is implemented and assessed, the Service may reconsider this critical habitat designation and revise as appropriate.

In our separate actions investigating possible barred owl management, we can, and are, modeling some approaches with and without barred owl competition effects on the northern spotted owl, and will continue to do so as new information becomes available. Recent research (Wiens 2012) indicates that population performance of both northern spotted owls and barred owls is greatest when high-quality habitat is most abundant, and most peer reviewers supported the approach of conserving more habitat to help offset the impact of the barred owl on the northern spotted owl.

County Comments on Active Management and Fire Management

Comment (82): Several counties including Wasco County, Oregon, and Del Norte County, California, requested that the Service promote active management activities within critical habitat to reduce fire risk and reduce fuels, and raised the concern that critical habitat designation could reduce or delay the ability of land managers to manage fuels and thus increase risks from wildfire.

Our Response: This rule does not establish management prescriptions for lands designated as critical habitat. However, the Service has made considerable effort to discuss, for the benefit of land managers, potential approaches to active forest management in dry forests, including actions that manage fuels and restore ecosystem health. We encourage land managers to consider active management of their forests that balances short-term impacts with long-term beneficial effects that ultimately support long-term conservation of the northern spotted owl. In dry forests, this could include using a landscape assessment approach to improve the estimation of effects of management actions on northern spotted owl habitat and to better identify and prioritize areas for treatments. The assessment may be used to provide support and rationale for treatment, especially in areas where active forest management actions appear to be in conflict with the conservation of high-value northern spotted owl habitat.

The draft economic analysis (DEA) addressed the potential impacts of critical habitat on fire management in Chapters 4 and 8. In Chapter 4, the DEA discussed the fact that ecological fire salvage activities could result in incremental economic effects. Due to data limitations and fire location uncertainty, however, these effects were not quantified. In the benefits discussion in Chapter 8, the DEA recognized that it is possible that the designation could result in increased resiliency of timber stands associated with improved timber management practices, such as thinning, partial cutting, and active adaptive forest management and monitoring. These efforts may reduce the threat of catastrophic events such as wildfire, drought, and insect damage. This in turn may generate benefits in the form of reduced property damage.

Comment (83): Jefferson County, Washington, encouraged the Service to determine adverse modification at a finer scale, such as the owl's home range.

Our Response: The final rule establishes that the scale of the adverse modification determination will be ''the entire designated critical habitat, as described below, with consideration given to the need to conserve viable populations within each of the physiographic provinces identified in the Revised Recovery Plan (USFWS 2011, Recovery Criterion 2).'' The Service believes the entire designated critical habitat is the appropriate scale for this analysis because our determination is whether implementation of the Federal action would preclude the critical habitat from serving its intended conservation function or purpose. That conservation role of critical habitat is to conserve the listed species throughout its range, which is closely aligned with the entire critical habitat designation. Therefore, the entire designation is the most appropriate scale for the adverse modification determination. However, a proposed action that compromises the capability of a subunit or unit to fulfill its intended conservation function or purpose (e.g., demographic, genetic, or distributional support for spotted owl recovery) could represent an appreciable reduction in the conservation value of the entire designated critical habitat.

Comment (84): Wasco County, Oregon, requested that the Service do an Environmental Impact Statement to ensure a full analysis of the effects of the critical habitat designation has been done, including a fuller picture of potential economic and social impacts.

Our Response: The critical habitat proposal was fully compliant with NEPA. Economic and social effects are not intended by themselves to require preparation of an environmental impact statement. 40 CFR 1508.14. We have determined, for the reasons contained in our Finding of No Significance, that an environmental impact statement is not necessary.

Comment (85): Klickitat County, Washington, asserts that the Service has not adequately considered ''forest vulnerabilities'' and potential economic impacts to local communities, and is inconsistent with the Presidential Memorandum to the Secretary of the Interior dated February 28, 2012.

Our Response: We disagree with the assertion that the Service has not adequately considered ''forest vulnerabilities'' in this designation of critical habitat. If we correctly understand ''forest vulnerabilities'' to include all those natural and human induced disturbance processes that have the potential to change the structure and function of forests, these factors played a prominent role in our entire approach to this designation. We believe this rule, along with the Revised Recovery Plan for the Northern Spotted Owl, provides

a thorough explanation of how past management and future disturbance can affect habitat quality for spotted owls, and especially how ecological forestry might be used to manage these effects.

The purpose of the economic analysis is to provide the Secretary of the Interior with information to consider potential economic impacts and analyze whether the benefits of excluding a particular area may outweigh the benefits of including that particular area as critical habitat based on potential disproportionate economic impacts. Chapter 6 of the FEA provides a detailed socioeconomic profile of each of the 23 counties (including Klickitat County, Washington) containing proposed critical habitat subunits. The analysis presents data on the percent change in timber production between 1990 and 2010 for each county, and on the percent growth of annual industry employment between 1989 and 2009 for each county. In addition, the analysis presents data on Federal land payments to each of the 23 counties as a percent of the total local government revenue in FY 2009, demonstrating the relative importance of these funds to each County's budget. We find the information provides sufficient context for understanding relative economic circumstances and the potential incremental impacts of the designation to local communities across the designation.

The section ''Consistency with Presidential Directive'' in our Executive Summary describes how we have addressed the points raised in President Obama's Memorandum of February 28, 2012.

Comment (86): Jefferson County, Washington, encouraged the Service to consider the effects of critical habitat designation on ecosystem services, such as drinking water, hunting and fishing, carbon storage, and erosion and flood control.

Our Response: The Service recognizes that much attention has been paid nationally and globally to valuing ecosystem services provided by landscapes. Published, peer-reviewed studies provide information on values of multiple categories of ecosystem services (e.g., agricultural production, water quality regulation, carbon storage and sequestration, recreation, aesthetic values, etc.) across a variety of land use types (e.g., wetlands, forests, etc.). Over the past 20 years, multiple studies have relied on this literature to develop large-scale benefits transfer analyses in order to estimate a total value of a parcel of land, a watershed, a State, or even the planet (e.g., Costanza 1997, as described in the comment letter). We believe that improving native ecosystems is a benefit to the species that rely on them, is consistent with the goal of the Act and will improve all these ecosystem functions.

Public Comments

Active Forest Management

Comment (87): One commenter agreed that the Service is not able to predict the outcome of section 7 consultations, but expressed concern that land management decisions would be made, using the critical habitat rule for justification of these outcomes. A suggestion was made to eliminate or modify portions of the critical habitat rule that encourage active management within critical habitat.

Our Response: The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and the NWFP recommends certain types of active forest management within the range of the northern spotted owl to meet various management goals. Our critical habitat rule refers to these recommendations. The Revised Recovery Plan encourages careful consideration and incorporation of specific and appropriate information when deciding which actions, if any, are appropriate for active forest management within critical habitat. However, we are not able to predict where or what types of actions will be proposed within northern spotted owl critical habitat, nor is it within the authority of this rulemaking to prescribe where or what types of actions will take place. The actual management activities that may take place within critical habitat will depend on future management decisions by the land managing agencies consistent with their land use plans and the legal authorities under which they operate, and in consultation with us under section 7 of the Act for those activities involving a Federal nexus.

Comment (88): Several commenters raised concern over the creation of early-seral habitats. The points raised a concern over the removal of current habitat to create early-seral habitat, expressed a need to make use of natural disturbances to achieve early-seral habitat, and questioned the appropriateness of creating early-seral habitat inside critical habitat.

Our Response: Recent research has informed land managers on the biological value of complex early-seral habitats. The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) suggests that management of early-seral habitats be considered where they are underrepresented and would improve landscape and biological diversity. Within that context, thinning and targeted variable-retention harvest in moist forests could be considered, where the conservation of complex early-seral forest habitat is a management goal. This approach provides a contrast to traditional clear-cutting that does not mimic natural disturbance or create viable early-seral communities that grow into high-quality habitat (Dodson *et al.* 2012, p. 353; Franklin *et al.* 2002, p. 419; Swanson *et al.* 2011, p. 123; Kane *et al.* 2011, pp. 2289–2290; Betts *et al.* 2010, p. 2127, Hagar 2007, pp. 117–118). Swanson (2012, entire) provides a good overview and some management considerations. The Revised Recovery Plan does not suggest that high-quality owl habitat or areas currently on a trajectory to become high-quality owl habitat be removed to create early-seral conditions. The Revised Recovery Plan recommends such treatments, if considered by the land management agencies, be applied in matrix areas consistent with the Standards and Guidelines of the NWFP.

Comment (89): One commenter asked how the Service and managers will evaluate forest management strategies without information on the potential effects of these strategies to determine whether they are positive, neutral, or negative.

Our Response: Commercial thinning has been shown to negatively affect northern spotted owls and their prey, and we have included a more detailed discussion of this issue in the final rule. In areas where active management may be appropriate for consideration, the goal is to conserve and restore ecological function; however, we recognize that management agencies may have multiple management goals. In areas where actions such as commercial thinning may be considered (e.g., the matrix land use allocation), we are not encouraging them in areas of high-quality owl habitat.

Comment (90): One commenter requested consideration of the forest thinning direction contained in *Ecologically Appropriate Restoration Thinning in the Northwest Forest Plan Area* (Kerr 2012) as an option for future critical habitat management.

Our Response: We appreciate this suggestion and have integrated the information in this reference into our discussions of forest thinning.

Comment (91): One commenter requested that special management considerations for the East Cascades emphasize management for well-distributed, large, contiguous blocks habitat across the landscape.

Our Response: Special Management Considerations for the East Cascades are identified that management may be required to address the threats to the essential physical or biological features in this region from past activities. Widespread management of large, fully contiguous blocks of habitat east of the Cascades is not ecologically sustainable in many places, due to the dynamic ecological processes and fire regimes that shape the distribution of forested habitats in this region (Williams 2012, entire). We do, however, recommend land managers consider the conservation of larger blocks of current habitat on areas of landscapes where it is more likely to be resistant or resilient to fire and other natural disturbance. We encourage the use of landscape assessments to identify areas important for ecological process restoration and areas that are valuable for northern spotted owl conservation and recovery (see, e.g., NWFP Standards and Guidelines p. C–13).

Comment (92): One commenter noted that the Service should emphasize protection of mid-seral forests so that they may develop into high-quality habitat.

Our Response: We recommend that habitats with high value to the conservation of the northern spotted owl be conserved. High-value habitat includes mid-seral forests as one component. Mid-seral forests that are generally not occupied by northern spotted owls, however, may be appropriate areas for land management agencies to consider for active forest management that may increase their rate of development into high-quality habitats.

Comment (93): One commenter noted that past active management resulted in excessive logging and road building, which led to the threatened and endangered status of species in the Pacific Northwest. Included in this comment are concerns over active management harming water quality, diminishing recreational activities, and increasing fire risk if followup actions (e.g., removal of slash, removal of burn piles, prescribed fire) are not carried out.

Our Response: We have identified the major threats to owl recovery in this rule, including traditional timber harvest that resulted in the removal of large areas of old forest. Active management, in general, may affect water quality and recreational opportunities, but it may also restore habitat conditions or reduce fire risk if implemented properly. We encourage land managers to be mindful of these concerns and to protect important areas from long-term adverse impacts wherever possible.

Comment (94): Several commenters expressed concern that logging in critical habitat and LSRs would increase the risk of extinction of the northern spotted owl, degrade owl habitat, increase the risk of fire, damage forest health, and damage watershed health. Commenters expressed concern about specific logging prescriptions that appear to remove trees or degrade areas that could function as habitat for northern spotted owl, such as mistletoe removal, post-fire logging, or disease management activities. In addition, several thousand commenters submitted similar comments in general support of protections against logging the mature and old-growth forests of the Pacific Northwest and Northwest California due to economic and environmental benefits.

Our Response: The critical habitat rule identifies habitats with high value to the recovery of the northern spotted owl that are essential and will receive regulatory protections under section 7 of the Act where a Federal nexus exists. We emphasize that careful consideration should be given to any forest management activities occurring within northern spotted owl critical habitat. The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) indicates that active forest management, when applied at appropriate scales and locations, could be a valuable tool in the recovery of the species and conservation of forest ecosystems. Further, we recommend that the focus of these treatments be outside of high-value habitat for northern spotted owls wherever possible and that high-quality habitats be conserved and recruited. Work inside of LSRs should be in accordance with the NWFP Standards and Guidelines. We again note that, although we encourage land management agencies to follow the recommendations for the Revised Recovery Plan for the Northern Spotted Owl, it is beyond the authority of this rulemaking to mandate specific management activities within critical habitat. The actual management activities that may take place within critical habitat will depend on future management decisions by the land managing agencies consistent with their land use plans and the legal authorities under which they operate.

Comment (95): One commenter suggested our treatment of the effects of forest thinning on owls and of fire was incomplete and biased towards supporting thinning treatments in critical habitat.

Our Response: We recognize that more research would be helpful to better understand how northern spotted owls respond to various vegetation management treatments, especially those implemented to address long-term forest health and increasing risk of wildfire. Thinning and other vegetation management may have either negative or beneficial impacts to northern spotted owl habitat depending on how, when, and where the treatments are implemented.

The existing information about the tradeoffs associated with active and passive management in dry forests indicates that strategic application of active management may offer a higher likelihood of achieving conservation objectives than no management. Although passive management can be viewed as more precautionary, this view is rooted in a perspective that considers risks to northern spotted owl habitat from natural disturbance to be relatively low. However, we believe that the weight of evidence from both tracking of habitat removal due to natural disturbance and results from modeled simulations of fire dynamics suggest that risks of habitat loss due to natural disturbance is high enough to warrant consideration of strategic active management within critical habitat by land managers, especially in forested plant associations that typically have frequent or mixed-severity fire regimes (Buchanan 2009, pp. 114–115; Healey *et al.* 2008, pp. 1117–1118; Roloff *et al.* 2012, pp. 8–9; Ager *et al.* 2007, pp. 53–55; Ager *et al.* 2012, pp. 279–282; Franklin *et al.* 2009, p. 46; Kennedy and Wimberly 2009, pp. 564–565). In the final rule, we have refined and expanded our discussion of ways land managers might implement active management to minimize potential risks to northern spotted owls and their habitat, and provide appropriate safeguards in the face of scientific uncertainties surrounding disturbance dynamics in dry forests and northern spotted owl responses to management. In addition, active adaptive forest management may prove to be an essential tool for reducing uncertainties and increasing the conservation effectiveness of active management for northern spotted owl habitat.

Comment (96): Several commenters expressed concern over the justification of projects that encourage timber harvest in suitable northern spotted owl habitat, including the pilot projects guided by Drs. Johnson and Franklin that are occurring in BLM's pilot projects out of the Roseburg and Coos Bay BLM offices.

Our Response: The Service is working with land managers and scientists to

minimize impacts to northern spotted owl's essential habitat, and owl conservation as a consequence of timber harvest and other vegetation management projects. We worked closely with Dr. Norm Johnson, Dr. Jerry Franklin, and the Roseburg and Coos Bay BLM offices to evaluate these pilot projects, which are not in LSRs and are consistent with requirements of the NWFP. The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) recommends applying ecological forestry techniques as a way of reducing impacts to northern spotted owl habitat in areas proposed for timber harvest. In general, northern spotted owl habitat in moist forests that is on a trajectory for development into late-successional conditions is not in need of active management to enhance its development. The Service recommends that land managers consider thinning and other regular management in critical habitat, when the goal is to improve or maintain northern spotted owl habitat and long-term forest health. Specific conditions vary as will determinations of where, when and how to apply management. The actual management activities that may take place within critical habitat will depend on future management decisions by the land managing agencies consistent with their land use plans and the legal authorities under which they operate, and in consultation with us under section 7 of the Act for those activities involving a Federal nexus.

Comment (97): Several commenters suggested that the Service should include a full analysis of the risks to northern spotted owl habitat from fire, in an effort to support the recommendations for active forest management, and should also include an analysis of the effects to northern spotted owl habitat from post-fire logging activities in the final rule.

Our Response: First, we must clarify that this critical habitat rule does not take any action or adopt any policy, plan, or program in relation to active forest management. The discussion is provided only for consideration by Federal, State, local, and private land managers, as well as the public, as they make decisions on the management of forest land under their jurisdictions and through their normal processes. Second, there is considerable scientific uncertainty over the risk of fire to northern spotted owl habitat. Where data are available, the literature shows that high-severity fire and increased frequency of fire may be a risk to the nesting function of northern spotted owl habitat (e.g., Kennedy and Wimberly 2009, p. 565). The literature so far is unclear, not only on how much high-severity fire may be a risk to northern spotted owls, but also regarding what spatial arrangement and amount of burned and unburned vegetation or different burn severities may be beneficial or detrimental to northern spotted owl occupancy and habitat use. We address this issue in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), in which we also suggested an adaptive management framework to test hypotheses that will help address this uncertainty. Recovery Action 12 in the Revised Recovery Plan summarizes the literature on post-fire logging and recommends that these types of silvicultural activities focus on conserving and restoring those habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood).

Comments on Ecological Forestry

Comment (98): One commenter noted that the Service is promoting timber harvest activities that are compatible with northern spotted owl critical habitat, but regulations prevent this work from occurring.

Our Response: We believe the activities recommended in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and discussed in this critical habitat rule are compatible with the Standards and Guidelines of the NWFP. We encourage land management agencies to consider active management of forests that balance short-term impacts with long-term beneficial effects that ultimately support long-term conservation of the northern spotted owl.

Comment (99): One commenter noted that ecological forestry practices are not clearly defined and according to the rule will be different in each situation.

Our Response: Land management decisions on when and where to apply ecological forestry practices are context-specific, based on local conditions, and will be made by the appropriate land managers. The prescription of specific management practices is beyond the authority of this rule. This critical habitat rule and the Revised Recovery Plan (USFWS 2011, entire) provide an overview and multiple scientific references on ecological forestry. We are available to work with land managers to provide technical assistance in further defining ecological forestry practices at finer scales, should land managers be interested in applying such techniques.

Comment (100): Several commenters raised concerns that critical habitat designation would reduce or delay the ability of land managers to manage fuels, that more implementation of fuels reduction activities are needed, that fire resiliency needs to be achieved, and that we consider timber and nontimber resources to manage fuels.

Our Response: The Service has made considerable effort to discuss recommendations and descriptions of active forest management in dry forests, including actions that manage fuels and restore ecosystem health, in this critical habitat rule. This rule is different from previous designations of northern spotted owl critical habitat in that we are recommending a ''hands on'' approach to forest management within critical habitat. We encourage land managers to consider active management of forests that balance short-term impacts with long-term beneficial effects, which ultimately supports long-term conservation of the northern spotted owl. In dry forests, we recommend that land managers consider a landscape assessment approach to improve the estimation of effects of management actions on northern spotted owl habitat and to better identify and prioritize areas for treatments. The assessment may be helpful, especially in areas where other landscape or biodiversity management goals may conflict with the conservation of high-value northern spotted owl habitat. We note that this rule can only provide general advice as to those activities that may be consistent with the designation of critical habitat for the northern spotted owl. The actual activities proposed within critical habitat are dependent upon decisions by the land managers themselves, in accordance with their land use plans and legal authorities.

Comments on Exclusions

Comment (101): Several comments questioned why the proposed critical habitat did not include private lands in Oregon but did in Washington or California, and encouraged the Service to exclude private lands in all three States in the final rule, due to concerns around the regulatory burdens of critical habitat and the lack of need for additional protections, in light of existing conservation agreements and State laws.

Our Response: In this designation of critical habitat, we relied on public lands to the maximum extent possible in determining what lands met the definition of critical habitat in that they either contain essential physical or biological features or are themselves essential for the species' conservation. We looked first to Federal lands for critical habitat; however, in areas of limited Federal ownership, some State and private lands provide areas

determined to be essential to the northern spotted owl, by contributing to demographic support and connectivity to facilitate dispersal and colonization. State and private lands were included only where essential to achieve conservation of the species, and State lands were prioritized over private lands. In Oregon, Federal and State lands identified were sufficient to meet the conservation needs of the owl; in Washington and California, there were some areas where Federal and State lands were not sufficient to meet the population metrics essential to recovery for the species, and some private lands were identified as essential for contributing to the conservation of the species. These private lands were subsequently excluded from the final designation under section 4(b)(2) of the Act (see Exclusions). As discussed in our response to *Comment (104),* such exclusion does not signal that these lands are not important for the conservation of the northern spotted owl, but only that the Secretary has determined that the benefits of excluding these areas outweighs the benefits of including them.

We received several comments from private landowners expressing concern that their land uses would be restricted by the designation of critical habitat, or that jobs would be lost if critical habitat is designated on private lands. Some landowners were under the false impression that their access to Federal funds would be restricted, or that they would be unable to complete forest health improvement projects on their lands if critical habitat were designated there. We reiterate that the regulatory effect of critical habitat is the requirement for Federal agencies to consult with the Service on actions they carry out, fund, or authorize that may affect the designated critical habitat of endangered or threatened species. Activities can continue on private lands with critical habitat in place; it is only if Federal funding or permits are required that the Federal agency involved would need to consult with the Service to insure that the proposed action does not destroy or adversely modify critical habitat. However, as a consequence of the exclusion of all private lands from this final designation of critical habitat for the northern spotted owl, concerns such as those expressed above should be moot.

Comment (102): One commenter expressed concern about the potential impact of designating critical habitat on private lands related to the California Environmental Quality Act (CEQA) regulations, and cited to the marbled murrelet, California red-legged frog, California tiger salamander, and western snowy plovers as examples of increased regulatory impact resulting from critical habitat designation.

Our Response: Our economic analysis concluded that private lands in California and subject to CEQA must comply with the California Forest Practice Rules already in place, regardless of critical habitat. Further, the economic analysis reports that CALFIRE is unlikely to request additional protective measures for habitat beyond those already required by these regulations. Subsequently, we conclude the incremental costs of the designation would be limited to the potential for additional administrative burden under CEQA (IEC 2012b, p. 5–19).

The only other potential regulatory impact to private landowners which we would foresee from the designation of northern spotted owl critical habitat may occur when a proposed project has a Federal nexus (e.g., Federal funding or authorization) and the project may affect designated critical habitat. However, as all private lands have been excluded from this final designation of critical habitat, this should no longer be a concern.

The Service is unaware that the designation of critical habitat for the marbled murrelet, California red-legged frog, California tiger salamander, or the western snowy plover has led to any increase in regulatory impacts to private landowners. While private landowners may have experienced an increased regulatory burden with the listing of these species under the Endangered Species Act, we are not aware of an increased regulatory impact associated with the designation of critical habitat for these species.

Comment (103): One commenter expressed concern that the regulatory burden imposed by critical habitat designation on private lands in California will be exacerbated, because the Service is no longer providing technical assistance for California forest landowners who wish to prepare State-required timber harvest plans.

Our Response: We believe the commenter was mistaken in stating that the Service is no longer available to assist private landowners in the preparation of timber harvest plans in California, as the Service's technical assistance program is still operational and available to assist private landowners in this regard. The Service does not review every timber harvest plan, but is available for review when requested after the initial review by CALFIRE. In addition, since all private lands have been excluded from this final designation of critical habitat, the concern regarding potential exacerbation of regulatory burden is no longer relevant.

Comment (104): Numerous commenters supported including private lands, and urged the Service not to exclude these areas in the final rule for a variety of reasons, including the conservation value of including all lands identified as suitable habitat, the need for connectivity, existing management flexibility and a lack of additional regulatory burden, the opportunity to build cooperative management agreements, and concerns that exclusion is not supported by the best available science and would signal that these lands are not important to the recovery of the species.

Our Response: The Act specifically requires the Service to designate critical habitat for listed species to the maximum extent prudent and determinable, and does not restrict such designation to particular land ownership. Rather, areas that meet the definition of critical habitat, as determined on the basis of the best scientific data available, are proposed for designation. However, section 4(b)(2) of the Act further provides that the Secretary, in designating critical habitat and making revisions, shall take into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may then choose to exercise his discretion to exclude any area from critical habitat if he determines that the benefit of exclusion outweighs the benefits of specifying such areas as part of the critical habitat, unless that exclusion would result in the extinction of the species.

Lands excluded under section 4(b)(2) are still considered essential to the conservation of the species. Such areas were identified as critical habitat because they either provide the essential physical or biological features, if occupied, or were otherwise determined to be essential, if unoccupied. Exclusion should never be interpreted as meaning that such areas are unimportant to the conservation of the species. Exclusion is based upon a determination by the Secretary that the benefit of excluding these essential areas outweighs the benefit of including them in critical habitat.

In this case, the Secretary has chosen to exercise his discretion to exclude non-Federal lands from the final designation of critical habitat if an existing conservation agreement or partnership is in place that provides benefits that are greater than the benefits

that would be provided by the designation of critical habitat. Such exclusions have only been made following a careful weighing of both the benefits of inclusion and the benefits of exclusion. We wish to emphasize that the exclusion of lands from the critical habitat designation should not be construed as a message that these lands are not important or essential for the conservation of the northern spotted owl, nor should exclusion be interpreted as some indication that these lands are now somehow subject to habitat degradation or destruction because they are not included in critical habitat. Lands excluded on the basis of conservation agreements and the recognition of conservation partnerships are fully expected to continue to make an important contribution to the conservation and recovery of the owl absent the designation of critical habitat. Such lands are excluded only if we have evidence that such expectations for future contributions of the habitat on these lands are well-founded, as evidenced by a conservation easement, habitat conservation plan, safe harbor agreement, or other instrument, or by a proven track record of conservation by the partner in question. The details of our considered analyses of each area under consideration for exclusion are provided in the Exclusions section of this document (above).

Comment (105): Numerous commenters requested that the final rule include lands covered by conservation agreements in the final rule for a variety of reasons, including consistency with existing policy, a need for connectivity, the habitat value of these areas, a lack of explicit population recovery objectives, a need for increased protections and legal safeguards, concerns about the conservation effectiveness and appropriate implementation of these agreements, and a need for additional analysis before they are excluded.

Our Response: As described earlier, the Service carefully evaluated each conservation agreement or partnership under consideration for exclusion on its own merits, and weighed the benefits of exclusion versus inclusion. As described in our response to *Comment (104),* above, we emphasize that the exclusion of such lands does not signal that they are not important to the conservation or recovery of the northern spotted owl, and indeed such exclusions are made only on the basis of our determination that the benefits of exclusion outweigh those of inclusion, and that such exclusion will not result in the extinction of the species.

Comment (106): Several commenters requested that the final rule exclude particular land areas in private ownership (including but not limited to Usal Redwood Forest Company, Hawthorne Timber Company, Mendocino Redwood Company, Rayonier, Sierra Pacific, Pope timberlands, Merrill & Ring's lands, Weyerhaeuser Mineral, SDS Lumber Co., Olympic Resource Management, Green Diamond, and Wauna Lake Club) for a variety of reasons, including economics, additional regulatory burdens and uncertainty, a lack of conservation benefits, mapping errors, effects on existing and future conservation easements and agreements, State protections, ongoing voluntary conservation activities, potential disincentives for preserving habitat, and possible negative impacts to existing partnerships and relationships.

Our Response: No private lands are included in the final designation of critical habitat. Many of these lands were excluded under section 4(b)(2) of the Act; our detailed evaluation of these exclusions is provided in the Exclusions section of this document. In some cases, lands were removed following a review of habitat conditions on the specific parcels identified using 2011 National Agricultural Imagery Program (NAIP) imagery, in response to public comment. Upon review, we determined that lands identified by Rayonier, Pope Resources, Olympic Resource Management, and Weyerhauser Mineral did not meet the definition of critical habitat. Therefore, these lands were removed from the final designation.

Some landowners asked for exclusion from the proposed critical habitat, but were not actually included in the proposed designation in the first place. An example of such a case is Merrill and Ring lands. In other cases, commenters did not submit sufficient location information for us to be certain of the location of the parcel in question; Wauna Lake Club, for example, fell into this category.

In cases where mapping errors may have been made in our proposed critical habitat designation, such that lands that do not meet the definition of critical habitat for the northern spotted owl were inadvertently included within the proposed designation, the mapping in the final rule was corrected, so that those lands are removed from the final designation. Sierra Pacific lands in California, for example, were inadvertently included in the proposed designation due to a mapping error; these lands were removed from the final designation. We similarly made any corrections to area total errors that were identified in comments on the proposed rule, and thank landowners for bringing these corrections to our attention.

All specific requests for exclusion and records of our consideration of those requests are in our record, and available upon request (see **FOR FURTHER INFORMATION CONTACT**).

Comment (107): More than 50 private landowners in Washington State requested individual exclusions for their lands for a variety of reasons, including economics, additional regulatory burdens, a lack of conservation benefits, fire risks, mapping errors, existing conservation agreements, and disincentives for voluntary conservation measures and for preserving habitat.

Our Response: Upon further review, using the underlying aerial photo imagery from the 2011 National Agricultural Imagery Program (NAIP) and Ruraltech's 2007 forestland parcel data, we determined that the vast majority of Small Forest Landowner parcels we examined had either highly fragmented, little, or no northern spotted owl habitat currently present. Based on the combination of parcel size, current habitat conditions, and spatial distribution, we concluded that private lands coded as Small Forest Landowner parcels do not provide the PCEs for northern spotted owls, nor are they essential to the conservation of the species; thus, these areas do not meet the definition of critical habitat, and we have removed them from the final designation of critical habitat for Washington State.

We removed from the final critical habitat designation lands described in 17 comments after confirming that these lands did not contain the PCEs, or that they were too small, fragmented, or isolated to contribute to spotted owl conservation, and therefore did not meet the definition of critical habitat. Lands owned by 19 other commenters that requested removal were not within proposed critical habitat. The land of one commenter was removed to correct a mapping error in the proposed rule. We excluded another commenter's lands due to their completion of a SHA. Finally, 16 commenters did not provide sufficient location information to enable us to unambiguously identify their parcels. Of these 16, we inferred that we likely removed 6 from the final critical habitat designation because the size of the commenters' parcels were very small, making it likely that our process of removing small forest landowners from the final designation included the properties of these commenters. For the remaining 10 commenters, lack of location and parcel size information in

the comments we received made it impossible for us to determine or infer whether these parcels were included in our final critical habitat designation. However, as all private lands were excluded from critical habitat under section 4(b)(2) of the Act (see Exclusions), no private lands remain in the final designation.

Public Comments on Critical Habitat Boundaries

Comment (108): One commenter noted that the inclusion of the term ''necessary'' within the definition of ''conserve'' (16 U.S.C. 1532(2)) indicates that Congress intended a ''high threshold'' for designating land as critical habitat, and that land designated must be required to bring the species to the point of no longer needing the protection of the Endangered Species Act. The commenter further asserts that the Service must show that all specific areas proposed as critical habitat are necessary, essential, and required for the continued existence of the species.

Our Response: The use of ''necessary'' in the definition of conservation does not change the requirements related to critical habitat. Furthermore, the Act provides that the Service ''to the maximum extent prudent and determinable * * * shall * * * designate any habitat of [the species] which is then considered to be critical habitat.'' 16 U.S.C. 1533(a)(3)(A); see also *Center for Biological Diversity* v. *FWS,* 450 F.3d 930, 935 (9th Cir. 2006) (noting Congress' use of the word ''shall'' and holding that ''[i]t follows that critical habitat designations are mandatory''). There are only two exceptions to the mandate that critical habitat be designated at the time of listing. First, designation may be temporarily delayed if critical habitat is ''not determinable,'' e.g., it cannot be identified based on current scientific information. 16 U.S.C. 1533(a)(3)(A); 50 CFR 424.12(a). Second, designation is not required if it is ''not prudent,'' see id., but Congress intended that finding to be made ''only rarely.'' S. Rep. 106–126, at 4 (1999); see also H.R. Rep. 95–1625, at 16–17 (1978) (designation required except in ''rare circumstances'').

We agree that the rule should designate either (1) specific areas within the geographical area occupied by the species at the time of listing that contain physical or biological features essential to the conservation of the species and which may require special management considerations or protection, or (2) specific areas outside the geographical area occupied at the time of listing that are essential to the conservation of the species. We have identified the specific areas that were occupied at the time of listing through historical surveys. We have determined that other areas were occupied at the time of listing (based on the presence of suitable habitat as well as the high probability that nonterritorial and dispersing subadult owls were present). In addition, we analyzed all areas as if they were not occupied and applied the standard applicable to unoccupied habitat. We used the methodology described in both the proposed and final rules to determine which unoccupied areas are essential to the conservation of the species, and have explained why unoccupied habitat in each subunit is essential to the conservation of the species.

For occupied areas, the attributes of forest composition and structure, and characteristics of the physical environment associated with nesting, roosting, and foraging habitat—physical or biological features used by the species—were identified based on published research results and expert opinion and incorporated into a predictive habitat model. We determined that, for the most part, the physical or biological features supporting these known sites are essential to the conservation of the species (the exceptions are owl sites that were isolated or in areas of marginal quality). The special management considerations are described by geographic region and in the subunit descriptions. However, large areas within the species' geographical range had not been surveyed at the time of listing, and we have determined that a designation based solely on the locations of those known territories would not be adequate to conserve the species. Therefore, we used habitat information based on habitat selected by those known owl pairs to identify other areas that were likely supporting northern spotted owl territories at the time of listing or that could support the species' recovery in the future. We then determined where these areas are essential to conservation of the species based on a spatially explicit northern spotted owl population model as described in the proposed rule, and again in this final rule.

Comment (109): One commenter stated that one or more of the PCEs are too general in nature and should be more narrowly clarified or defined. In particular, the comment suggested that PCE #1 and #4 seem to be met by all forested lands.

Our Response: PCE 1 (Forest types that may be in early-, mid-, or late-seral stages and that support the northern spotted owl across its geographical range) identifies the specific forest types that support northern spotted owl life-history needs across the species' range, but is more narrowly refined in that it must exist in concert with one of the other PCEs to meet the definition of critical habitat. PCE 4 (habitat to support the transience and colonization phases of dispersal) is described in the preamble of the proposed rule as those forests with at least an average diameter at breast height (DBH) of 11 inches (28 centimeters) and at least a 40 percent canopy cover. We have included these metrics in the regulatory portion of the final rule to more narrowly clarify the forest structure that meets this PCE. In addition, it is only where these PCEs in the appropriate arrangement and quantity are essential to the conservation of the northern spotted owl that they are selected for designation as critical habitat.

Comment (110): Several commenters believe that additional lands beyond those already designated as northern spotted owl critical habitat are not necessary for northern spotted owl recovery, and the increase in total area is not supported by the science. The commenters suggest that including them will reduce or eliminate timber harvest on designated lands.

Our Response: The continued decline of the overall northern spotted owl population demonstrates that the threats to the species are still having a significant impact on northern spotted owl occupancy, reproduction, and survival. As described in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), the main threats to northern spotted owls are the past and continued loss of habitat and the competitive effects of barred owls. The increase in designated critical habitat area to help offset these threats is supported by northern spotted owl experts, researchers, and scientific peer reviewers. The results of our modeling efforts presented in Appendix C of the 2011 Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011, Appendix C) and in the Modeling Supplement for this rule (Dunk *et al.* 2012b) show that the 2008 critical habitat network performed worse (greater population declines over time, higher extinction risk) than the 2012 Revised Critical Habitat this revised designation.

The Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) recommends active management of some forest lands using ecological forestry approaches in appropriate stands such that we believe there are widespread opportunities for continued

timber harvest management within the range of the northern spotted owl.

Comment (111): One commenter noted that the Endangered Species Act requires that designated critical habitat only include those areas ''occupied at the time of listing,'' and that any additional areas defined by the Secretary must be essential to conserving the species. The commenter argued that the standards for designating critical habitat for occupied and unoccupied habitat differ, and that Congress did not intend the phrase ''conserve'' to include extending the range of a species. The commenter also asserted that stating that substantially all of the occupied and unoccupied area is necessary does not comply with the statutory requirements.

Our Response: Congress specifically provided for designating unoccupied areas where doing so is essential to the conservation of the species. Congress expressly recognized that ''conservation'' could require designation of areas unoccupied at the time of listing. In this rule, we are designating unoccupied habitat in places where it is essential to the species' recovery; however, we are not designating critical habitat outside the historical range of the species. We are also not designating critical habitat everywhere within the present range of the northern spotted owl.

The proposed rule did not say that ''substantially all of the occupied and unoccupied area is necessary.'' The proposed rule explained how much of each subunit was occupied based on historical survey data, and why the areas of potentially unoccupied habitat in each subunit are essential to the conservation of the species. In addition, the methodology used to determine what is essential was explained in the proposed rule and this final rule.

Comment (112): Several commenters suggested that there was insufficient evidence to determine whether lands proposed as critical habitat were occupied at the time of listing, and questioned the data used for assessing northern spotted owl populations, both at the time of listing and at the present time.

Our Response: Occupancy by individuals of wide-ranging species can be difficult to definitively demonstrate or verify, particularly when different areas are utilized by individuals at different times in their life stages, and when the species responds to survey techniques in a variety of ways. Effectively detecting territorial northern spotted owls in a home range is a well-established technique, but locating nonterritorial or transient northern spotted owls is more difficult, even though they occupy many areas between established home ranges of territorial owls. The Service determined that most of the areas within critical habitat that have the PCEs were occupied at the time of listing by the species. However, as stated in the rule, we have determined all areas within critical habitat to be essential for the conservation of the species. Areas essential to the conservation of the species are not required to be occupied at the time of listing to be included in critical habitat.

For the purpose of developing and evaluating revised critical habitat for the northern spotted owl, we used a definition of ''geographical area occupied by the species'' at the time it was listed consistent with the species' distribution, population ecology, and use of space. We based our identification of ''occupied'' geographical area on: (1) The distribution of verified northern spotted owl locations and (2) scientific information regarding northern spotted owl population structure and habitat associations. While there were approximately 1,500 northern spotted owl pairs identified at the time of listing (1990), subsequent surveys across a larger percentage of the landscape in the mid and late 1990s detected more than 4,000 pairs. Because adult northern spotted owls are long-lived and have high site fidelity, it is reasonable to assume that these sites identified as occupied several years post-listing were also occupied by owls at the time of listing.

In addition, we are not stating that all critical habitat was occupied at the time of listing, but as clearly identified in the proposed rule and this final rule under the section Unoccupied Areas (77 FR 14062, p. 14099), we acknowledge the uncertainty regarding whether some areas were occupied at the time of listing or not (especially those areas used for dispersal or which were likely occupied based on habitat suitability). Therefore, we have evaluated these areas as if they were unoccupied at the time of listing and have found them to be essential to the conservation of the species.

Comment (113): One commenter questioned how some ''occupied'' habitat areas can be considered nonessential while other ''non-occupied'' habitat was considered essential for the conservation of the species.

Our Response: To conserve the northern spotted owl it is essential to have larger, connected areas that are managed for the development of their habitat even though some of those areas may not currently be occupied by the species. As habitat develops over time, both within occupied and unoccupied areas, we anticipate northern spotted owls will colonize the unoccupied habitat and positively contribute to population demographics which contribute to conservation of the species. The closer these currently unoccupied areas are to the improved sites over time the more likely dispersing northern spotted owls will be able to successfully colonize them. By evaluating northern spotted owl population metrics, such as relative population size, population trend, and extinction risk that resulted from each scenario evaluated, we designated only those lands that contain the physical and biological features essential to conserve the northern spotted owl, or that are essential themselves. This network has the potential to support an increasing or stable population trend of northern spotted owls that exhibits relatively low extinction risk, both rangewide and at the recovery unit scale, and achieves adequate connectivity among recovery units. It does not include every known northern spotted owl site. Occupied northern spotted owl sites that are not included are isolated or in small groups with other sites and will provide relatively less demographic contribution to the population than those sites that are in larger, contiguous groups. Therefore, we determined that they did not contain the physical and biological features essential to northern spotted owl conservation.

Comment (114): Numerous commenters requested we maximize the total area included in the designation by including the most area in any of the composites or by including all northern spotted owl habitat across all ownerships.

Our Response: We have designated critical habitat based on the identification of those areas meeting the definition of critical habitat or that are otherwise essential to the conservation of the northern spotted owl. Toward this end, maximizing land area is not the key factor. Our goal was to designate critical habitat that is essential for northern spotted owl recovery but achieves the desired results on as small an area as possible (i.e., it is efficient). This reduces any potential regulatory burdens and land management conflicts, which will increase the likelihood of success at meeting our goals. In addition, designating areas beyond that necessary to achieve the conservation of the species would indicate that we had included areas beyond what is truly essential to the conservation of the

species, and exceeded the intent of the statute.

Comment (115): Several commenters suggested revisions to the boundaries of the proposed critical habitat, including several proposed additions (e.g., lands near Cascade-Siskiyou National Monument, Coquille tribal land, Coos Bay Wagon Road lands, the Olympics/Western Cascade area, etc.) for several reasons, including the conservation value of the habitat, increased connectivity benefits for dispersal and gene flow, the need for additional protections to avoid habitat degradation, and consistency with the best available science and existing policy.

Our Response: When determining what is essential to the conservation of the northern spotted owl, we prioritized Federal, then State, and finally private or Tribal lands. Where Federal and State lands were sufficient to provide for the essential conservation needs of the northern spotted owl as demonstrated through our population modeling in HexSim, no additional lands were added. In addition, in accordance with the provisions of the Act, not all habitat that could be occupied by northern spotted owls was included in the designation. Only areas that meet the definition of critical habitat for the species were designated.

In Washington, we added suggested areas to critical habitat only where updated information about land ownership indicated a change in ownership from private ownership to Federal ownership. This was based on our prioritization of landownerships in the designation, as described above, wherein we looked to Federal lands first for critical habitat, and included State and finally private or Tribal lands only where necessary to achieve the conservation of the species. These areas had not initially been included in the proposal because the ownership information we used had indicated these lands were privately owned, and therefore they were not prioritized for inclusion. These additions occurred in the central Cascade Range of Washington where many sections of industrial timberlands in checkerboard ownership with Federal lands had recently been transferred to Federal ownership. This area of the central Cascades surrounding Snoqualmie Pass has repeatedly been identified as essential to maintaining demographic linkages among spotted owl populations from northern to southern Washington, and from the west slope to the east slope of the Washington Cascades.

Public Comments Regarding the Northwest Forest Plan (NWFP)

Comment (116): Several commenters stated that the rule needs to be more explicit about how it relates to the NWFP, and that the NWFP should direct the management of the critical habitat lands.

Our Response: We have clarified the relationship between the critical habitat rule and the NWFP under the ''Forest Management Activities in Northern Spotted Owl Critical Habitat'' heading. The designation of critical habitat for the northern spotted owl identifies the areas essential for the conservation of the species; it does not supersede the Standards and Guidelines for lands in the NWFP. The Service believes the NWFP has functioned as intended for the retention and development of late-successional forest habitat (Thomas *et al.* 2006; Davis 2012). The NWFP was developed with the expectation that emerging scientific data would be incorporated into the management of Federal forest lands. The discussions of active forest management in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and this preamble are based on numerous recent scientific study results. We wish to be clear, however, that the inclusion or exclusion of NWFP reserves in the designation of critical habitat changes neither the land allocation nor the Standards and Guidelines for those lands under the NWFP. Nevertheless, we believe that our discussion of active forest management is consistent with the objectives of the NWFP.

Comment (117): One commenter suggested that lands currently managed under the NWFP do not require additional management considerations or protections from designated critical habitat.

Our Response: The Service is not relieved of its statutory obligation to designate critical habitat based on the contention that it will not provide additional conservation benefit. We do not agree with the argument that specific areas and essential features within critical habitat do not require special management considerations or protection because adequate protections are already in place. In Ctr. for Biological Diversity v. Norton, 240 F. Supp. 2d 1090 (D. Ariz. 2003), the court held that the Act does not direct us to designate critical habitat only in those areas where ''additional'' special management considerations or protection is needed. If any area provides the physical or biological features essential to the conservation of the species, even if that area is already well managed or protected, that area still qualifies as critical habitat under the statutory definition if special management is needed.

Comment (118): Numerous commenters asserted the proposed critical habitat rule would result in the weakening of the NWFP, including the dismantling or eradication of the late-successional (and riparian) reserves, and that we should use a variety of approaches explicitly elucidated in the final rule to maintain the LSR network.

Our Response: In designating critical habitat the Service is required to use the best available science to identify specific areas that provide the PCEs or are otherwise essential to the conservation of the species. Our modeling effort and other data identified some nonreserved areas that are high value for the northern spotted owl and essential to the conservation of the species. Additionally, there are portions of reserved allocations that are of relatively low value to the northern spotted owl. As a result of incorporating the best available science, our modeling process demonstrated that the critical habitat network identified here is more effective at conserving the northern spotted owl than the NWFP network of reserves. This is not unexpected, as the LSR network was never intended solely for the benefit of northern spotted owls, but was created to provide for many late-successional species. However, the designation of critical habitat does not change the existing NWFP land use allocations or Standards and Guidelines. The inclusion or exclusion of NWFP reserves as critical habitat changes neither the land allocation nor the Standards and Guidelines for those lands. The Service encourages continued implementation of the NWFP and adherence to the Standards and Guidelines for reserve management.

Comment (119): Several commenters noted the critical habitat rule should adopt the Standards and Guidelines of the NWFP in an effort to protect northern spotted owl habitat, including all late-successional and old-growth forests.

Our Response: In designating critical habitat we are required to identify those lands essential to the conservation of the species through application of the best available science. Our incorporation of state-of-the-art modeling programs, techniques, and data identified those areas, many of which contained late-successional or old-growth forest. However, the purpose of this rule is to designate critical habitat, not to adopt specific standards for its management. The Revised Recovery Plan for the Northern Spotted

Owl (USFWS 2011) recommends the retention of structurally complex forests where they currently exist (Recovery Action 32). We did not find, however, that retaining all northern spotted owl habitat is essential for the conservation of the species, so not all habitat was included.

Public Comments on Competition From Barred Owls

Comment (120): Several commenters recommended that the Service should objectively determine whether the barred owl threat has so overwhelmed the northern spotted owl as to make additions to critical habitat unnecessary, and noted that dealing with the barred owl and habitat threats separately could be detrimental to northern spotted owl recovery.

Our Response: The scientific information available at this time is not adequate to statistically assess the effect of barred owls on any specific conservation strategy or agency action, though these strategies include efforts to address barred owls. The extent to which northern spotted owls remain (sometimes undetected) on areas with high barred owl densities is unclear. However, the threat posed by barred owls does not relieve the Service of its statutory obligation to designate critical habitat for the northern spotted owl under section 4(a)(3)(A) of the Act. Furthermore, suitable habitat is essential for northern spotted owls to persist, with or without barred owls. Our modeling approach for designating critical habitat included barred owl effects on spotted owl population performance. Recent research (Wiens 2012) indicates that population performance of both northern spotted owls and barred owls is greatest when high-quality habitat is most abundant, and most peer reviewers supported the approach of conserving more habitat to help offset the impact of the barred owl on the northern spotted owl.

Public Comments on the Modeling Process

Comment (121): One commenter was critical that the process for combining different models in different modeling regions was unclear, and was also critical that a nonrandom sampling of nesting centers and the approach used to create a contiguous underlying RHS (Relative Habitat Suitability) map using MaxEnt modeling software.

Our Response: Although the RHS values within one modeling region may not be directly comparable to another's, the similarity of each modeling region's strength of selection curves (see Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011)), suggested that the interpretation of RHS values was similar between/among regions. Furthermore, Zonation was run within modeling regions (see Appendix C of the Revised Recovery Plan) to ensure that potential critical habitat units and subunits were well distributed throughout the northern spotted owl's range. We are aware of only one effort to date that has utilized random sampling of a relatively large region within the range of the northern spotted owl (Zabel *et al.* 2003). The demographic study areas were not randomly located, nor were the northern spotted owl location data we used. Thus, the chance exists that it is biased in some way. Nonetheless, given the relatively large sample sizes, and the geographic and habitat variation that exists around northern spotted owl sites in the samples we used, we contend that this is the best data available to use. The Service acknowledges that there is uncertainty in this process, and that this is unavoidable. There exists no perfect rangewide habitat map, no perfect (large) random sample of owl locations, no randomly allocated demographic study areas from which to draw strong range-wide inferences about population trends, nor a perfect understanding of the northern spotted owl's life history. That said, we have used the best data available, thoroughly documented our approach and presented our evaluation of the usefulness of the models we used, and we find they provide a strong foundation using the best available science for informing decisions about critical habitat.

Comment (122): One commenter indicated a need to clarify the basis for the thinning of northern spotted owl location data used in modeling.

Our Response: The basis of the thinning is articulated on pages C–20 and C–21 of Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011).

Comment (123): One commenter indicated that the assumptions for this modeling process were not completely spelled out nor were their validities addressed. For example, the modeling of habitat suitability assumes that core use areas and home ranges of northern spotted owls are relatively constant in size throughout their geographic range, but this assumption is not well supported by the proposed critical habitat, Appendix C of the 2011 recovery plan, or the published literature. Core use areas and home ranges increase in size for northern spotted owls in the northern part of their range versus those in the southern part (Thomas *et al.* 1990). Second, the modeling process for evaluating habitat suitability under MaxEnt assumes that some moderate amount of edge and degree of forest fragmentation is good for demography and fitness of northern spotted owls throughout their geographic range based on Franklin *et al.* (2000), yet this relationship has been shown mainly for northern California and one area in Oregon (Olson *et al.* 2005), not the remainder of the subspecies' range in Oregon and Washington. For example, Dugger *et al.* (2005) found no relationship between the amount of edge and demographic performance of northern spotted owls in southern Oregon; consequently, the validity of this assumption for the entire range of the subspecies is questionable.

Our Response: We did use one spatial scale throughout the northern spotted owl's range for our MaxEnt modeling. We also assumed that territories, in our northern spotted owl HexSim model, were of uniform size (3 hexagons) throughout the northern spotted owl's range. We did not, however, assume home ranges were of equal size throughout the range (see table C–24 in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011)). We also did not assume that edge or forest fragmentation was good for northern spotted owl demographic performance in our MaxEnt models. We did, however, allow for edge metrics to be included in the models where they had clear effects on the MaxEnt models; however, we did not force them in to the models in modeling regions where they had no effect. It is important to note that, unlike studies that have attempted to evaluate competing mechanistic hypotheses regarding northern spotted owl habitat/climate-demographic relationships (e.g., Franklin *et al.* 2000, Dugger *et al.* 2005), in our MaxEnt modeling process, we did not attempt to evaluate competing hypotheses. Instead, we attempted to develop MaxEnt models that had good discrimination ability, were well calibrated, and were robust (see our response to *Comment (20);* additional discussion is provided on pages C–30 to C–32 of the Revised Recovery Plan, USFWS 2011).

Comment (124): One commenter requested more justification for the choice of features in MaxEnt modeling. For example, the threshold feature was used, but the product feature was excluded. They predicted that product features in particular might be relevant to biological hypotheses (e.g., when nesting habitat is low, increases in foraging habitat don't increase occupancy, but when nesting habitat is

greater, foraging habitat has a greater impact on occupancy).

Our Response: We could have allowed all MaxEnt feature types to be used in our process. The product (interaction) feature would have resulted in even more complex models. However, we were able to develop models without additional complexity (e.g. interaction terms) that worked well for the purposes for which they were developed. Results from model cross-validation and comparisons with independent data sets (USFWS 2011, Appendix C, Table 19, pp. C–39 to C–41) showed that our models were well calibrated and had good ability to predict spotted owl locations (USFWS 2011, Appendix C, Table 20).

Comment (125): Several commenters requested more detail regarding how the different Zonation scenarios from Phase 1 in Appendix C of the Revised Recovery Plan were selected for inclusion in proposed critical habitat. In particular, the reviewers believed that Zonation 70 and 90 scenarios would have provided better modeled northern spotted owl population performance.

Our Response: We assume that the question is about why the 30, 50, and 70 percent of habitat value were chosen for the initial Zonation networks. They were chosen to provide relatively broad side-boards, particularly in regard to network size. To have started with even more extreme side-boards (e.g., Z10 and Z90) would have been excessive because these configurations would have included either a very large amount of land that doesn't have features that would support owls (Z90) or an area so small (Z10) that viable owl populations could not be sustained. It is true that a Z90 scenario would have provided much more area of potential critical habitat, but the amounts of high RHS (> 0.5) in Z70 are nearly identical to those in Z90. In fact, Z50ALL contained 92%, 98%, 99%, and 100% of RHS bins 0.6–0.7, 0.7–0.8, 0.8–0.9, and > 0.9, respectively. Z90ALL contained 100% of the RHS from each bin, but encompassed a much larger area (i.e., for very little added inclusion of high RHS areas, Z90 included millions of additional acres). In effect, moving from Z70 to Z90 adds a lot more area; however, the additional lands added do not contribute much to spotted owl population performance.

Zonation 70 was considered, and subsequently modified in various composite networks we evaluated. We found that simply increasing the area of potential critical habitat networks did not always result in better performance of simulated owl populations in HexSim (e.g., Composite 7 was 13.9 million ac (5.625 million ha) and had an ending population that did not differ (95 percent confidence intervals overlapped) from composites with from 18.2 to more than 20 million ac (7.4 to more than 8.1 million ha)). In some modeling regions, our modeling results suggest that owl populations are likely to remain relatively low; in part due to the relatively small amount of mid-to-high RHS area in them. The population results for Zonation 40, 60, 80 and 90 are provided in our Modeling Supplement (Dunk *et al.* 2012b).

Comment (126): One commenter indicated there were key assumptions used in the modeling process that should be more clearly documented. The reviewer indicated that the proposed critical habitat document refers the reader to the Dunk *et al.* (2012a) Modeling Supplement for a discussion of these assumptions but they were unable to locate them in this document. Not only should the assumptions of the modeling be included in the proposed critical habitat, but the validity of the assumptions should also be addressed.

Our Response: The key assumptions used in our modeling process are provided in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), and referenced in our proposed rule. Appendix C also provides a thorough discussion of our process of testing and cross-validating our models. We have also clarified this in the final version of our Modeling Supplement (Dunk *et al.* 2012b).

Comment (127): One commenter noted that the modeling of population response and viability under HexSim assumed that recruits into the population become co-owners of their mother's territories, yet most owls are recruited into the population in different areas after extensive dispersal over several months and sometimes years. They asked to what extent are these assumptions valid, and how would lack of validity potentially affect the results of the modeling process?

Our Response: In the northern spotted owl HexSim model we assumed that juvenile birds, prior to dispersal, co-owned their mother's territory. However, juveniles were forced to disperse in the model. The recruits are only co-owners until they fledge, and fledging always takes place in the first year of life. Further, in the modeling two post-fledging females did not share a territory.

Comment (128): One commenter noted that composite 3 performed poorer than composite 1 based on population performance, yet composite 4 was based on the network in composite 3 and composite 5 was based, in part, on that in composite 4. This sequence of models based on the poor performance of composite 3 does not make sense from an ecological or conservation stand point. It is obvious that composites 1–7 do not represent the complete range of habitat networks that might provide for sustainable populations of northern spotted owls in most of the modeling regions. They contend that there should have been more attention paid to increasing habitat for northern spotted owls and providing for sustainable populations in all modeling regions instead of increasing efficiency. They understood the need to make any habitat network efficient but believed that this was a case where efficiency has trumped conservation of habitat for the northern spotted owl and other species associated with old forest ecosystems.

Our Response: Relatively poorer performance (as noted by the reviewer) is not equivalent to ''poor performance.'' In fact, the 95 percent confidence intervals of the mean estimated population sizes at time-step 350 overlapped for composites 1, 3, 4 (highest point estimate), 5, 6, and 7 indicating that the differences may not be statistically significant. Furthermore, although Composite 3 did perform worse than Composite 1 in terms of exceeding pseudo-extinction thresholds, Composite 7's performance was nearly identical to Composite 1's. Thus, we disagree with the assertion that our sequence was based on poorly performing composites. There are an infinite number of possible potential critical habitat networks that could have been evaluated. Efficiency, as used by the Service in this effort, did entail reducing the size of potential critical habitat networks, because our charge under the statutory definition of critical habitat is to designate only those lands occupied at the time of listing that contain essential physical and biological features or unoccupied lands that are essential.

Comment (129): One commenter indicated that the process for comparing GNN (vegetation) data with owl nest sites and foraging areas is unclear. The reviewer asked whether GNN data indicated that nest site centers were characterized by large, old trees with closed canopy forests and stated that this process needs better explanation.

Our Response: The process for developing models of nesting and foraging habitat is described in detail on pages C–14 through C–43 in Appendix C of the 2011 Revised Recovery Plan for the Northern Spotted Owl. Nesting and roosting habitat was characterized by

large, old trees with closed canopies; however, the specific vegetation characteristics included in the models varied by region. Our confidence that the GNN layer was sufficiently accurate to support our modeling process was based on several formal and informal evaluations. First, we evaluated northern spotted owl habitat modeling conducted by the Northwest Forest Plan Interagency Monitoring Program (Davis *et al.* 2011), which was also based on the GNN data. This effort used GNN and MaxEnt to predict northern spotted owl nesting habitat, obtaining models quite similar to the NR models in our modeling effort. We also obtained less formal, but very useful, feedback from a number of USFS scientists who had made comparisons between GNN output and their own field-typed northern spotted owl nesting habitat with good results. Finally, as described in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011), we evaluated the reliability of the MaxEnt models' predictions (RHS) and found that the models had good ability to predict northern spotted owl locations. Systematic inaccuracy of the GNN data would be unlikely to result in the accurate predictions we obtained in our modeling. In addition, please see our responses to *Comment (19)* through *Comment (22)* for details on our testing, cross-validation, and use of GNN and MaxEnt.

Comment (130): One commenter stated that more information on the ''independent test data sets'' used for model cross-validation is necessary before they are acceptable as an adequate test. In particular, if these data sets suffer from the same non-random sampling as the training data, then they will not aid in determining whether the RHS and AUC values are biased by the nature of the sampling or not.

Our Response: As described in Appendix C of the Revised Recovery Plan (USFWS 2011, p. C–20), we expended substantial effort on the verification of both the spatial accuracy and territory status of each site center used in our data set. We received high quality data from northern spotted owl demographic study areas (DSAs), and obtained a large set of additional locations from the NWFP Effectiveness Monitoring Program. We also obtained and verified data sets from private timber companies, the USFS Region 5 NRIS database, and a number of research and monitoring projects throughout the range of the northern spotted owl. We are aware of only one effort to date that has utilized random sampling of a relatively large region within the range of the northern spotted owl (Zabel *et al.* 2003). Because of the spatial extent of the range of the northern spotted owl (more than 23 million acres), we do not have the luxury of having equal survey effort throughout the region. The demographic study areas are not randomly located, nor are the northern spotted owl location data we used. Nonetheless, given the relatively large sample sizes, and the geographic and habitat variation that exists around northern spotted owl sites in the samples we used, we consider this information to represent the best available scientific data for our purposes, and are not aware of any alternative data sets.

Comment (131): One commenter expressed concern that the encounter rates of northern spotted owls with barred owls found in Forsman *et al.* (2011) were reduced downward to a maximum rate of 0.375 even though there is strong evidence in Forsman *et al.* (2011) that the rate is higher in some modeling regions, and Wiens *et al.* (2011) has shown that abundance of barred owls (and encounter rates) is much higher in the Coast Ranges of Oregon than initially thought or is documented in Forsman *et al.* (2011). The lower encounter rates of northern spotted owls with barred owls that were used in Phases 2 and 3 of the modeling represent more optimistic performances of northern spotted owls to habitat conditions than is likely to occur in reality. The reviewer contends that it would have been more appropriate to use Zonation 70 or even 90 to a greater extent in some modeling regions, than to arbitrarily reduce the barred owl encounter rate to a maximum of 0.375 in order to provide for sustainable populations in all modeling regions.

Our Response: The modeling we conducted suggested that the larger the barred owl encounter probability was, there was less variation in northern spotted owl population performance among potential critical habitat networks (even when network size varied by more than a factor of 2); effectively all populations did uniformly poorly. However, when barred owl encounter probabilities were lower (e.g., 0.25), considerable variation in northern spotted owl performance among potential critical habitat networks resulted. Thus, under extremely high barred owl encounter probabilities, our modeling suggested that even large amounts of area in potential critical habitat networks did not compensate for those barred owl impacts. Thus, in order to identify potential critical habitat areas for the northern spotted owl, we made assumptions about barred owl encounter probabilities in each of the 11 modeling regions. The assumed changes in encounter probabilities we used in Phases 2 and 3 of our modeling were, in most cases, relatively modest changes from the currently estimated encounter probabilities. In fact, for Phase 2 and 3 modeling, we decreased barred owl encounter probabilities in only 3 of 11 modeling regions, and increased encounter probabilities in 8 of 11 modeling regions. Mean absolute value of change (from currently estimated to what we assumed in Phases 2 and 3) among modeling regions was 0.081 (range = 0.005 (in the KLE) to 0.335 (in the OCR)). For additional detail, please see our response to *Comment (38).*

Comment (132): One commenter suggested that we use an occupancy analysis on the long-term demographic study areas rather than modeling habitat with MaxEnt to better address barred owl effects.

Our Response: Barred owl impacts were included in HexSim. In our response to comments made on Appendix C in the Draft Revised Recovery Plan for the Northern Spotted Owl (75 FR 56131; September 15, 2010), the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) addressed the choice we made to use MaxEnt and the full data set of owl site center locations that was available to us, rather than rely solely on data from the Demographic Study Areas.

Comment (133): One commenter contended that a separate analysis of BLM checker-boarded lands in western Oregon is needed in order to understand the performance of northern spotted owl populations under the different habitat networks and composites on those lands.

Our Response: The number of possible owner/district/region-centric analyses that we could have evaluated was nearly infinite. The BLM's ownership was considered in the same way that other ownerships were. In developing the critical habitat designation, we prioritized public lands over private lands.

Comment (134): One commenter noted that for most of the study areas, the estimates from HexSim compared favorably to the empirical estimates from the field studies except for the South Cascades (CAS) and Klamath (KLA) Study Areas. In one case (CAS), the estimate from HexSim was much larger than that from the field studies, and in the other case (KLA) the estimate from HexSim was significantly smaller than from the field studies. These differences and inconsistencies raise some concerns for the validity of the

modeling results from HexSim. The commenter asked for some explanation for these differences and inconsistencies, and whether the input parameters for HexSim need to be revised.

Our Response: We are aware of these differences, as noted in Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). We evaluated multiple changes to the northern spotted owl HexSim model's settings, but those changes did not result in overall better agreement between HexSim population estimates and empirical estimates from demographic study areas (DSAs). To some extent, this issue is the result of the spatial scale at which we ran the northern spotted owl HexSim model. The overall results, in our view, were quite good—but not in every specific case. Although there were discrepancies at these local areas, we believe that the scale at which we evaluated information for potential critical habitat networks (modeling regions and the entire geographic range of the northern spotted owl in the United States, which is at least an order of magnitude larger than a demographic study area) was appropriate. We provide additional justification in the following paragraphs.

The KLA DSA is quite small, and is distributed across the Klamath East and Klamath West modeling regions. The CAS DSA is large, and is distributed across the Klamath East and East Cascades South modeling regions. There were no simulated northern spotted owl life-history parameters that varied based on demographic study area location. Some demographic data (resource target and home range size) did, however, vary by modeling region.

HexSim simulation data show that the East Cascades South modeling region exchanged owls principally with the Klamath East and West Cascades South modeling regions. The Klamath East modeling region exchanged owls principally with the East Cascades South and Klamath West modeling regions, with relatively small numbers of immigrants coming from the West Cascades South region. The Klamath West modeling region exchanged owls principally with the Klamath East modeling region, with the next highest number of emigrants and immigrants being associated with the Oregon Coast and Redwood Coast regions, respectively.

The simulated CAS DSA population size is roughly 45 owls too large, whereas the KLA DSA population size is about 55 owls too small. These two DSAs are spread across three modeling regions, with both DSAs residing partly in the Klamath East region. Because the Klamath East modeling region exhibits high rates of simulated immigration and emigration with the other two modeling regions in question (see previous paragraph), the discrepancy in simulated DSA population sizes is not a big concern. The sum of the simulated CAS and KLA DSA population sizes is almost exactly equal to the combined field estimates for those two regions. This suggests that HexSim's simulated northern spotted owl population size and distribution is quite accurate at the scale of the DSA for most DSAs, and for these two DSAs in particular, it is similarly accurate, just at a slightly larger spatial scale.

Comment (135): One commenter asked what publication or data set were used for establishing the barred owl influence on northern spotted owl reproduction in the HexSim model.

Our Response: In the northern spotted owl HexSim model we used, barred owls did not have any influence on northern spotted owl reproduction, but did on adult survival. This has been clarified.

Comment (136): Several commenters requested that the Service integrate industry data into the modeling process and that attention be given to the assumptions and limitations of the models and whether or not the assumptions and model outputs have been validated.

Our Response: The modeling process incorporated data sets, expert opinion, and published information from the timber industry. We carefully evaluated the appropriateness of our models, data sets, and assumptions and tested the outputs and products of the modeling effort; we therefore are confident that our process was rigorous and met our objectives. Please see Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) for a discussion of the rigorous testing and cross-validation we conducted on our models, as well as our responses to *Comment (19)* through *Comment (22).*

Comment (137): One commenter raised concerns about leaving out high RHS value habitat on State and private lands in Washington, and provided recommendations of specific areas to include in critical habitat designation.

Our Response: The modeling process that the Service developed to help identify potential critical habitat is most appropriately used to make relative comparisons of alternative scenarios. While we sought to make the models as realistic as possible to achieve meaningful relative comparisons, these modeling tools are not designed to predict specific future outcomes. We are confident in the ability of the modeling routine to rank a set of scenarios from best to worst and provide insights about the degree of difference among them. But population metrics provided by the models are better viewed as relative indices than as predictions. This caution about interpretation of model output is particularly relevant to modeling regions with low amounts of total habitat area, such as in the State of Washington. In the modeling environment, small population sizes tend to lead to high variation in outcomes among iterations. Furthermore, competitive effects of barred owls played a large role in determining population outcomes, especially in Washington where encounter rates between barred owls and northern spotted owls are high.

We used the objectives and criteria in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) to guide our critical habitat proposal. Only after we had a critical habitat network that we considered essential to meet recovery objectives did we impose the secondary criterion of network efficiency. We retested networks after efficiency modifications were made to ensure they were still likely to meet recovery objectives. We included State or private lands only where our modeling results indicated Federal land was insufficient to provide what is essential for recovery.

As described in the section Criteria Used to Identify Critical Habitat, we have included in this designation only those areas occupied at the time of listing that provide the essential physical or biological features, or areas unoccupied at the time of listing that we have determined are otherwise essential to the conservation of the northern spotted owl. We appreciate the commenter's suggestion of additional areas for consideration, and we did evaluate all areas on the basis of RHS throughout the range of the northern spotted owl, including State and private lands in southwest Washington. We have included in this final designation all areas that we have determined are essential to the conservation of the species. A determination that certain areas are not essential should not, however, be interpreted to mean that such areas do not have the potential to contribute to the recovery of the species, and we encourage landowners to participate in other recovery efforts to achieve conservation on their lands (for example, as identified in Recovery Actions 14 and 15 of the Revised Recovery Plan (USFWS 2011)). In addition, we identified some State and

private lands in Washington as essential for the conservation of the northern spotted owl, but all of the private lands and some of the State lands were subsequently excluded under section 4(b)(2) of the Act (see Exclusions). As discussed in our response to *Comment (104),* above, exclusion of areas is not the same as a determination that those areas are not essential; it only reflects the Secretary's determination that the benefits of excluding such areas outweighs the benefits of including them in critical habitat.

Comment (138): One commenter claimed that critical habitat includes nearly all suitable habitat—occupied or not—and was driven by the artificial constraints incorporated into the recovery plan—namely the manipulation of the barred owl interaction model. According to the commenter, absent these artificial constraints, the model would have predicted that none of the alternatives will conserve the species in the face of barred owls, therefore none of the lands wherein there is significant barred owl interaction are ''essential'' for the survival of the species. The commenter further stated that given the significant impact on the human environment by restricting management of the lands within this region, the Service needs to clearly provide the public with an estimation of the scientific reliability of their ability to conserve the northern spotted owl, and this information is critical to weighing the social and economic ramifications of the proposed action.

Our Response: The proposed critical habitat rule did not include ''nearly all suitable habitat'' and our evaluation indicated that the large majority of the proposed designation was occupied at the time of listing and contains the physical and biological features essential to conservation of the species. It also identified other areas essential to the species' conservation, which represent only a small portion of the proposed critical habitat. Contrary to the commenter's assertion, the barred owl impacts used in the population modeling process were similar to or slightly higher than those reported in most modeling regions; barred owl effects were reduced in only three of 11 regions (Table 2 in Modeling Supplement). This was done to enable the identification of areas essential to the spotted owl's recovery; threats that are not habitat-based are addressed through implementation of actions in the recovery plan. The current influence of barred owls on occupancy by northern spotted owls does not negate the role of habitat in the recovery of the species. The Service clearly noted in the proposed rule that the areas proposed as critical habitat are essential, but not sufficient absent other management actions, to recover the northern spotted owl.

Comment (139): One commenter was concerned that the proposed rule did not present an effects analysis for the proposed exclusions that indicates how northern spotted owl populations would likely respond if these lands were excluded.

Our Response: Many of the potential exclusions put forth in the proposed critical habitat rule would be unlikely to affect the outcome of our population modeling. This is because those exclusions, if made, would be based on their having some existing habitat protections (e.g., wilderness areas, national parks, HCPs, SHAs) that we would reasonably expect to continue into the future, and thus our treatment of them in the modeling would be the same as if they were included in a critical habitat network. If we were to exclude lands without consideration of continued conservation, we agree that this could change the results of our population modeling. However, since this is not the case, and no such lands were excluded from this final rule, we did not need to conduct such an analysis in this final rule.

Comment (140): One commenter was critical that no analysis was provided as to the relative effectiveness of the new critical habitat network in also capturing habitat for other late-seral/old-growth-associated species of concern, and encouraged an analysis of the effects of the proposed critical habitat network on multi-species conservation goals, by overlaying critical habitat boundaries on data on occurrence and habitat distribution for other species of concern.

Our Response: Analyzing the effects of the proposed critical habitat network on multi-species conservation goals is beyond the scope of the critical habitat designation process for the northern spotted owl. Furthermore, the results of such an analysis would not affect the selection of the final critical habitat designation for the northern spotted owl, as the statutory language defines critical habitat with reference to a particular listed species.

Comment (141): One commenter suggests that the Service fails to explain to the public why, in order to model sustainable northern spotted owl populations, it was required to arbitrarily select an interaction rate with barred owls that was not based on science-based field studies. Rather, the commenter states, it was based on the assumption that barred owls would be addressed through their extirpation from wide swaths of the Pacific Northwest (''Modeling and Analysis Procedures used to Identify and Evaluate Potential Critical Habitat Networks for the Northern Spotted Owl,'' USFWS Feb. 28, 2012, pp. 14–15), an assumption that is neither legally nor scientifically supportable.

Our Response: The Service made no assumption, written or otherwise, that the barred owl would be extirpated from any portion of the northern spotted owl's range. The ''ceiling'' on barred owl encounter rates that was used in the modeling (Phases 2 and 3 from Dunk *et al.* 2012a) was not arbitrary, but based on the results from several scenarios presented and compared during Phase 1 modeling. As explained in both Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and Dunk *et al.* 2012b, the barred owl encounter rates used in the testing and selection of the proposed critical habitat designation are, in most modeling regions, similar to or even slightly above the currently estimated encounter rates. Only in portions of Washington were encounter rates reduced in order to identify essential habitat absent the undue influence of barred owls, but certainly not to the extent of ''extirpation of wide swaths'' as suggested in this comment. For additional details, please see our response to *Comment (38).*

Comment (142): One commenter stated that the original critical habitat designations were based on forest stand characteristics whereas the new designations are based on computer simulations that are untested and unreliable, and that this is not an improvement on the existing science. The commenter states that northern spotted owl populations have continued to decline as suitable habitat has increased; therefore, there are factors other than habitat that are decimating northern spotted owls, namely barred owls and catastrophic fires, and increasing the size of habitat will do nothing to save them.

Our Response: While it is true that northern spotted owl populations continue to decline, we have no evidence to suggest that suitable habitat has increased rangewide. Furthermore, we recognize that loss or degradation of habitat is not the only threat affecting northern spotted owl populations. However, as we have stated, comprehensive recovery actions for the northern spotted owl are provided in the Revised Recovery Plan (USFWS 2011). The existence of other, non-habitat based threats does not relieve

the Service of its statutory obligation to designate critical habitat for the species to the maximum extent prudent and determinable.

We believe the commenter may not have understood that the computer programs that we used were developed, to the extent that it was defensible to do so, with empirically derived information, and thus were also ultimately based on real forest stand characteristics. In cases where this was not possible, a rationale for parameter inputs was provided (see Appendix C of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and Dunk *et al.* 2012b). For example, actual weather station data are not available across the entire range of the northern spotted owl; however, temperature and precipitation models that provide site-specific climate data across the species' range provide these data. Additional explanation of the extensive degree to which our models were tested and cross-validated is also provided there, as well as in our responses to *Connet (19)* through *Comment (22),* among others.

Comment (143): Several commenters noted that the Service should redo its habitat modeling by including active management as a setback of owl habitat and to determine how long it will take for treated areas to recover to suitable nesting, roosting, and foraging habitat.

Our Response: The analysis suggested in this comment is predicated on the availability of reliable information on the extent to which active management may potentially be implemented within the boundaries of critical habitat, if at all. As we have noted throughout this rule, the discussion of active management provided is for use by Federal, State, local, and private land managers, as well as the public, as they make decisions on the management of forest land under their jurisdictions and through their normal processes. We are attempting to emphasize that critical habitat is not necessarily a ''hands off'' designation, depending on the nature of the habitat and the action under consideration, and we encourage land managers to consider the flexibility of management options available to them consistent with the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) and the Standards and Guidelines of the NWFP (USDA, USDA 1994). However, as noted in our economic analysis of the designation, predicting what land managers may choose to do is an exercise in uncertainty; land managers may choose to refrain from any management actions, may continue to manage lands as they currently do, or make choose to implement alternative active management practices. Given that we do not know whether land managers will even attempt to implement active management, much less how often or on what scale, attempting to model the effects of those actions on RHS would be purely speculative and, for our purposes, uninformative.

Other Public Comments

Comment (144): Two comments were submitted regarding how proposed critical habitat (not specific to a particular land use allocation) will negatively impact future development within counties.

Our Response: The forested areas included in the critical habitat designation are primarily managed for forest products, including timber production. We are not aware of any development projects proposed within the area of this revised designation, and our final economic analysis did not identify any such potential impacts.

Comment (145): Two commenters asserted that the regulatory mechanisms for protecting critical habitat on State and private lands were insufficient to adequately protect northern spotted owl habitat.

Our Response: The statutory authority defining and regulating critical habitat is the Endangered Species Act (Act). Section 7(a)(2) of the Act specifically provides that protections to critical habitat via consultation are triggered by actions authorized, funded, or carried out by Federal agencies (referred to as a ''Federal nexus''). If there is no Federal nexus involved in a proposed action, the law does not require consultation with the Service. The Act does not provide a direct regulatory mechanism for protecting critical habitat on State or private lands absent a Federal nexus.

Comment (146): One commenter requested that the Secretary identify those lands being designated for the purpose of expanding the range or dispersing the northern spotted owl into unoccupied areas.

Our Response: The designated lands are entirely within the range of the northern spotted owl and the vast majority of lands were occupied by northern spotted owls at the time of listing. This designation does not identify any areas for the purpose of expanding the range of the species. We have included some small areas that may have been unoccupied at the time of listing for the purposes of accommodating potential population growth. Each of the subunit descriptions in this rule describes the subset of area, if any, that was identified to assist with northern spotted owl movement across broad landscapes, to provide connectivity between established populations, or to provide for population expansion. Population expansion, as used here, is meant to describe population growth in terms of increased numbers of individuals within an area, not range expansion. In Oregon we have designated two areas specifically to assist in the movement of northern spotted owls between the Oregon coast (ORC) and the western Cascades south (WCS) critical habitat units. In Washington, many historically occupied areas included in critical habitat are currently unoccupied due to reductions in spotted owl populations. Full occupancy of these formerly occupied areas (population growth or expansion) would provide for conservation of the spotted owl without expanding the range. Relative to past critical habitat designations for the spotted owl, we also included additional areas in northern Washington into the current critical habitat designation. These areas may increase the potential for dispersal of owls to and from British Columbia, Canada, in the future. Currently, such exchange is unlikely due to low abundance of spotted owls in this landscape on both sides of the international border. All of this area is within the current geographic range of the northern spotted owl, and does not expand that range beyond its historical boundaries.

Comment (147): One commenter questioned how the Service had applied a ''significant contribution'' standard to occupied and unoccupied areas.

Our Response: We considered a specific area to make a ''significant contribution'' to the conservation of the species if adding or removing that area from the habitat network under consideration resulted in an appreciable change in the population performance in that modeling region.

Comment (148): One commenter requested additional clarification of the terms ''largely occupied'' or ''approximately occupied'' at the time of listing for particular subunit areas.

Our Response: These terms have been clarified in the final rule. For each subunit, the proposed rule explained that the specified percentage ''was covered by verified northern spotted owl home ranges at the time of listing.'' As an example, such subunit descriptions then went on to say: ''[w]hen combined with likely occupancy of suitable habitat and occupancy by nonterritorial owls and dispersing subadults, we consider this subunit to have been largely occupied at the time of listing. In addition, there

may be some smaller areas of younger forest within the habitat mosaic of this subunit that were unoccupied at the time of listing. We have determined that all of the unoccupied and likely occupied areas in this subunit are essential for the conservation of the species to meet the recovery criterion that calls for continued maintenance and recruitment of northern spotted owl habitat. The increase and enhancement of northern spotted owl habitat is necessary to provide for viable populations of northern spotted owls over the long-term by providing for population growth, successful dispersal, and buffering from competition with the barred owl.'' Thus, the specified percentage is based on actual surveys. However, as described in Criteria Used to Identify Critical Habitat, we also determined that all areas designated are essential to the conservation of the northern spotted owl, using the more restrictive standard for unoccupied areas, to ensure all areas were appropriately designated even if there was any uncertainty about its occupancy status at the time of listing.

Comment (149): One commenter requested additional clarification about how the ''time of listing'' occupancy analysis relates to information suggesting that old growth and late-successional habitat features may not be optimal for the northern spotted owl in the Oregon Coast Range.

Our Response: Northern spotted owls live in a variety of forest types and rely on forests of varying structure to survive during different parts of their life cycles. The occupancy data from the time of listing reinforces that the northern spotted owl requires older forest structure to maintain viable reproducing populations throughout much of its range. This commenter appeared to be referring to studies that have shown that northern spotted owls will use younger forests in the Oregon Coast Ranges (Glenn *et al.* 2004) and appear to benefit from some degree of younger forest interspersed in older forest in southwest Oregon (Olson *et al.* 2004) and northern California (Franklin *et al.* 2000). However, none of these studies suggest that old growth and late-successional forest are not optimal habitat for northern spotted owls.

Comment (150): One commenter requested that the Service acknowledge the benefits of grazing on public lands as a tool to manage vegetation which provides the northern spotted owl with easier access to prey. The commenter also expressed concern that the expansion of critical habitat would limit grazing.

Our Response: We are not aware of any research or scientific publications on grazing and northern spotted owl foraging use, and the commenter did not provide supporting information. In any case, this rule does not prescribe limitations on grazing.

Comment (151): One commenter requested that regeneration harvest be restored on all Federal forests within the Northwest Forest Plan boundary, in particular on the Olympic Peninsula. The commenter suggested that regeneration harvest would help restore forest health, create jobs, provide revenue from timber harvest, and reduce effects of forest fires on northern spotted owl habitat.

Our Response: This rule is limited to the designation of critical habitat for the northern spotted owl. While the preamble discusses some management techniques for consideration by land managers, specific management prescriptions for Federal lands within the NWFP is beyond the scope of this rulemaking.

Comment (152): Several commenters suggested narrowing the scale at which the Service assesses whether a proposed action destroys or adversely modifies critical habitat to better reflect northern spotted owl biology, to better capture localized negative trends, or to align with the intent of the Endangered Species Act.

Our Response: In accordance with Service policy, the adverse modification determination is made at the scale of the entire designated critical habitat, unless the critical habitat rule identifies another basis for the analysis (USFWS and NMFS 1998). The adverse modification determination for the northern spotted owl will occur at the scale of the entire designated critical habitat, as described above in the section Determinations of Adverse Effects and Application of the ''Adverse Modification'' Standard, with consideration given to the importance of the conservation function of units and subunits within each of the recovery units identified in the Revised Recovery Plan (USFWS 2011, Recovery Criterion 2). The Service believes the entire designated critical habitat is the appropriate scale for this analysis, because our determination is based on whether implementation of the Federal action would preclude the critical habitat as a whole from serving its intended conservation function or purpose. However, a proposed action that compromises the ability of a subunit or unit to fulfill its intended conservation function or purpose could represent an appreciable reduction in the conservation value of the entire designated critical habitat.

Comment (153): Several commenters suggested that the Service cannot legally designate land as critical habitat that does not currently contain primary constituent elements (PCEs), and should not designate lands that may become habitat in the future.

Our Response: In our proposed designation of critical habitat for the northern spotted owl, we identified primarily areas that were occupied at the time of listing as critical habitat; all such areas support the PCEs and subsequently the essential physical or biological features as identified in this rule. In addition, some areas that may not have been occupied at the time of listing are designated as critical habitat, because we determined that such areas are essential to the conservation of the species. These areas make up a relatively small percentage of the total designation. Because the loss or degradation of habitat was one of the primary threats that led to the listing of the species, the restoration of habitat is required to achieve the recovery of the species, as identified in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). In some areas, the recovery goal of achieving viable populations across the range of the owl cannot be achieved without the development of some areas that are presently younger forest into additional habitat capable of supporting northern spotted owl populations into the future.

We evaluated all areas anticipated to develop into suitable habitat in the future as if they were unoccupied at the time of listing, to determine whether such areas are essential to the conservation of the species. We included such areas in the final designation of critical habitat only if they were essential to the conservation of the species because they provide connectivity between occupied areas, room for population expansion or growth, or the ability to provide sufficient suitable habitat on the landscape for owls in the face of natural disturbance regimes, such as fire. In addition, recent research indicates that northern spotted owls require additional habitat area to persist in the face of competition with barred owls. Finally, in some areas where habitat loss or degradation was historically severe, areas of currently degraded habitat may be in need of restoration to provide the large, contiguous areas of nesting, roosting and foraging habitat required by the species. Section 3(5)(A)(ii) of the Act provides for the designation of critical habitat in specific areas outside the geographical area occupied at listing

upon a determination that such areas are essential for the conservation of the species. As the Secretary has determined that these areas of younger forest that may have been unoccupied at the time of listing are essential to the conservation of the species, the law provides for their designation as critical habitat.

Economic Analysis Comments

Comments From States

Comment (154): The California Department of Forestry and Fire Protection (CALFIRE) states that the designation of Jackson Demonstration State Forest land as critical habitat could result in costly section 7 consultations that might prohibit or delay the approval or implementation of environmental restoration projects. It identifies water quality permits under the Clean Water Act for timber harvesting plans as a potential future nexus, while noting that currently, a waiver of waste discharge requirements can be applied to discharges related to timber harvest activities on non-Federal lands in the North Coast Region. It identifies current litigation threatening this exemption.

Our Response: Chapter 5 of the Final Economic Analysis (FEA) provides extensive discussion of the potential Federal nexuses necessitating section 7 consultation on State and private lands (paragraphs 209 through 221). Specifically, it discusses the Clean Water Act (CWA) permitting requirements and a recent ruling by the Ninth Circuit that has the potential to increase permitting requirements for silviculture operations as sources of point-source pollution. *Northwest Environmental Defense Ctr.* v. *Brown,* 640 F.3d 1063 (9th Cir.). However, in light of the fact the United States Supreme Court has granted a *writ of certiorari* to review this ruling, the economic analysis concludes that considerable uncertainty surrounds this litigation and whether it will in fact change the permitting requirements for silvicultural operations within the next 20 years. Due to this uncertainty, we assume for purposes of our economic analysis the current CWA exemption and subsequent lack of a Federal nexus continues, and therefore do not anticipate direct effects on private or State lands associated with Clean Water Act permitting activities, and therefore do not anticipate any significant impacts to the restoration projects resulting from the designation of critical habitat. Please see the discussion of the Jackson Demonstration State Forest in the section Changes from the Proposed Rule for more details.

Comment (155): CALFIRE provides additional information describing the current management of the Jackson Demonstration State Forest and northern spotted owl habitat.

Our Response: We have added additional discussion of baseline practices at Jackson Demonstration State Forest to Chapter 5 of the FEA.

Comments From Federal Land Managers

Comment (156): U.S. Bureau of Land Management (BLM) asked for clarification as to how the DEA used the data provided by their agency.

Our Response: The BLM provided more detailed geospatial data than other agencies; therefore, when BLM data are aligned with the Service data layers and USFS historical and projected timber harvest, the analysis endeavors to utilize a consistent data set across land ownership types. For example, while BLM provided data on 30 years of planned timber harvest, as well as stand age (i.e., over and under 80 years of age), the analysis focuses on timber harvest projections for the first decade to derive a 20-year projection and does not incorporate stand age, because this information was not available for other areas. Specifically, the draft economic analysis (DEA) used a filtering approach to identify those specific areas where incremental timber harvest effects may occur. Further explanatory detail on these methods has been added to Chapter 4 of the final economic analysis (FEA).

Comment (157): The BLM requested further clarification on how the Service considered the effects on long-term, sustained-yield timber production due to the shift in management objectives for the Matrix lands that are proposed to be designated as critical habitat.

Our Response: The DEA and FEA state that the obligation of the agencies is to consult with the Service to ensure that their actions are not likely to destroy or adversely modify critical habitat and may opt from a wide range of management options, consistent with their land use plans and statutory authorities. It is challenging to predict how the land management agencies will respond or on what actions they will consult. Therefore, there is considerable uncertainty regarding long-term effects, if any, on sustained yield timber production due to a potential shift in management objectives within the revised critical habitat designation. A range of potential effects are discussed qualitatively in the analysis.

Comment (158): The U.S. Forest Service questioned the DEA assumption about the distribution of timber harvested from Federal lands, and stated that the average estimated annual yield per acre may understate actual timber harvest, as well as the assumption that USFS harvest projections include only thinning activities and do not anticipate future regeneration harvest activities.

Our Response: In an ideal world, the economic analysis would utilize detailed geospatial data showing when and where Federal timber harvest is projected to occur. However, lacking data on the narrowly defined areas where timber harvest is projected to occur, and where critical habitat may have an incremental effect on these harvests, the analysis broadly applies projected timber harvest across all Federal land acres. Using this approach, the DEA used timber harvest projections ranging from 14 to more than 200 bf per acre per year across critical habitat subunits, as described in Chapter 4 of the DEA (IEC 2012a, p. 4–18). The DEA based FS Region 6 projections on historical timber harvest quantities provided by USFS. Therefore, planned changes to timber harvest were not contemplated. To address this uncertainty in the amount of timber that could potentially be harvested in the future (i.e., if changes to timber harvest should occur), the FEA scales existing baseline projections upward to account for a potential 20-percent increase in timber harvest projection on USFS lands. The FEA also revised the language regarding projected timber activities to clarify that they may include both thinning and regeneration harvest.

Comment (159): The U.S. Forest Service stated that the DEA assumption about the distribution of timber harvested from Federal lands is problematic and that the average estimated yield of 63 BF per acre per year may understate actual timber harvest. In Region 6, the FY 2013 and FY 2013 NWFP timber program is expected to increase by 20 percent in terms of acres and volume. USFS also disagrees with the assumption that ''USFS harvest projections include only thinning activities and do not anticipate future regeneration harvest activities (page 4–18).''

Our Response: In the Final Economic Analysis, we rely on data provided by USFS Region 5 and Region 6 to estimate annual projected timber harvest amounts. Each region provided an annualized projection of future timber harvest (Region 5) or a 5-year historical annual average timber harvest (Region 6) by national forest. Using GIS acreage data for each national forest, we calculate an average annual timber

harvest yield in BF/acre/year. We then estimate a baseline average annual timber harvest yield for each critical habitat subunit based on the number of acres and the proportion of the subunit within each national forest.

To estimate potential incremental economic impacts of the proposed critical habitat designation, we focused on matrix lands that are likely to be unoccupied by the northern spotted owl. We did not estimate that there will be incremental economic impacts across the entire proposed critical habitat, so the comparison to the USFS expected harvest for the entire National Forest System across the entire range of the northern spotted owl is inappropriate. There are approximately 9.5 million acres of USFS lands in the proposed critical habitat. Of these, 6.9 million acres are reserves and 2.6 million are matrix lands. Of the matrix lands, approximately 1.1 million acres are predominantly younger forests (considered to be unoccupied) and 1.6 million acres are northern spotted owl habitat. Furthermore, we estimate that approximately 6.5 percent of northern spotted owl habitat is likely to be unoccupied. We find that incremental economic impacts to USFS timber harvest are relatively more likely in unoccupied matrix lands or approximately 1,158,314 acres of 2,629,031 total acres of all USFS matrix lands.

For example, in USFS Region 5, there are approximately 956,000 acres of matrix lands. The data provided by Region 5 suggest that the annualized projected timber harvest in these matrix lands is 105.4 MMBF (as noted in the comment). However, we estimate that incremental economic impacts due to the critical habitat designation would be relatively more likely to occur in unoccupied areas. We presume that there will not be incremental impacts to timber harvest due to critical habitat in occupied areas as these areas are already sufficiently managed for NSO conservation in the baseline. In Region 5, there are approximately 502,500 acres of matrix lands that are likely to be unoccupied (100 percent of predominantly younger forests and 6.5 percent of northern spotted owl habitat). Thus our area of potential impact is smaller than that contemplated in the comment. Our estimate of baseline timber yield within these areas, however, is consistent with those presented in the comment and FS data. Specifically, the annualized projected timber harvest in these unoccupied matrix lands is 55.5 MMBF. Therefore, when we contemplate a 20 percent reduction in timber harvest due to critical habitat in matrix lands that may potentially experience incremental impacts, we calculate a reduction of approximately 11.1 MMBF (20 percent of 55.5 MMBF), versus a reduction of 21.1 MMBF (20 percent of 105.4 MMBF). In sum, our baseline timber yield and harvest projections are consistent with the USFS data cited in the comment; we are simply assessing impacts on a more constrained set of acres where incremental impacts are relatively more likely to occur.

Note also that the DEA based USFS Region 6 projections on historical timber harvest quantities provided by USFS. Therefore, planned changes to timber harvest were not contemplated. To address this uncertainty, the FEA scales existing baseline projections upward to account for a potential 20 percent increase in timber harvest projection on USFS lands. The FEA also revises the language regarding projected timber activities to clarify that they may include both thinning and regeneration harvest. However, this does not materially affect the results of the analysis.

Finally, we note that our estimate of the area of younger forest in the matrix where incremental impacts may occur is most likely an overestimate. As stated above, we estimated that of the matrix lands, approximately 1.1 million acres are predominantly younger forests (considered to be unoccupied). This estimate, however, was based on the total area of younger forest in the matrix within the proposed designation regardless of patch size. As we noted in our incremental effects memorandum (IEC 2012b, p. B–7), it would be unusual for an agency to contemplate a timber sale or other activity on a very small patch of younger forest; based on our experience, we assumed roughly 40 ac (16 ha) as the minimum patch size of younger forest on which we would anticipate potential incremental impacts. As the estimate of younger forest within the matrix used in the economic analysis did not screen out patches less than 40 ac (16 ha) in size, the resulting total of 1.1 million acres is likely an overestimate of the area of younger forest where incremental impacts may occur on matrix lands. In addition, the final designation represents a net reduction of matrix lands where economic impacts are relatively more likely to occur and this reduction was not analyzed in the FEA (see Changes from the Proposed Rule). It is also important to note that, even if there were likely to be higher economic impacts, we would not exclude these lands from designation under section 4(b)(2) because a critical habitat designation in these areas will likely have regulatory benefits in conserving this essential habitat.

Comment (160): The USFS suggested that additional person-hours for consultations to consider critical habitat issues may be higher than described in the DEA.

Our Response: The USFS currently plans projects outside of existing critical habitat that may be included in the revised critical habitat. Therefore, the administrative burden may include additional consultations beyond the additional hours contemplated for consultations that would already occur absent critical habitat. The FEA makes note of this potential incremental increase in administrative burden.

Comments on the Economic Analysis From the Public

Comment (161): One submission noted that the proposed rule does not make clear the specific restrictions imposed on designated private lands. Furthermore, many submissions note that the resulting regulatory uncertainty will likely reduce the market value of designated private lands, contributing to the loss of multiple-use, working forests that provide other valuable types of habitat and jobs, or result in timber management practices designed to ensure private lands do not become northern spotted owl habitat. Potential third-party litigation risk also contributes to this uncertainty.

Our Response: The proposed rule provided a detailed description of the protection provided to areas designated as critical habitat (see 77 FR 14081; March 8, 2012). Specifically, section 7 of the Act requires 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. Chapter 5 of the DEA provided explicit discussion of the potential for State and private landowners to request Federal permits, thereby necessitating consultation under section 7. Furthermore, the chapter acknowledged the concerns raised in the comments regarding the potential impact of regulatory uncertainty on the market value of private lands, including potential changes in State regulations in response to the designation and changes in private timber harvest practices resulting from greater perceived investment risk, and discusses the existing data limitations preventing estimation of the monetary value of such impacts (see DEA paragraphs 259 through 281). Additional information provided through public comment and

supporting the existing analysis has been added to Chapter 5 of the FEA.

All private lands have been excluded from this final designation of critical habitat for the northern spotted owl (see Exclusions).

Comment (162): One submission states that all private and State lands in Washington are already subject to State and Federal regulations providing protection for the northern spotted owl; therefore, designating these lands results in duplicative regulation that is contrary to Executive Order 13563 and the President's memorandum dated February 28, 2012. An additional submission recommends that the Service rely instead on existing State regulations and cooperative approaches.

Our Response: The Service is required under the Act to designate critical habitat to the maximum extent prudent and determinable for listed species regardless of State laws. This process is separate from and additional to the listing of a species under the Act and is specifically needed for the northern spotted owl because habitat loss is one of the primary threats to its conservation. The requirement to designate critical habitat is not replaced by State regulations or classification of lands. Please note that, as discussed in our section on Exclusions, above, we were able to exclude all private lands proposed as critical habitat in the State of Washington and California.

Comment (163): One submission questions the DEA's estimate that 117,628 ac (47,602 ha) in Washington may be subject to incremental effects, noting that the calculation is unclear. The comment suggests the correct acreage is 133,895 ac (53,558 ha). Furthermore, two submissions express concern that the State could change the definition of suitable habitat to include all designated private lands, implying the potential increased regulatory burden identified in the DEA may be understated.

Our Response: As noted in Exhibit 5–6 of the DEA, area calculations in the DEA were based on the GIS data layers provided by the Service to the economists preparing the DEA on March 1, 2012. The area estimates derived from these data layers differ slightly from those provided in the proposed rule due to minor boundary adjustments under consideration by the Service. A total of 178,147 ac (72,094 ha) of private land in Washington were proposed for designation, of which 60,519 (24,491 ha) were subject to existing or proposed conservation plans, leaving 117,628 ac (47,602 ha) that may be subject to indirect impacts. As discussed in detail in paragraphs 227 through 235 of the DEA, interviews with Washington State regulators revealed that even if all private lands were designated and subsequently defined by the State as suitable habitat, the State would defer to approved habitat conservation plans (HCPs) or Safe Harbor Agreements (SHAs). Thus, indirect incremental impacts for 60,519 ac (24,491 ha) are unlikely. Of the remaining 117,628 ac (47,602 ha), much of this area may already fall within mapped Home Range Circles for the northern spotted owl and thus are already considered to be suitable habitat. Finally, whether the State will make any changes to its regulations is highly uncertain. However, as all private lands in the State of Washington have been excluded under section 4(b)(2) of the Act (see Exclusions), the concerns expressed by the commenter are moot.

Comment (164): One submission states that the DEA does not account for additional, unforeseen regulatory costs and project delays associated with the regulation of critical habitat by California State agencies.

Our Response: Chapter 5 of the DEA provides a detailed account of our discussions with the California Department of Forestry and Fire Protection (CALFIRE) to understand whether the State would regulate harvests on private timberlands differently if those lands are federally designated critical habitat (see paragraphs 246 through 257). Given the extensive baseline protections provided by California's Forest Practice Rules and the California Environmental Quality Act, CALFIRE does not anticipate any changes as a result of the designation.

Comment (165): Two submissions note that private landowners obtain Federal funding for forest health improvements, fire resiliency projects, and watercourse restoration. Access to these funds may be restricted or delayed because of the designation, resulting in decreased incentives for landowners to complete such projects.

Our Response: As all private lands have been excluded from this final designation of critical habitat for the northern spotted owl, the concerns expressed by these commenters are no longer relevant.

Comment (166): One private landowner stated that the economic impacts of the northern spotted owl listing and protection prior to critical habitat designation are relevant considerations in the exclusion process.

Our Response: Section 4(b)(1)(A) of the Act provides that the listing of a species is determined based solely on the basis of the best scientific and commercial data available. However, under section 4(b)(2) of the Act, the Service may consider economic impacts, and other relevant impacts of designating a specific area as critical habitat. Therefore, when designating critical habitat and evaluating specific areas under section 4(b)(2) of the Act for potential exclusion, we consider the incremental impacts of critical habitat designation, above the ''baseline'' conservation measures resulting from listed status. These incremental impacts (economic or other factors) are then evaluated relative to the conservation benefit of including the specific area in the critical habitat designation. If the costs outweigh the benefits, then the Secretary may exercise his discretion to exclude the area, provided that the exclusion does not result in the extinction of the species.

Comment (167): One submission takes issue with the DEA's conclusion that the approval of HCPs and reinitiation of consultations on existing HCPs will result only in minor administrative burden. Interpretive disputes around the adverse modification of critical habitat can readily lead to costly delays, litigation, and pressure to modify existing and proposed HCPs as well as other projects. Critical habitat designations on private lands discourage the development of HCPs and take away stability over long-term investment horizons.

Our Response: The reinitiation of consultation on an existing HCP is the responsibility of the Service and requires the formulation and addition of an adverse modification analysis. Those consultations that already include an effects determination and no jeopardy determination for northern spotted owls will have incorporated an analysis of the effects of the action (the HCP) on northern spotted owl habitat, which will be similar to the adverse modification analysis except that additional analysis could be needed on impacts to the conservation function of the critical habitat subunit. Only where an HCP would be anticipated to cause adverse modification of a newly designated critical habitat network would significant modification likely be necessary, and we have not found any HCPs that fall into this category for this designation. As for HCPs that are under development the need to minimize impacts to northern spotted owl habitat in an effort to minimize impacts to northern spotted owls is likely to suffice to bring the impacts below the threshold of destruction or adverse modification, thereby reducing the time and energy necessary to complete an HCP as indicated in the Economic Analysis. We note that we have excluded all lands

covered by an HCP pursuant to section 4(b)(2).

Comment (168): Several comments provided additional information on the relationship between the amount of private forestland available for harvest and employment. The three comment letters refer to the results of a recent study prepared by Forest2Market on the economic contribution of forestry-related industries to Washington State's economy. They state that for every 1,000 ac (400 ha) of private forestland in Washington, there are 5 jobs in forestry-related industries (or 11 to 15 jobs including indirect and induced employment), an associated $224,000 to $233,000 in wages (or $495,000 to $631,000 including indirect and induced employment), and up to $30,000 in taxes and fees annually. The commenters then use these relationships to estimate the total number of jobs supported by private working forestland proposed for critical habitat designation.

They conclude that if private acres in Washington are designated as critical habitat, all of these jobs, and the associated wages, taxes, and fees, will be lost. In other words, a total of 1,650 jobs, $74.3 million in annual wages, and $4.5 million in annual taxes and fees to counties will be lost. If the Washington multipliers are extended to all 1.3 million private acres proposed in Washington and California, more than 19,000 jobs could be affected. A separate comment states that for every 1,000 ac (400 ha) of private working forestland in California taken out of production, 12 jobs are lost. Using the resultant multiplier of 0.012 jobs per acre, the comment states that the 1.27 million ac (514,000 ha) of private land proposed for critical habitat designation in California represents more than 15,000 jobs.

Our Response: The comments assume the designation of critical habitat precludes any timber harvests on private lands (i.e., all employment associated with designated acres will be lost). Chapter 5 of the economic analysis examines the potential for harvests to be precluded on private lands and concludes that existing baseline protections in the form of habitat conservation plans (HCPs) and Safe Harbor Agreements (SHAs) are likely to provide sufficient protection to much of the habitat without additional restrictions (see paragraphs 211 and 212 of the DEA). We note that all private landowners with HCPS or SHAs that were proposed for exclusion from critical habitat in the proposed rule were excluded from the final designation. In addition, private landowners of small woodlots in Washington were removed from critical habitat upon a determination that their lands either do not provide the PCEs or are not essential to the conservation of the species. Finally, the remaining 307,308 ac (124,364 ha) of private lands in the proposed designation in California and Washington, which we identified as possibly subject to incremental changes in harvests as a result of the indirect effects of critical habitat designation should a Federal nexus exist, have been excluded from the final designation (see Exclusions). However, here we explain how we derived our estimates of the relationship between private timberland, harvest levels, and employment in the economic analysis.

On some private lands, uncertainty on the part of landowners over whether the designation will result in future restrictions may create an incentive for those landowners to shorten harvest rotations, cutting timber earlier than is financially optimal (see paragraphs 263 through 269 of the FEA). We did not anticipate that private landowners will be precluded from harvesting timber as a result of the designation; rather, we assumed they may harvest earlier than they would have absent the designation. As a result, the estimates noted in the comment of lost employment and associated wages, fees, and revenues anticipated in the comments are likely overstated.

In Washington, 21,715 ac (8,788 ha) of private land in the proposed designation are identified by the State as suitable habitat for the northern spotted owl, but are not currently designated as ''critical habitat state.'' It is possible that the State may reclassify these areas as ''critical habitat state'' in response to the Federal designation, which would impose significant administrative costs on landowners, such that landowners would likely forego future harvests. However, such a regulatory change on the part of the State is uncertain (see complete discussion in paragraphs 231 through 235, 269, and 276 through 279 of the FEA). These private lands are not included in the final designation, as the result of either refinements to critical habitat (determinations that small private landholdings either do not contain the PCEs, or are not essential to the conservation of the species) or exclusions under section 4(b)(2) of the Act.

Thus, the DEA estimated that at worst, it is possible that 21,715 ac (8,788 ha) in Washington may not be harvested, or approximately 1,086 ac (439 ha) per year over the 20-year timeframe of our analysis. Estimating the impact of such a small change in harvestable acres on employment is difficult and likely to be highly dependent on the location and timing of the foregone harvests. The relationships between acres and jobs, revenues, or fees and taxes presented in the comments may not be applicable to such small, marginal changes in harvestable acres.

For example, the ratio of 5 jobs for every 1,000 ac (400 ha) likely represents the average jobs created per acre when total acres of forestland are divided by total timber employment in the State (the Forest2Market report is not clear about whether its ratios represent average or marginal changes). A marginal estimate, on the other hand, would look at the number of jobs associated with the ''next'' 1,000 acres of harvest given existing employment levels and harvestable acres, as the relationship between jobs and acres may not be perfectly linear. Employment associated with the next 1,000 acres of harvest may be larger or smaller than the average. Furthermore, it is possible that other private acres may be harvested as substitutes for the 21,715 ac (8,788 ha) that could be restricted if the State changes its regulations, diminishing the rule's effect on employment. Thus, even if we knew with certainty that the State of Washington will change its regulations as a result of the designation, forecasting potential changes in employment is challenging given existing data limitations.

Comment (169): One comment states that the SDS Lumber Company is the only remaining mill in Klickitat County, and that designating approximately 29,000 ac (11,700 ha) of private forest in Klickitat and Skamania Counties, including approximately 16,000 ac (6,500 ha) of SDS and Broughton Lumber Company land, will have direct and significant impacts on its 300 employees.

Our Response: SDS and Broughton Lumber Company have developed a Safe Harbor Agreement in collaboration with the Service. As described in the Exclusions section of this document, SDS lands within the proposed critical habitat covered by this SHA have been excluded from the final designation.

Comment (170): One comment states that Rayonier (a forest products company) already protects 100 of the 540 ac (40 of the 220 ha) of its land in Washington proposed for critical habitat, making the remaining 440 ac (180 ha) especially important to Rayonier, local communities, and the people who work in forest industry. A reduction in logging on these 440 ac

(180 ha) would directly reduce logging and trucking jobs and have downstream effects in the community.

Our Response: We determined that the lands owned by Rayonier did not meet our definition of critical habitat, therefore these lands are not included in our final designation (see *Comment (106)).* Therefore, we do not anticipate any potential impact of critical habitat in terms of possible reduced harvests on Rayonier lands or effects on local employment due to this rulemaking.

Comment (171): One comment noted that the ''checkerboard'' and intermingled Federal and private ownership patterns make it difficult, if not impossible, for many timberland owners to haul their timber products without the use of some type of Federal road use permit. Access to existing or new roads may be precluded by critical habitat concerns.

Our Response: This issue is addressed in Chapter 5 (p. 5–6) of the FEA. The report notes that a review of Federal consultations over the last 3 years indicates that no consultations related to the northern spotted owl have resulted from application for this type of permit. Representatives of the USFS and BLM further noted that formal consultation of this type of activity is not prioritized, and that any request for consultation would likely be limited to hauling activity and would not include the timber harvest activity itself. As a result, we do not anticipate any direct effects on State or private lands as a result of this potential nexus.

Comment (172): One comment notes that the DEA does not address potential affects to the U.S. Treasury and Federal job losses.

Our Response: Project modification costs quantified in the DEA result from changes in the quantity of timber harvested on Federal lands. As discussed in detail in Chapter 4 of the DEA, section 7 consultations on the sale of timber from Federal lands may result in an increase, decrease, or no change in harvest levels, based on several plausible assumptions. The direct cost (or benefit) of these section 7 project modifications is a loss (or gain) in Federal revenues collected by the U.S. Forest Service and the U.S. Bureau of Land Management resulting from the associated timber sales. Stumpage values related to these effects are summarized in Exhibit ES–4 of the DEA. With available data, we are unable to discern how these timber harvest changes may affect employment at Federal agencies.

Comment (173): One commenter suggested that the DEA fails to comply with the requirements of Executive Order 12866, which requires the Secretary to base his decision on the best reasonably available economic information, and circular A–4, which provides guidance for complying with Executive Order 12866. The commenter states that the DEA applies different standards of information and analysis in its assessment of the effect of the proposed rule on timber production and its assessment of other important ancillary benefits of the designation, as well as the baseline applied in the analysis.

Our Response: An assessment of ancillary benefits is not possible without first assessing the effect of the proposed rule on timber production; the ancillary benefits derive from changes in timber management practices. Therefore, accurately assessing changes in timber production is critical for multiple facets of the economic analysis. The results of this assessment suggest that incremental changes in annual harvests are likely to be small, less than one percent of total harvests in the 56 counties overlapping the designation. While quantification of the value of foregone timber (or timber brought back into production as a result of the regulation) is relatively straightforward, because market data provide an indication of the value of this resource, estimating the marginal changes in terms of the distributional impacts on communities of these small changes in harvests, or the marginal changes in ecosystem services, is challenging and requires significantly more data and sophisticated modeling tools. Thus, both are discussed qualitatively in the FEA.

Regarding the assessment of ancillary benefits, Circular A–4 states, ''You should begin by considering and perhaps listing the possible ancillary benefits and countervailing risks. However, highly speculative or minor consequences may not be worth further formal analysis. Analytic priority should be given to those ancillary benefits and countervailing risks that are important enough to potentially change the rank ordering of the main alternatives of the analysis'' (Circular A–4, p. 26). This text provides some discretion to the Agency to determine whether the quantification of ancillary benefits is necessary. As described in responses to earlier comments, the application of best available data and tools to estimate the incremental changes in ecosystem services resulting from the designation of critical habitat would require significant effort and some data that do not currently exist. Because the Service has not excluded areas where such benefits are possible (i.e., Federal matrix lands), quantification of ancillary benefits would not change the regulatory outcome.

With regard to baseline definition, the comment suggests the analysis should incorporate potential future changes in timber markets, changes in external factors affecting costs and benefits, changes in future regulations, and likely future compliance with other regulations. With regard to future demand for timber, the analysis relies on the best available data provided by the USFS and BLM regarding baseline harvest levels (see FEA paragraphs 166 through 175). Data to predict future changes in the demand of timber products are highly speculative, given current economic conditions (e.g., demand for timber is largely driven by the housing market). We have no reason to anticipate other regulatory changes that would affect the designation of critical habitat, and the comment provides no additional information on this topic. Finally, we consider the degree of compliance with section 7 of the Act in the absence of critical habitat in determining the likelihood of future consultations (see, for example, the discussion in paragraphs 181 through 186 of the FEA).

Comment (174): One comment claims that the DEA distorts the impacts of the proposed critical habitat designation on Douglas County by including ''metropolitan areas that have little to no critical habitat nor similarities to Douglas County's social and economic environment.''

Our Response: Chapter 6 of the DEA provided a detailed socioeconomic profile of each of the 23 counties (including Douglas County) containing proposed critical habitat subunits with higher proportions of Federal forests that are relatively more likely to experience incremental impacts due to the designation of critical habitat. The analysis presents data on the percent change in timber production between 1990 and 2010 for each county, and on the percent growth of annual industry employment between 1989 and 2009 for each county. In addition, the analysis presents data on Federal land payments to each of the 23 counties as a percent of the total local government revenue in FY 2009, demonstrating the relative importance of these funds to each county's budget. The analysis then concludes that five counties (including Douglas County) may be more sensitive to additional incremental changes in timber harvests, industry employment, and Federal land payments. Such data are not readily available at a sub-county level. We believe, however, the

information provides sufficient context for understanding relative economic circumstances across the designation.

Comment (175): One comment states that designating O&C lands as critical habitat is inconsistent and in direct conflict with the statutory provisions of the O&C Act and Sec. 701(b) of FLPMA (Federal Lands Policy management Act). (''O&C lands'' refers to certain areas in western Oregon established under the O&C Act of 1937, and ''O&C'' counties represent those counties containing O&C lands). The Association of O&C Counties asserts that the proposed critical habitat designation will prevent 18 O&C counties from receiving sufficient revenues on a sustainable basis as required by the O&C Act, and will result in employment and income impacts on a local and regional scale.

Our Response: The designation of critical habitat is not a land use allocation. Under section 7(a)(2) of the Act, each Federal agency must insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the designated critical habitat of the species. 16 U.S.C. 1536(a)(2). To help action agencies comply with this provision, section 7 of the Act and the implementing regulations set out a detailed consultation process for determining the impacts of a proposed activity on species listed as threatened or endangered, or its designated critical habitat. 16 U.S.C. 1536; 50 CFR Part 402. In *Seattle Audubon Society* v. *Lyons* (''Lyons''), 871 F. Supp. 1291 (W.D. Wash. 1994), the district court held that ''the O & [C Act] does not allow the BLM to avoid its conservation duties under NEPA or ESA * * *'' Id. at 1314. The critical habitat designation does not preclude the sustained yield timber management of O&C lands consistent with the above requirements of the Act. The economic impact to local counties of this critical habitat designation will be determined by the timber management direction the Federal land managers take within critical habitat lands. We believe the ecological forestry techniques discussed in this designation could allow for timber harvest that is consistent with critical habitat objectives and section 7(a)(2), thereby providing increased revenues to affected counties. The Service encourages land managers to consider use of this type of forest management in critical habitat where appropriate.

As discussed in detail in Chapters 3 and 6 of the FEA, the O&C counties currently elect to receive Secure Rural Schools and Community Self-Determination Act (SRS) rather than revenue-sharing payments from BLM under the O&C Act. These payments are supplemented by Payments in Lieu of Taxes (PILT) (see paragraphs 128 through 130 of the FEA). Even absent the designation of critical habitat, the magnitude of future payments under these programs is highly uncertain given that these Federal programs have not been reauthorized (i.e., SRS) or funded (i.e., PILT) by Congress. If SRS and PILT payments continue, the changes in harvests on BLM lands will have minimal to no effect on payments, because SRS and PILT are not directly linked to harvest levels. However, if Congress decides to reduce or end payments under SRS and PILT, counties will shift back to receiving revenue-sharing payments under the O&C Act, and changes in timber harvests on BLM lands will affect the size of these payments. Importantly, we note that under the third scenario analyzed in the DEA, the potential decrease in harvest from BLM lands represents approximately 2 percent of total harvests from BLM lands in these counties (Based on BLM transaction data over the last four quarters (2011Q4–2012Q3) viewed at *http://www.blm.gov/or/resources/forests/blm-timber-data.php*). Thus, if affected, impacts to revenue payments resulting from the designation are likely to be small.

Comment (176): One commenter states increased timber production often has been associated with deteriorating indicators of socio-economic well-being in nearby rural communities, including income, percent living in poverty, and housing conditions, and noted a positive relationship between the health of local economies and the presence of unlogged Federal forests.

Our Response: The comment cites extensively from a report by the National Resources Council (NRC) (NRC 2000). The committee was asked to evaluate the nature of possible economic and social costs and benefits of alternative forest management practices. The committee wrote, ''[a]lthough the question is easy to ask, it is hard to answer. Few social-impact studies clearly tie social and economic outcomes with specific forest-management practices, such as old-growth harvest rates, the use of clearcutting as a harvest technique, or the relative intensity of silvicultural practices'' (p. 163). The committee went on to review a meta-analysis of the relationship between varying levels of timber dependence and measures of community well-being, which finds for most relationships that ''well-being went up as timber dependency went down'' (p. 163). Furthermore, the committee cited studies suggesting that ''wilderness and amenity protection can have a positive influence on certain measures of community well-being, although in-migration brings its own difficulties'' (NRC 2000, p. 164).

The NRC report concluded, ''[d]iverse economic conditions create diverse opportunities and thus temper the effects of timber industry fluctuations on local communities'' (p. 165). It went on to note that ''[a]s the importance of extractive industry declines, the Pacific Northwest communities are looking toward tourism as a way to bolster their economies * * * However, tourism by itself is not a substitute for timber industry jobs'' (NRC 2000, p. 167).

In summary, the NRC report suggests that economically diverse communities are better off than communities that are highly dependent on the timber industry, and preserving wilderness can attract new economic activity to communities. We have added text summarizing the NRC findings in the FEA. However, the designation of critical habitat does not preserve wilderness. Furthermore reducing timber harvests does not guarantee that other sources of economic activity, such as tourism or in-migration by wealthy, highly educated individuals, will generate enough new economic activity to replace lost timber-related jobs and wages. Finally, the designation is likely to reduce or increase annual timber harvests from Federal lands by less than one percent. Thus, any changes in economic diversity resulting from the rule are likely to be difficult to measure.

Comment (177): One comment suggests that the proposed critical habitat designation will create a regulatory hurdle that will impede the construction of vital infrastructure projects (roads, bridges, power lines, and other utilities).

Our Response: Chapter 7 of the DEA discusses the potential economic impacts to road and bridge construction and maintenance, and installation and maintenance of power transmission lines and other utility pipelines. The analysis concludes that all potential conservation efforts associated with linear projects are expected to result from the presence of the northern spotted owl, not the designation of critical habitat, and are thus considered baseline impacts (see paragraphs 315 through 320 of the DEA). Incremental costs attributable to critical habitat are limited to the administrative costs of additional hours spent by Federal

agency staff and the Service to consider critical habitat during section 7 consultation on these projects.

Comment (178): Many comments describe the adverse impacts that changes in the timber industry have had on local and regional employment levels, government revenues, and overall socioeconomic conditions. Several of these comments request that these impacts be taken into consideration in the economic analysis.

Our Response: Chapter 3 of the DEA describes how, over the past 20 years, the Pacific Northwest timber industry has undergone significant changes that have manifested in reduced timber-related jobs and revenues. The analysis provides detailed data on the changes in timber production levels between 1990 and 2010, and on the changes in industry employment and payroll between 1989, 1999, and 2009 in each of the 56 counties where critical habitat was proposed. This information is intended to provide context for the analysis and illustrate the importance of the timber industry to local economies. In addition, Chapter 6 of the DEA provides a detailed socioeconomic profile of the 23 counties containing proposed critical habitat subunits that contain a higher proportion of Federal lands that are relatively more likely to experience incremental impacts due to the designation of critical habitat. The chapter examines trends in timber harvests, industry employment, and Federal land payments in these counties, and concludes that certain counties may be more sensitive to additional incremental changes in timber harvests, industry employment, and Federal land payments.

Comment (179): The Small Business Administration (SBA) expressed concern that the Service does not have an adequate factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small businesses. It disagrees with the Service's assertion that small businesses are not directly regulated by the proposed rule and states that the Service incorrectly analyzes the universe of affected small businesses by counting the number of consultations required by the designation, as opposed to the number of all small businesses affected by these consultations. SBA also notes that the DEA states private landowners may be affected if they have federally funded or permitted activities on Federal or private land, such as participation in timber sales or timber management projects or application for a section 10 permit.

Our Response: The Service agrees with SBA's statement that small entities (businesses, governments) may be affected by the designation of critical habitat as third parties involved with consultation under section 7 of the Act with Federal action agencies. However, we disagree that these entities are directly regulated. This position is supported by existing case law regarding the certification requirements under the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA) (see paragraphs 378 through 381 of the DEA), and SBA's handbook, ''A guide for Government Agencies: How To Comply With the Regulatory Flexibility Act (2003). However, we believe it is good policy to assess these indirect impacts to third parties if we have sufficient available data to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. Therefore, where third parties are anticipated to participate in consultations under section 7 of the Act with Federal action agencies, these entities are included in the screening analysis (see paragraphs 383 through 392 of the DEA). Please refer to the discussion under Regulatory Flexibility Act later in this final rule and the FEA for a more complete discussion of our factual basis for certification under RFA that this rule will not result in a significant impact to a substantial number of small entities.

Comment (180): An additional entity asserts that the Service is incorrect in stating that only Federal agencies will be ''directly regulated'' by critical habitat designation. It contends that private sector entities relying directly or indirectly on Federal timber sales are also directly regulated. The entity cites case law, stating, ''The RFA requires consideration of *'the small entities which will be subject to the proposed regulation—that is, those small entities to which the proposed rule will apply.' Cement Kiln Recycling Coalition v. E.P.A.,* 225 F. 3d 855, 869 (DC Cir. 2001).'' A critical habitat designation ''applies to'' private parties as much as Federal agencies; a private party seeking a Federal permit that may affect designated critical habitat cannot obtain the permit until a consultation is completed under section 7 of the Act, and has the statutory right to participate in that consultation. Thus, such entities must be considered under the RFA.

Our Response: The Service's current understanding of recent case law, including the *Cement Kiln* case, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The language from the *Cement Kiln* case quoted by the commenter merely restates the language of the RFA itself. Several court decisions, including the *Cement Kiln* decision, have interpreted that language to require Federal agencies to analyze the rule's effects on any small entities that are subject to—that is, directly regulated by—the rule, rather than requiring Federal agencies to consider every potential impact that a regulation may have on indirectly affected small entities. *See also Am. Trucking Ass'ns* v. *Envtl. Prot. Agency,* 175 F.3d. 1027 (D.C. Cir. 1999); *Mid-Tex Elec. Coop.* v. *Fed. Energy Regulatory Comm'n,* 773 F.3d 327 (D.C. Cir. 1985); *et al.*

The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to insure that any action authorized, funded, or carried out by the Agency is not likely to adversely modify critical habitat. The designation of critical habitat for an endangered or threatened species only has a regulatory effect 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 regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, EO's 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EO regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

Therefore, as discussed in the previous response, where third parties

are anticipated to participate in section 7 consultations, these entities are still included in the screening analysis if sufficient data is available to complete the necessary analysis. The direct compliance costs of section 7 consultations concerning timber sales are the administrative costs of conducting the consultation, which are primarily borne by the Service and the Federal Action Agency, and potential changes in revenues to Federal agencies from timber sales.

Potential impacts to the profitability of timber industry entities resulting from changes in the price or availability of timber represent an indirect effect of the regulation. In this case, we note that potential changes in timber harvests are anticipated to be less than one percent of average annual harvests in the region subject to the designation.

Comment (181): The SBA states that the Service underestimates the economic impact of the rule on the timber industry and private landowners because, in its screening analysis, it only considers administrative costs of section 7 consultations, rather than quantifying the costs of project modifications resulting from those consultations.

Our Response: Project modification costs quantified in the DEA result from changes in the quantity of timber harvested on Federal lands. As discussed in detail in Chapter 4 of the DEA, section 7 consultations on the sale of timber from Federal lands may result in an increase, decrease, or no change in harvest levels, based on several plausible assumptions. We note that if future harvests are restricted, total annual harvests could decrease by 24.56 million board feet (MMBF). This decrease represents less than one percent of 2010 total harvest and the average annual harvests between 2006 and 2010 across the 56-county area overlapping proposed critical habitat. The designation may also result in an increase in annual harvests of 12.28 MMBF, or less than half a percent of total annual harvests in the 56-county area. Finally, it is possible that harvest levels will not change a result of the designation. In summary, the proposed rule is anticipated to have a minor impact on future harvest levels. Although the Service has estimated these potential impact scenarios relative to the total harvest, the agency acknowledges that the designation of critical habitat may have indirect impacts on industry subsectors and/or related sectors with high concentrations of small businesses. However, a more detailed analysis capturing these impacts is not available to the agency at this time.

The direct cost (or benefit) of these section 7 project modifications is a loss (or gain) in Federal revenues collected by the U.S. Forest Service and the U.S. Bureau of Land Management resulting from the associated timber sales. Stumpage values related to these effects are summarized in Exhibit ES–4 of the DEA. In the FEA, we include additional information in the RFA/SBREFA screening analysis (Appendix A) describing these project modification costs, which are borne entirely by Federal agencies.

The potential indirect effects of these lost Federal revenues, in terms of implications for County revenue sharing programs, are discussed in Chapter 6 of the DEA (see paragraphs 293 through 299). In addition, Chapter 6 also identifies the counties with Federal lands more likely to experience changes in harvest levels as a result of the designation and provides background information on harvest and employment trends in these counties.

Comment (182): Several commenters stated that the DEA misrepresented the baseline or underestimates timber harvest impacts on Federal lands. One commenter in particular asserts that the true baseline is best represented by the land management plans that have been adopted by BLM and FS, in which planned annual harvest volumes may total 840 MMBF across all lands encompassed by the NWFP.

Our Response: The baseline projection should represent the best estimate of the world absent critical habitat, given the best available data. Relying on this criterion, the baseline projection first focuses on areas of the proposed designation where incremental impacts to Federal timber harvest are relatively more likely to occur as a result of critical habitat. As identified in the Incremental Effects Memorandum, these areas include matrix lands that are likely to be unoccupied by the northern spotted owl, representing approximately 1.4 million acres of matrix lands out of approximately 12 million Federal acres in the proposed designation. Given that incremental impacts, if any, are likely to occur primarily in these more discrete areas, a projection utilizing the range-wide planned harvest levels contemplated under the NWFP would overstate baseline conditions.

Second, based on historical experience, projected actual timber harvest in the baseline on USFS and BLM lands is likely to be less than that in the formally-approved land management plans under the NWFP. Federal land managers have not achieved this level of timber harvest over the past several years, and do not anticipate this level of harvest in the future, providing further confirmation that the identified long-term sustained yield of 840 MMBF associated with these plans would overstate the baseline.

For those matrix areas where incremental effects may be relatively more likely to occur, the FEA utilizes a variety of planned, historical actual, and projected actual timber harvest data provided by BLM and FS to derive the annual baseline projection, which totals approximately 123 MMBF. This projection is then appropriately caveated, with the FEA noting that within the discrete areas of each subunit where incremental effects may occur, the subunit level projection could vary materially from future actual timber harvest in these areas.

We note further, however, that based on comments received from Federal land managers, we have added an additional sensitivity analysis to Chapter 4 of the FEA. Specifically, the sensitivity analysis tests alternative assumptions concerning: (a) The percentage of northern spotted owl habitat on BLM matrix lands that is likely to be unoccupied, which increases the acreage where incremental timber harvest impacts may occur and thus the baseline projection; and (b) the baseline harvest projection for USFS Region 6, where we assume a 20 percent increase in baseline timber harvest relative to historical yields.

Comment (183): Several commenters questioned whether the DEA was meaningful, because it displays results as a menu of choices, including a potential increase in timber harvest on Federal lands. In addition, one commenter contemplated a potential reduction in annual planned harvest volumes of 500 MMBF as a result of critical habitat designation.

Our Response: The DEA presented alternative scenarios due to considerable uncertainty regarding the specific projects that may be proposed or management options that Federal land managers may consider. These scenarios are intended to present a range of estimates for the potential incremental impacts of various options for complying with section 7 available to Federal agencies. Based on the best available data and information, these decisions, including the adoption of ecological forestry practices, may result in harvest levels being maintained (as described in Scenario #1), increased (Scenario #2), or decreased (Scenario #3). This range of estimates is not meant

to be interpreted as ''over 100 potential outcomes.'' Statistical analyses frequently account for uncertainty by presenting a range of estimates in which each individual data point is not considered an independent outcome. One purpose of this analysis was to aid the Secretary in determining if any lands should be excluded due to the financial burden associated with the designation, and this analysis does so by identifying the subunits and relevant landowners for whom incremental impacts are relatively more likely to occur, as demonstrated through these scenarios.

With respect to the representation of the potential 500 MMBF reduction in annual timber harvest, this figure overstates any possible effect of critical habitat. This volume is roughly equivalent to the total harvest on the National Forest System and BLM lands in the NWFP area in recent years, and is roughly five times the baseline harvest projection for potentially-affected areas. The figure implies that the designation will largely preclude any timber harvest whatsoever on Federal lands operated under the NWFP. Based on the historical record of actual timber harvest volumes and the best available information concerning potential future harvest activity under the designation, we reject this representation.

Comment (184): One comment suggested that the DEA underestimated the administrative costs associated with consultations.

Our Response: The additional burden of 4 to 6 hours described in the FEA reflects an incremental impact to consultations that would already occur due to the listing of the species. These costs do not reflect the total cost of consultations that would occur absent the critical habitat designation. The FEA discusses additional consultations that would not have occurred but for the critical habitat designation.

Comment (185): One commenter stated that the high-impact economic estimate based on a $250/mbf stumpage value underestimates the true economic costs of the proposed designation, and that a stumpage rate of $350/mbf is more realistic.

Our Response: The stumpage values in the economic analysis ($100 to $250/mbf) reflect a wide range of historical values for timber harvest from Federal lands for the years 2000 to 2011 (the most recent estimates that were available). Average stumpage prices vary by forest, species, product, and year, reflecting, among other things, shifts in economic demand. Exhibit 4–11 presents a weighted average of stumpage values across USFS National Forests and BLM districts within the proposed critical habitat designation for each Federal land manager. These values best represent the average price of timber sold in areas of concern where incremental effects are relatively more likely to occur. Please see chapter 4.4.3 of the FEA for further explanation of how we arrived at these values. However, even if we apply the $350/mbf figure, the annual high-impact result would increase by $2.5 to $2.9 million, which is still a relatively small incremental impact.

Comment (186): One submission noted that a number of Pacific Northwest Ski Areas Association (PNSAA) member ski areas operate on National Forest System (NFS) land potentially within the range of the northern spotted owl. The primary request of the comment is that areas covered by special use permits (SUPs) under which the ski areas operate be excluded from the final designation. The comment goes on to note potential burdens critical habitat designation may entail for these areas and their economic impact. This economic activity and any related regulatory impacts are not addressed in the draft economic analysis.

Our Response: While ski areas are found on a very small proportion of the forested lands in the Pacific northwest, our analysis found these lands provide essential high-value northern spotted owl habitat to the critical habitat network. Currently, impacts to northern spotted owl habitat in these areas are subject to the section 7 consultation process for effects to northern spotted owls. Our experience shows that ski area development actions generally tend not to conflict with northern spotted owl and critical habitat conservation needs, so we do not anticipate any significant regulatory burden associated with the designation of these lands as critical habitat. Removing lands managed under ski area special use permits would increase fragmentation of the critical habitat network and potentially continuous tracts of northern spotted owl habitat. Therefore, there is a greater benefit to the species associated with retaining ski areas in the critical habitat designation. In situations involving the imminent loss of human life or property the managing agency should implement emergency section 7 measures to avoid compromising public safety. A note regarding ski area activities and their economic impact has been added to Chapter 1 of the FEA.

Comment (187): Several submissions commented upon how critical habitat may affect wildfire risks and related coverage of this issue in the draft economic analysis. One comment asserts that critical habitat makes fuel management more difficult, resulting in the destruction of habitat. Another comment notes the prospect of reduced fire risk under critical habitat due to restoration of riparian forests or road closure.

Our Response: The FEA addresses the potential impacts of critical habitat on fire management in Chapters 4 and 8. In Chapter 4, the FEA discusses the fact that ecological fire salvage activities contemplated as part of proposed critical habitat designation on both reserved and nonreserved lands may result in incremental economic effects. Due to data limitations and fire location uncertainty, however, these effects are not quantified. In the benefits discussion in Chapter 8, the FEA recognizes that it is possible that the designation could result in increased resiliency of timber stands associated with improved timber management practices, such as thinning, partial cutting, and adaptive management and monitoring. These efforts may reduce the threat of catastrophic events such as wildfire, drought, and insect damage. This in turn may generate benefits in the form of reduced property damage.

Comment (188): One comment noted that the DEA only considers impacts related to logging, and limits its coverage of many other economic purposes that critical habitat may negatively affect.

Our Response: Based on a review of the consultation record, recognized threats to the species, and other related information, the FEA focuses on those economic activities that could be materially affected by the designation. These activities include timber harvest on public and private lands, fire management activities, and linear projects (roads, gas pipelines, utility lines, etc.). We are not aware of other economic activities that will be materially affected by the designation. In addition, the FEA qualitatively considers potential benefits from the designation on certain activities, including recreation.

Comment (189): Multiple submissions assert that the DEA does not sufficiently consider the cumulative economic impacts of northern spotted owl conservation efforts since the time of its listing, instead focusing primarily on the potential incremental impacts of the proposed critical habitat designation prospectively.

Our Response: The U.S. Office of Management and Budget's (OMB) guidelines for best practices concerning the conduct of economic analysis of

Federal regulations direct agencies to measure the costs of a regulatory action against a baseline, which it defines as the ''best assessment of the way the world would look absent the proposed action.'' (OMB, ''Circular A–4,'' September 17, 2003, available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.*) The baseline utilized in the DEA is the existing state of regulation, prior to the designation of critical habitat, which provides protection to the species under the Act, as well as under other Federal, State, and local laws and guidelines. To characterize the ''world without critical habitat,'' the DEA also endeavors to forecast these conditions into the future over the timeframe of the analysis, recognizing that such projections are subject to uncertainty. This baseline projection recognizes that the northern spotted owl is already subject to a variety of Federal, State, and local protections throughout most of its range, due to its threatened status under the Act and regardless of the designation of critical habitat.

Significant debate has occurred regarding whether assessing the impact of critical habitat designations using this baseline approach is appropriate, with several courts issuing divergent opinions. Courts in several parts of the country, including the 9th Circuit Court of Appeals, which has jurisdiction in Washington, Oregon, and California, have ruled that the consideration of economic impacts in the designation of critical habitat should be based on the incremental impacts of the designation. See, e.g., *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; *Arizona Cattle Growers* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010), cert. denied, 179 L. Ed. 2d 300.

Chapter 3 of the FEA provides extensive discussion of the historical and current economic conditions against which critical habitat is designated. Specifically, the document provides data, by each of the 56 counties overlapping the proposed rule, on changes in timber harvests, timber industry employment, and timber industry payroll since 1989. It also provides a detailed discussion of the existing revenue-sharing programs related to timber harvests and the data describing which counties are most reliant on these programs.

Comment (190): One comment states that, while accepted in the academic literature, existence values, contingent values, recreational hedonic values, and other nonmarket values that might be assigned to critical habitat designation are unreliable and irrelevant where the only benefit of relevance to the decisionmaker is the conservation of a listed species. The Act calls for a cost-effectiveness approach where the Service should seek to minimize the economic costs and burdens that must be incurred to designate only that habitat that is essential for species conservation. Other benefits are irrelevant and should not be offset against the costs.

Our Response: The valuation of nonmarket goods as part of the evaluation of the benefits of proposed Federal regulations is a widely accepted and regularly applied practice. The U.S. Office of Management and Budget (OMB) explicitly recommends the use of revealed preference (recreational demand models, hedonics) and stated preference methods (contingent valuation) in its guidance to Federal agencies (Circular A–4) on best practices for preparing regulatory analysis required by Executive Order 12866. Circular A–4 includes criteria for conducting and applying stated preference studies, which are commonly used to measure existence values. Chapter 8 of the FEA describes the data limitations preventing the Service from quantifying or estimating the value of these benefits. Thus, the direct benefits of the designation are described qualitatively.

In weighing the benefits of including an area in critical habitat as opposed to excluding it, ancillary benefits may be considered, although we agree with the comment that the most relevant benefit of designating critical habitat for the northern spotted owl are the benefits to the species' conservation and recovery. However, ancillary benefits are relevant only to a decision whether to exclude an area under section 4(b)(2) of the Act, not to the threshold determination that an area meets the definition of critical habitat. We agree that only lands that meet the definition of critical habitat (areas occupied at the time of listing containing features essential to the species' conservation or unoccupied areas that are themselves essential to the species' conservation) should be designated.

Comment (191): One comment states that most of the economic benefits (e.g., existence value, wildlife viewing, ecosystem services) derive from the listing; the incremental benefit of critical habitat is negligible to nonexistent.

Our Response: As discussed in detail in the DEA, particularly Chapter 4, the designation of critical habitat may result in changes in timber management practices. These physical changes are likely to support the conservation and recovery of the northern spotted owl. As described in Chapter 8 of the DEA (paragraphs 342 through 343), the benefits of the regulation in terms of improved probability of northern spotted owl conservation and recovery are difficult to quantify due to existing data limitations.

Comment (192): Several commenters asserted that in not attempting to quantify environmental and ecosystem services benefits, the Service is not employing the best available science regarding the benefits that endangered species and their critical habitat provide, and is undervaluing the economic benefits of the designation. The comment asserts that multiple global efforts have been developed to quantify ecosystem services in order to inform policy, promote incorporating ecosystem services into decision making, and provide guidelines to assess costs and benefits of policies and better account for ecosystem service effects. Commenters encourage the Service to make a credible (if rapid) attempt to value ecosystem service benefits and consider ecosystem services.

Our Response: The Service recognizes that much attention has been paid nationally and globally to valuing ecosystem services provided by landscapes. Published, peer-reviewed studies provide information on values of multiple categories of ecosystem services (e.g., agricultural production, water quality regulation, carbon storage and sequestration, recreation, aesthetic values, etc.) across a variety of land use types (e.g., wetlands, forests, etc.). Over the past 20 years, multiple studies have relied on this literature to develop large-scale benefits transfer analyses in order to estimate a total value of a parcel of land, a watershed, a State, or even the planet (e.g., Costanza 1997, as described in the comment letter).

The first comment focuses in particular on the potential relevance to the DEA of a large-scale benefits transfer estimate developed for the Skykomish watershed. This study is characterized as a ''rapid ecosystem service valuation.'' In general, the authors first identified land cover types present in the watershed, identified the categories of ecosystem services relevant to those types, and then researched existing studies valuing those categories of ecosystem service benefits. From the available literature, the authors estimated a range of values for each category of ecosystem service by relying on the low end and high end estimates identified. The authors then summed across relevant ecosystem service values

to estimate a value range for each land cover type, and summed across the land cover types within the watershed to estimate a value range for the entire Skykomish watershed of $245 million to $3.3 billion per year.

While case- and site-specific modeling to value ecological benefits is preferable, the Service agrees that benefits transfer methods may be useful in the absence of resources for intensive primary research. To use these methods in support of Federal rulemakings, OMB has developed guidelines for conducting credible benefits transfer. A rapid assessment of ecosystem services, such as that developed for the Skykomish, is unlikely to meet the criteria specified by OMB. Multiple responses to similar large-scale benefits transfer studies have highlighted the theoretical and practical problems associated with estimating and extrapolating per-acre estimates of values taken from other studies of ecosystem services (e.g., Bockstael *et al.,* 2000).

First, this approach ignores site-specific factors affecting the production of services by not accounting for variations in the condition or quality of an ecosystem. For example, a less dense or degraded forest area stores less carbon than a dense, healthy forest. The extent to which a given acre of land delivers ecosystem services also depends on the surrounding land uses. For example, a wetland downslope of cropland may provide a valuable service by filtering nitrogen runoff and decreasing the total amount of the nutrient reaching a water supply, whereas a wetland surrounded by forest is unlikely to intercept such runoff to begin with and, therefore, would not provide this service. By relying on site-specific studies valuing these types of services in other areas—the Skykomish study relies on a variety of studies of ecosystems all across the country—these differences are not taken into account. In addition, benefits transfer for rapid assessments, such as the Skykomish study, fail to account for differences in values associated with differences in socioeconomic context between sites. For example, the recreational value of a forest depends on multiple site-specific socioeconomic factors such as accessibility (landownership and proximity to roads and towns). In transferring values of ecosystem services from other studies, the Skykomish study fails to account for such ecological and socioeconomic context affecting these values. This represents one reason we do not rely on the values presented in this study in the DEA.

Second, rapid assessments do not provide information on the effects of changes in the condition or quality of an ecosystem on the associated service values. The Skykomish study assigns an equal value to all ''forest'' acres and therefore does not provide any information to support an analysis of the ecosystem service benefits of changes in the management of a forest. It is the incremental change in the value of a service provided that is relevant to the DEA. For example, the DEA concludes critical habitat designation for the northern spotted owl may result in the harvest of fewer board feet of timber in a portion of the forests. Decreased harvest of trees may not change the land cover type (forest) as characterized in the rapid assessment; it simply affects the density of the trees in given areas. The rapid assessment approach does not address such differences across areas within a land use type (i.e., forests); rather, it is more useful in comparing the ecosystem services provided across different land use types (i.e., deserts, prairie, forests, marshes) and is therefore of limited use in evaluating tradeoffs associated with changes in the condition of a given ecosystem.

Consequently, absent a full-scale change from one ecosystem type to another, the rapid assessment approach to valuing benefits of critical habitat designation does not provide a valid approach to quantifying the ecological benefits of critical habitat designation for the northern spotted owl. While the DEA provides information on the types of services associated with the ecosystems types potentially affected by the designation, it does not attempt to perform a rapid assessment of the values of these services, for the reasons stated.

Comment (193): One commenter suggested that the Service could employ any of three approaches to value ecosystem service benefits of critical habitat designation: (1) The Integrated Valuation of Ecosystem Services and Tradeoffs (InVEST) model; (2) the Ecosystem Services Review Method; and (3) the Wildlife Habitat Benefits Estimation Toolkit. The comment states that all three are available and ready for immediate, widespread use. A second comment states that the Service is far behind the ecosystem services valuation curve.

Our Response: The Service recognizes that multiple tools exist that focus on evaluating ecosystem service benefits of land management changes. The authors of the DEA have experience with a number of these methods, including the InVEST tool and the Wildlife Habitat Benefits Estimation Toolkit. As a practical matter, the InVEST tool could be used to evaluate potential ancillary benefits of critical habitat for the northern spotted owl. The tool comprises a series of biophysical and economic models that aim to translate changes in a given landscape into changes in the delivery of multiple ecosystem services. These models are data-intensive and require site-specific information.

For each ecosystem service, InVEST relies on two separate models: One that estimates the biophysical change in the delivery of a service and, for some services, a second economic model that monetizes that change. For example, to estimate the change in water quality resulting from changes in the management of a given forest, the following types of detailed, on-the-ground, data would be required as inputs to the biophysical model: A digital elevation model, soil depth, plant available water content (the fraction of water that can be stored in the soil profile for plants' use), root depth of vegetative cover, evapotranspiration, nutrient or sediment loading for each land use type across the landscape, the vegetation filtering capacity of the land cover (as a function of the type and density of vegetation), and pre-existing water quality conditions for model calibration (e.g., nitrogen, phosphorus, or sediment concentrations). While some of these data are available; some would need to be generated at a relatively fine level of resolution in order to model the incremental changes in the ability of the landscape to filter pollutants likely to result from the designation. The InVEST tool values this service in terms of changes in treatment costs for nutrients or sediment. These costs are likewise site-specific.

This effort is particularly significant in light of the conclusion of the DEA that the critical habitat designation is most likely to generate only minor incremental changes in the management of land uses within the designation. The key change is a potential increase or decrease in timber harvest of less than one percent in the region. While the analysis describes qualitatively that this change potentially could generate some marginal improvements in services such as water quality regulation, these benefits are expected to be relatively minor, ancillary benefits of the rule. The same is true of application of other models to evaluate benefits, such as the Multiscale Integrated Model of Ecosystem Services (MIMES), also described in the comment. Finally, the areas most likely to produce these ancillary benefits (e.g., Federal matrix lands) are included in the final designation; thus additional analysis of

the ancillary benefits of including these areas would not change the final regulatory decision. The DEA therefore provides qualitative information to the Service regarding potential ancillary benefits.

The objective of the Ecosystem Services Review (ESR) Method is to provide companies with information on how their business depends on ecosystem services, whether their business affects their (or others') ability to access these services, and opportunities to capitalize on and minimize effects on these services. The ESR is not a quantitative tool but a series of steps embedded in a spreadsheet model to help users incorporate consideration of ecosystem services into business decisionmaking. While useful to corporations, it is unclear how this tool may be used to improve the benefits discussion in the DEA. Section 8.2 of the DEA describes potential categories of ancillary ecosystem service benefits that may result from the designation and where (in which units) these benefits may occur. This information is provided for the Service to consider alongside the costs. The ESR does not provide a means to value these services.

The Wildlife Habitat Benefits Estimation Toolkit is a benefits transfer tool developed by the Defenders of Wildlife and Colorado State University for the purposes of valuing ecosystem services associated with species and habitat conservation, such as property values, recreation, and existence values. The benefits transfers facilitated by this toolkit suffer from some of the same issues as the rapid assessment described above. The policy context or sites subject to analysis are most often not transferable to the issue being evaluated: In this case, the land management changes resulting from the critical habitat designation for the northern spotted owl.

Comment (194): One organization stated the DEA is incomplete, in part because it focuses too narrowly on impacts to the timber industry, while the final designation will also affect the economies of the region in other ways. Specifically, two comments stressed that the analysis should consider the total value of the goods and services provided by forests in this region, including reduced wildfire threats, reduced impacts of droughts, reduced threat of insect damage, reduced property damage due to these risk reductions, increased quality or quantity of recreational activities, aesthetic improvements for people passing on nearby roads, carbon sequestration, and improved water quality.

Our Response: The economic analysis's focus on changes in timber harvest practices is appropriate because this activity is the conduit for all other ''on-the-ground'' changes, positive or negative, resulting from the designation. Increases or decreases in timber harvests could positively or negatively affect regional socioeconomic conditions. Thus, Chapter 3 of the DEA provides context explaining historical and current conditions, and Chapter 6 identifies counties that may experience the greatest impacts. The same changes in timber harvests could affect the northern spotted owl's conservation and recovery, discussed in Chapter 8 of the DEA. Finally, these changes in timber harvests are the driver of the potential changes in other ecosystem services, including recreational opportunities, described in the comment. These ancillary benefits are also described in Chapter 8 of the DEA.

Responses provided to earlier comments review the best available modeling tools for quantifying and valuing ecosystem services and describe why these tools were not employed in this instance. In the FEA, we expand our qualitative discussion of potential ancillary benefits to include the broader set of ecosystem service categories discussed in the comment.

Comment (195): One organization states that OMB's Circular A–4 is fundamentally flawed in excluding the flow of ecosystem services from the baseline and recommending discounting practices that are inconsistent with ecosystem service valuation. The comment further states that Circular A–4 is insufficient because it provides the Service with a rationale to avoid quantifying the benefits of critical habitat designation by allowing for a qualitative assessment where benefits are ''difficult to quantify.''

Our Response: The conceptual framework of the FEA is to evaluate impacts by comparing the world without critical habitat (baseline) to the world with critical habitat. The difference between these two states represents the incremental impacts of the rule. Thus, the FEA does not exclude the flow of ecosystem services from the baseline. To understand how the flow of ecosystem services may change, one must first understand the categories and magnitude of existing services. In this way, while not explicitly quantified in the analysis, the current flow of ecosystem services is implicitly captured in our characterization of the baseline condition.

Put another way, the organization appears to be asking us to first present the total value of all services provided by forests included in proposed designation. Then, our analysis would estimate the value of the incremental change in quality and quantity of these services as a result of the designation. Such an effort would be equivalent, on the cost side of the analysis, to first presenting the total value (in terms of stumpage prices) of all the timber found in proposed critical habitat, and then presenting the value of the change in the amount of timber harvested as a result of the regulation. On both sides of the equation, providing a monetized estimate of the value of the baseline resources is not a necessary step to understanding the value or the change in services resulting from the designation. Correctly *characterizing* the baseline conditions is necessary, but valuation efforts appropriately focus on what will change, rather than what exists today.

Substantial debate surrounds the selection of appropriate discount rates for ecosystem services. While Circular A–4 recommends applying discount rates of 7 and 3 percent for regulatory analyses, it does not preclude the application of alternative discount rates for comparison. The comment recommends assessing ecosystem services benefits using discount rates of zero and one percent, in addition to three and seven percent. Because ecosystem services are not quantified in the economic analysis, we do not consider additional sensitivity analysis around the discount rate assumption.

Further, such an effort would require some data that are not currently available.

Comment (196): One comment states that the cost of avoiding carbon emissions is less than the cost of climate mitigation, and several studies have shown that changing forest practices is one of the more efficient and economical ways to store carbon and reduce emissions. Given that carbon storage is just one of the many important ecological services provided by mature and old forest, every effort should be made to avoid as much warming as possible by protecting mature forests.

Our Response: We have added discussion of the potential for increased carbon sequestration to Chapter 8 of the FEA.

Comment (197): A comment asserts that the Presidential Memorandum to the Secretary of the Interior on the northern spotted owl is not consistent with the Endangered Species Act because it states that ''the benefits of excluding private lands and State lands may be greater than the benefits of

including those areas in critical habitat.'' The commenter is concerned that this statement is made in the Presidential Memorandum without an attempt to quantify ecosystem services benefits of the designation on these lands, and these benefits are therefore given an effective price of zero.

Our Response: We do not believe that the directive in the Presidential memorandum is inconsistent with section 4(b)(2) of the Act, which states that the Secretary may exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, as long as failure to designate such areas will not result in extinction of the species. The purpose of the economic analysis is to provide the Secretary of the Interior with information to support analysis of where the benefits of excluding a particular area may outweigh the benefits of including that particular area as critical habitat. In providing the qualitative discussion of benefits, the FEA does not assign zero values to these potential benefits; this discussion is provided for the Secretary to consider alongside the quantitative information provided.

Comment (198): One commenter stated that the DEA estimates the benefits of increased timber production in terms of the market value of the logs, but ignores the costs to Federal agencies of producing the logs (i.e., costs of managing the land for timber production and executing the timber sales), and that the total cost to taxpayers may exceed the logs' market value.

Our Response: In support of its comment that the costs to Federal agencies (and ultimately taxpayers) of timber sales exceeds the revenues from the sales, the commenting organization cites several studies from the early 1980s, as well as a more recent report published by the Congressional Research Service (CRS) in 2004 (Gorte, R.W. 2004, Below Cost Timber Sales: An Overview, CRS, Order Code RL32485).

We agree that whether the net benefit of timber sales in terms of costs and revenues is positive has been the subject of much debate. CRS summarizes this debate and notes ''the estimates of financial results of [USFS] timber sales vary widely. This disparity is due to differences in basic approach—profit-and-loss, cash flow, or other approach—and in assumptions about relevant costs'' (Gorte, R.W. 2004, summary page). In particular, CRS notes differing assumptions regarding which Agency costs are relevant and how to allocate those costs to specific sales may result in different answers using the same basic accounting approach.

CRS also notes that the USFS sells timber for many reasons, such as ''to generate receipts, to supply wood for manufacturers, to provide employment, to expand access for motorized vehicles, to alter the composition and distribution of vegetation in the area, and more'' (p. 5). The ''value'' of all of these positive attributes of the sales may not be captured in the stumpage price paid by the loggers or mills purchasing the timber, as many of these attributes represent market externalities. Furthermore, ''the multiple outputs, environmental impacts, and differing time scales of timber sales and related activities make identifying relevant costs and comparing them with relevant revenues problematic. Two decades of debate have not resolved the dilemma, and further debate seems unlikely to result in widespread agreement'' (Gorte, R.W. 2004, p. 7).

Thus, whether the Federal agency costs of baseline timber sales anticipated in the absence of critical habitat, or new sales potential generated by the designation, exceed revenues is unknown. However, the fact that these sales are often conducted for multiple purposes, such as improved ecosystem services or regional employment, and those purposes may have value that is not captured in stumpage prices, suggests that our assumption that the benefits of the sales exceed costs is not unreasonable.

Comments on the Economic Analysis From Counties

Comment (199): Several counties including Wasco, Del Norte, Klickitat, and Skamania Counties expressed criticism of the Draft Economic Analysis, including concerns about the incremental analysis approach and the negative economic impact of reducing or restricting commercial timber harvest on local communities (employment, tax base, quality of life, and other socioeconomic impacts).

Our Response: The economic impact to local counties of this critical habitat designation will be determined in large part by the timber management direction the Federal land managers take within critical habitat lands. Project modification costs quantified in the FEA primarily result from changes in the quantity of timber harvested on Federal lands. As discussed in detail in Chapter 4 of the DEA, section 7 consultations on the sale of timber from Federal lands may result in an increase, decrease, or no change in harvest levels, based on several plausible assumptions. We note that if future harvests are restricted, total annual harvests could decrease by 24.56 million board feet (MMBF). This decrease represents less than one percent of 2010 total harvest and the average annual harvests between 2006 and 2010 across the 56-county area overlapping proposed critical habitat. The designation may also result in an increase in annual harvests of 12.28 MMBF, or less than half a percent of total annual harvests in the 56-county area. Finally, it is possible that harvest levels will not change as a result of the designation. In summary, the designation is anticipated to have a minor impact on future harvest levels.

The DEA used a filtering approach to identify those specific areas where incremental timber harvest effects may occur. Further explanatory detail on these methods has been added to Chapter 4 of the FEA. In addition, the chapter also notes the potential effects to the baseline timber projection related to increasing the percentage of matrix lands with northern spotted owl habitat that are likely to be unoccupied.

Comment (200): Two small county governments submitted comment stating the proposed rule would have disproportionate impacts on local employment, payroll, and county services funded by revenues-sharing programs and taxes. They provide data describing economic conditions in the 1970s and 1980s, and describe the economic decline experienced since the owl was listed in 1991.

Our Response: We recognize that many small governments have experienced significant changes in employment, payroll, and county revenues as a result of the decline in the timber industry over the last 21 years. Chapter 3 of the DEA provides detailed data by county describing these changes and providing context for the analysis. Chapter 6 provides information specific to the counties where changes in Federal timber harvests are relatively more likely. We note that these counties are not directly regulated by the designation of critical habitat for the northern spotted owl; rather, potential impacts result from changes in harvest practices on Federal lands or where other Federal actions may be involved.

Given the numerous factors affecting the future of the industry, including changes in the availability of Federal timber, mechanization, transfer of capital investment away from the region, closure of less efficient mills, and fluctuating demand for wood products, we are unable to provide quantitative projections of future timber-related employment. Furthermore, as discussed in Chapters 3 and 6 of the DEA, uncertainty regarding

the future of existing county revenue-sharing programs, such as PILT and SRS, confound our ability to predict potential changes in county revenues. However, we note that reasonable assumptions suggest overall changes in harvest levels resulting from the designation are likely to be less than one percent of current levels. Chapter 6 of the DEA discusses the counties most likely to see the largest changes. In addition, most of the costs cited by the commenter, if not all, are attributable to the listed status of the northern spotted owl, rather than the incremental effects of critical habitat.

Comment (201): Several county governments reference a report prepared by the Sierra Institute for Community and Environment and Spatial Informatics Group, titled ''Response to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl by Industrial Economics,'' and submitted as a public comment. Funding for the report was provided by the National Forest Counties and Schools Coalition. The report states that the DEA's assessment is insufficient in its documentation of cumulative socioeconomic impacts and current socioeconomic conditions. It provides detailed discussion and data concerning a variety of characteristics for communities potentially affected by the designation, including: Number of mills and mill closures; employment patterns; revenue-sharing payments to counties; family income; poverty levels; home ownership; health outcomes and factors; and enrollment in programs such as School Free and Reduced-Price Meals (FRPM).

Our Response: Chapter 3 of the DEA is intended to provide context to the decision maker regarding historical changes in the timber industry in the Pacific Northwest in terms of production, employment, income, and county revenues. It also discusses multiple possible causes contributing to these changes, including protection of the northern spotted owl. The Sierra Institute for Community and Environment report provides additional socioeconomic information supplementing the background information provided in Chapter 3. Text summarizing the contents and availability of this report has been added to the FEA. We note that verification of the data provided by the Sierra Institute for Community and Environment is complicated by the fact that citations are not provided for the majority of the report's figures and data.

Comment (202): The Sierra Institute for Community and Environment states in several places in its report that the DEA argues the loss of 30,000 jobs in the timber industry between 1990 and 2010 was offset by regional gains in population and employment of 15 percent and 18 percent, respectively. They state that the DEA errs by assuming that job gains in one time period offset losses in another, and that job gains (and losses) are equally distributed across the region. In addition, they claim that the DEA does not analyze or sufficiently discuss the issue of disparity and does not discuss how areas with a proportionally greater amount of employment in the timber industry are affected by the proposed critical habitat designation.

Our Response: The authors are referring to information provided in paragraphs 14 and 106 of the DEA, which present regional job loss figures and changes in regional population and employment. The DEA simply presents these facts; it makes no assumptions, and draws no conclusions, about whether lost timber jobs are offset by overall employment gains in the region or how job losses and gains are distributed across the region. Detailed analysis of rate and nature of reemployment of former timber industry employees is complex and beyond the scope of the DEA.

Chapter 6 of the DEA attempts to address potential disparity in the distribution of regional impacts of the designation. It combines background information on timber industry harvest and employment trends (presented in Chapter 3), and county dependency on revenue-sharing payments, with information about subunits where changes in timber harvest are possible (Chapter 4). It highlights the counties most likely to be affected by the rule based on proximity to affected subunits, and identifies which of these counties have already experienced the most significant declines in the industry over the last 20 years. The report notes that these counties may be more sensitive to future changes in timber harvests.

Definitely linking changes in timber harvests to timber-related jobs in certain communities is challenging. Timber industry jobs are not necessarily closely correlated with the amount of timber being harvested in that specific county; some mills or related manufacturers (e.g., wood product manufacturers) may rely on resources harvested from outside their immediate community. In its presentation of historical data on regional mill closures, the Sierra Institute for Community and Environment acknowledges, ''Other reasons for mill closure also include, but are not limited to, industry closing older, less efficient mills, closure of mills that handled only larger trees coupled with less old-growth timber available, and shipping raw logs and cants out of the region for processing elsewhere. Additional study is needed'' (page 31).

Teasing out the precise location of potential regional impacts resulting from critical habitat designation is particularly challenging due to the relatively small overall change in harvest anticipated to result from the final rule (at worst, a less than one percent decline in annual harvest). This marginal change in available Federal timber is unlikely to cause large-scale changes in the regional industry. Identification of who will experience impacts requires better understanding of potential substitutes and the degree of flexibility in the current production system, as well as proprietary information about the financial characteristics and operations of individual mills. Such data are not available to us and are not provided in the Sierra Institute for Community and Environment's report.

Comment (203): The Sierra Institute for Community and Environment report states that the DEA fails to link job losses to socioeconomic conditions and that this is required by the February 2012 Presidential Memo.

Our Response: The Presidential Memorandum directs the Secretary of the Interior to: (1) Publish, within 90 days of the date of this memorandum, a full analysis of the economic impacts of the proposed rule, including job impacts, and make the analysis available for public comment. The DEA satisfied this direction. It estimates the incremental change in social costs and benefits that may result from the proposed rule, as required by Executive Order 12866, following OMB's guidance on best practices as defined in *Circular A–4,* and consistent with existing case law; and, it provides a separate analysis of potential job impacts in Chapter 6.

The memorandum did not require the Secretary to take the additional step of developing complex models to link changes in timber industry employment to changes in socioeconomic conditions, such as poverty rates, homeownership, and participation in food assistance programs, as suggested by the report authors. Furthermore, the authors of the Sierra Institute for Community and Environment report acknowledge that linking changes in socioeconomic factors to changes in land management, and specifically to critical habitat designation, is challenging due to time constraints and complex data requirements (see, for example, pages 94, 105, 168 of the Sierra Institute for

Community and Environment report). As a result, the organization does not estimate these changes in its report.

Comment (204): The Sierra Institute for Community and Environment report states that an unintended consequence of critical habitat designation is that private landowners ''do nothing'' due to the increased cost of compliance, and that this has real social and environmental costs, such as reducing job availability and revenues and increasing fire risk.

Our Response: As described in Chapter 5 of the DEA, there is a potential for increased compliance costs, such as preparing environmental impact statements. In Washington, the DEA indicated that this may occur only in the event that the State Forest Practices Board redefines all suitable habitat overlapping Federal critical habitat within SOSEAs as ''critical habitat state'' (see paragraphs 227 through 232 of the DEA). The likelihood of such an outcome is uncertain. If it occurs, we estimated that at most 21,715 ac (8,788 ha) of proposed private lands could be incrementally affected. The remaining lands are already considered ''critical habitat state'' or are protected by existing or proposed HCPs and SHAs. The potential social and environmental costs of not harvesting these 21,715 ac (8,788) over the 20-year timeframe of the analysis are too small to measure.

In California, the FEA states that one stakeholder noted that landowners may be required to provide additional documentation under CEQA to demonstrate that their management plan timber harvest plan will mitigate impacts to critical habitat. Since CALFIRE has stated that it is unlikely to require additional protective measures for designated critical habitat beyond those already required by State regulation, any incremental costs would be limited to the possibility for additional CEQA review.

The FEA also identifies possible changes to timber harvest practices suggested by private parties as potentially occurring due to regulatory uncertainty, ranging from harvesting existing trees as early as feasible to discontinuing use of the property for timber production. However, due to the high degree of uncertainty over whether these impacts may occur, we were not able to quantify the potential effects.

We note that all private lands were excluded from critical habitat for the northern spotted owl under section 4(b)(2) of the Act (see Exclusions), therefore none of the potential scenarios considered by the DEA are germane to the final designation.

Comment (205): The Sierra Institute for Community and Environment report states that the DEA is insufficient because it does not adequately characterize cumulative socioeconomic impacts. The authors state that ''understanding current condition requires an understanding of what has transpired in recent years and trend [sic], which are, for the most part, not factors in the analysis.'' They also question why the Entrix report and the 2012 analysis ''ended up in inconsistent places with respect to baseline and included incremental impacts.''

Our Response: The DEA provides data on historical changes in timber industry production, employment, and income (see Chapter 3). It also provides information about trends in county revenue-sharing payments. This information is included in order to provide the Secretary with context for the incremental impacts of the analysis.

The OMB guidelines for best practices (*Circular A–4*) concerning the conduct of economic analysis of Federal regulations direct agencies to measure the costs of a regulatory action against a baseline, which it defines as the ''best assessment of the way the world would look absent the proposed action.'' The baseline utilized in the DEA is the existing state of regulation, prior to the designation of critical habitat, which provides protection to the species under the Act, as well as under other Federal, State, and local laws and guidelines. To characterize the ''world without critical habitat,'' the DEA also endeavors to forecast these conditions into the future over the timeframe of the analysis, recognizing that such projections are subject to uncertainty. This baseline projection recognizes that the northern spotted owl is already subject to a variety of Federal, State, and local protections throughout most of its range, due to its threatened status under the Act, and regardless of the designation of critical habitat.

Significant debate has occurred regarding whether assessing the impact of critical habitat designations using this baseline approach is appropriate, with several courts issuing divergent opinions. In 2010 and 2011, courts in several parts of the country, including the Ninth Circuit Court of Appeals, which has jurisdiction in Washington, Oregon, and California, ruled that decisions concerning designation of critical habitat should be based on the incremental impacts of the rule. The 9th Circuit cases were appealed to the Supreme Court, which declined to hear them.

The Entrix report analyzing the 2008 designation was prepared under subcontract to Industrial Economics, Incorporated (IEC), the authors of the 2012 analysis, and project managers from IEC worked closely on both efforts. The difference in the two analyses regarding whether to quantify impacts resulting from baseline regulatory protections is due to the change in case law described in the previous paragraph.

Comment (206): The Sierra Institute for Community and Environment report questions why the background data provided on timber industry employment and harvests do not factor into the overall assessment and analysis of impacts. The report states that the analysis does not address localized and community-level impacts.

Our Response: As described above, Chapter 6 of the DEA combines data from Chapters 3 and 4 of the analysis to identify counties that may be particularly susceptible to changes in timber harvests resulting from the designation. Employment and harvest trend data are generally available at the county level through publicly available sources, such as State natural resource agencies, the U.S. Census, and the U.S. Bureau of Labor Statistics. Assessing distributional impacts as a finer level of resolution is challenging given a lack of data. In addition, linking changes in community outcomes to the designation would require complex modeling that is beyond the scope of this analysis given the numerous other confounding factors and the relatively small changes in annual harvest that could result from the designation.

Comment (207): The Sierra Institute for Community and Environment report states that counties, municipalities, and schools were ''given short shrift'' in the DEA and that there was no substantive exchange about the conditions of counties or municipalities for the analysis. In addition, other economist commenters also said that they were not consulted for the DEA.

Our Response: During preparation of the draft, IEC contacted many stakeholders, including Federal agencies, State governments, and representatives of the timber industry, and sought to obtain economic and other relevant information from publicly available sources. They collected and analyzed data on historical changes in timber harvests and timber industry employment and payroll for each of the 56 counties overlapping the proposed designation and reviewed literature related to impacts to regional communities, including counties. IEC conducted research on county revenue sharing programs and presented data on the proportion of total county revenues

derived from these programs. Two of the eight report chapters in the FEA focus exclusively on historical and current conditions in the counties, identifying those that are most likely to experience incremental impact and those that are likely to be more sensitive to changes in in harvests resulting from the proposed regulation.

IEC also reached out directly to County representatives. On June 6, 2012, IEC emailed representatives of Siskiyou, Skamania, and Douglas Counties, as well as the Association of O & C Counties, the Association of Oregon Counties, and the Washington State Association of Counties, and offered to meet with them via conference call. On June 25, 2012, IEC received a letter from representatives of Skamania, Douglas, and Siskiyou Counties requesting a meeting with all of the counties that may be affected by the designation. Since the comment period closed on July 6, 2012, the Service determined that there was not time to arrange a meeting with all 56 counties. However, on July 20, 2012, per section 4(b)(5) of the Act, we again invited all State agencies and affected jurisdictions to submit their comments on the proposed critical habitat revision.

Comment (208): The Sierra Institute for Community and Environment report questions the DEA's statement that employment in California, Oregon, and Washington increased only three percent between 2000 and 2010. The report states that reliance on Bureau of the Census and Bureau of Labor Statistics for employment data, such as the data presented in Exhibits 3.6 and 3.7 of the DEA, will result in an undercount of employment. Lastly, the authors state that they were unable to replicate the numbers in the tables because the methodology is inadequately specified.

Our Response: In both the Executive Summary and Chapter 3, the DEA reported that total employment in California, Oregon, and Washington increased by three percent between 2000 and 2010. IEC has added the source for this data, which is the Bureau of Economic Analysis (BEA), to the FEA. The BEA provides data on total annual State employment, which IEC used to determine the tri-State area employment increase between 2000 and 2010. The data is publically available and can be found online at BEA's Interactive Data Web site at *http://www.bea.gov/itable/.*

The data source for Exhibits 3.6 through 3.8 of the DEA, which present historical timber industry employment and payroll data for each county that contains proposed critical habitat (as well as for each State and for the entire study area), is the U.S. Census Bureau's County Business Patterns. Data for the County Business Patterns excludes data on self-employed individuals, employees of private households, railroad employees, agricultural production employees, and most government employees. More information on these exclusions can be found at *http://www.census.gov/econ/cbp/methodology.htm.* While a certain amount of undercoverage may occur, we believe the data provide the best available information from a reliable source. The exhibits list the SIC and NAICS codes that were used to estimate industry employment, as well as the Web site where the data can be found (*http://censtats.census.gov*).

Comment (209): The Sierra Institute for Community and Environment report states active forest management occurs on National Park Service lands in Shasta County.

Our Response: We make note of this representation in the FEA.

Comment (210): The Sierra Institute for Community and Environment report disagrees with the results of Scenario 3 of the Federal lands analysis (described in Section 4.4.2.3 of the DEA). The authors state that the DEA bases its analysis of incremental changes in timber harvests on a period in which there is a severe downturn in the economy and wood products industry and that this results in an undercount of likely impacts. They state that the analysis ''relies on 5 years (2006 to 2010) of harvest data to base future timber harvests.'' In addition, they state that estimates of harvest totals are generalized and not linked to subunit timber harvest totals.

Our Response: The DEA and FEA rely on historical actual harvest data for USFS Region 6 because it represented the best available data for purposes of the analysis. For USFS Region 5, the analysis relies on projected actual timber harvests by forest, provided by USFS. For BLM lands, the FEA utilizes BLM-provided data on timber harvest projections by critical habitat subunit for three decades of incremental impact estimates, by land allocation type, forest conditions, and harvest type. To conduct the analysis, these various timber projections needed to be converted to board feet, per-acre, per-year measurements, by critical habitat subunit. In an ideal world, the FEA would utilize detailed geospatial data showing when and where Federal timber harvest is projected to occur. However, lacking data on the narrowly defined areas where timber harvest is projected to occur, and where critical habitat may have an incremental effect on these harvests, the analysis broadly applies projected timber harvest across all Federal lands. Using this approach, the FEA uses timber harvest projections ranging from 14 to more than 200 BF-per-acre per-year across critical habitat subunits, as described in Chapter 4. In sum, the FEA does not rely exclusively on historical data, and variable projected harvests are linked to specific subunits to the extent possible.

Comment (211): The Sierra Institute for Community and Environment questions the baseline timber harvest projection used in the DEA, stating that it fails to draw a distinction between dry and wet forests and those that are commercially viable and those that are not.

Our Response: As noted in the prior response, the economic analysis endeavors to distinguish potential future harvest levels by forest type and characterization, and by areas within each subunit, to the extent possible given the best available information.

Comment (212): The Sierra Institute for Community and Environment report claims that the DEA does not provide sufficient analysis of indirect incremental effects of the critical habitat designation on private landowners. To assess the effects of potential changes in Washington State regulations resulting from critical habitat designation, the authors suggest, ''There may not be adequate estimates of the probability or the total number of acres that could be included, but probabilistic models coupled with a sensitivity analysis could offer insight into the impact and are possible to develop'' (Sierra Report 2012, p. 13).

Our Response: Chapter 5 of the FEA provides a detailed discussion of the sources of the data required to quantify the potential indirect effects of the designation on private lands (see paragraphs 279 through 287), including the number of acres where landowners are likely to alter current timber management practices; the characteristics of the stands (type of tree, age, etc.) subject to changes in the timing of harvests; current and revised harvest schedules; financial models of the change in the present value of existing lands that incorporate information about stumpage prices, stand growth curves, and the opportunity cost of capital to private timber managers; and information regarding the probability that the Washington Forest Practices Board will undertake regulatory changes. Basic data are not available for most of these elements, and thus, information necessary to create distributions

describing these data elements and assumptions, which are required for probabilistic models, are scarce. Any distributions would likely be vague (for example, the probability of the Washington Forest Practices Board changing its regulations would range from zero to 100%, with an equal probability of any point in between these two endpoints). While it is technically possible to build a Monte Carlo-type probabilistic model using such vague probability distributions, the lack of data for meaningful inputs would render the results uninformative. We also note that private lands have been excluded from the final rule pursuant to section 4(b)(2) of the Act.

Comment (213): The Sierra Institute for Community and Environment report states that it is important for the DEA to quantify potential impacts of critical habitat designation on SRS and PILT payment programs. The authors state that it is not difficult to quantify the effects that future changes in timber harvests from Federal lands resulting from critical habitat designation would have on these payment programs. The authors also state that the analysis does not make clear that the revenue-sharing programs for Federal lands only continues if SRS is reauthorized after 2013.

Our Response: The Sierra Institute for Community and Environment is mistaken in its statement on page 14 of its report that the revenue-sharing programs for Federal lands only continue if SRS is reauthorized after 2013. It is true that if SRS is not reauthorized, the payments received by counties could be substantially different. However, as described in paragraphs 128 through 129 of the FEA, the U.S. Forest Service (USFS) 25% Fund and the Bureau of Land Management Oregon and California Land Grant (BLM O&C) Revenue-Sharing Payments (50 percent of commercial receipts) are permanently authorized by Congress and have dedicated funding sources in the form of commodity receipts. States and counties currently elect to receive SRS payments instead of revenue-sharing payments from the USFS 25% Fund and the BLM O&C Revenue-Sharing Program. In the absence of SRS (and possibly a second program called Payments in Lieu of Taxes, or PILT), the older programs would still be available and would serve as the sources of revenue-sharing payments.

Exhibit 3–9 in the FEA illustrates the relative magnitude of historical payments under all four programs, and Exhibit 3–10 provides information on percent of local government revenue that is made up of payments from these programs. Current SRS and PILT payments are based on historical revenue payments under preexisting programs and are allocated based on formulas considering a variety of factors. If these programs are re-authorized and funded, changes in revenues from Federal lands designated as critical habitat would first filter through the national allocation scheme and then through the State formulas, making it difficult to predict changes in payments. If these programs are not reauthorized and funded, then the payments would change each year based on a 7-year rolling average of receipts for USFS lands and the prior year's receipts for BLM O&C lands, and would also be filtered through the State's allocation formulas. Given the uncertainty associated with the future of SRS and PILT, the varying allocation schemes associated with the programs, and the relatively small change in anticipated harvests, the potential change in revenue-sharing payments is difficult to predict. Importantly, we note that the reauthorization and funding of SRS and PILT is unrelated to the decision to designate critical habitat for the northern spotted owl.

Environmental Analysis Comments

Comment (214): One commenter believed that the Secretary has not met the NEPA standard of full cooperation with State and county agencies in two different ways: (1) By setting a public comment timeframe that limits the agencies' ability to fully and knowingly provide comments; and (2) by denying the county the opportunity to be a cooperating agency under CEQ regulations and DOI policy.

Our Response: We believe the 30-day public comment period is adequate for review and comment on the draft environmental analysis and is consistent with the public comment period on many NEPA documents. In addition, we provided counties with an extended opportunity to comment, as described in Previous Federal Actions, above. With regard to cooperating agencies, neither CEQ nor DOI regulations discuss cooperating agencies in the context of environmental assessments because they are generally concise documents prepared to determine whether the proposed action will significantly affect the quality of the human environment and whether an environmental impact statement (EIS) is needed. Thus, environmental assessments normally do not warrant use of formally designated cooperating agencies. Because we initiated the NEPA analysis with an environmental assessment, we did not formally appoint any agency as a cooperating agency.

Comment (215): Several commenters requested the Service complete an environmental impact statement to address the effects of thinning, ecological forestry, and other active management activities on northern spotted owl populations. Commenters believe an EIS needs to be done for the critical habitat rule for a number of reasons, including that effects are significant; critical habitat designation could harm, rather than recover, the northern spotted owl; there is a need to accurately identify relevant environmental concerns and to take a ''hard look'' at these concerns; and the analysis in the draft environmental assessment is insufficient to prove effects are not significant (i.e., presents no information to justify a finding of no significant impact (FONSI)).

Our Response: This rulemaking is limited to the designation of critical habitat for the northern spotted owl. This final rule does not mandate or prescribe specific management activities, and the implementation of thinning, ecological forestry, or other types of activities is not required by this rulemaking. Should any such activities be proposed by the land management agencies when implementing specific projects on their managed lands, the only effect of this critical habitat rule is that Federal agencies will have to consult with the Service on their activities that may affect designated northern spotted owl critical habitat and ensure that their actions are not likely to destroy or adversely modify critical habitat, as those terms are used in section 7 of the Act. Our critical habitat proposal was fully compliant with NEPA, although we note that we elected to develop an environmental assessment pursuant to NEPA in this case entirely at our discretion, and not as a legal requirement. The proposal presented an overview of the state of the science on active management for consideration by land managers. It does not require any specific management actions. Any plans or project-level decisions concerning active forest management are appropriately made by land managers in accordance with their normal planning and project implementation procedures, and are beyond the authority of this rulemaking. Actions proposed on Federal lands must be consistent with the requirements of the NWFP and associated plans, and these plans have already undergone NEPA compliance. Step-down implementation of specific actions such as thinning projects on USFS or BLM lands also require NEPA compliance on a case-by-case basis.

Comment (216): One commenter stated that the barred owl EIS should not be a separate analysis document from the NEPA analysis done for the critical habitat rule, but that a single EIS should be prepared to address the entire proposal.

Our Response: The barred owl EIS represents an action entirely separate from the present critical habitat rulemaking, and is an evaluation of an experiment stemming from the recommendations of the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011). The Federal action requiring NEPA for the barred owl EIS is the issuance of a permit under the Migratory Bird Treaty Act for the scientific collection of barred owls, as well as additional permits that may be required for the experiment. In contrast, the designation of critical habitat is a statutory requirement under the Act, and is an entirely separate action from the issuance of necessary permits for research, take, or special use. We have addressed the barred owl EIS as an ongoing action in the cumulative effects analysis section of the environmental assessment of this rulemaking.

Comment (217): Commenters believed that the Draft Environmental Assessment is predecisional because it has committed to completing the NEPA process in a preordained timeline that does not allow sufficient time to meet the NEPA requirements of an EIS.

Our Response: An EIS is required only when an action is determined to have likelihood of significant impact on the human environment. Completion of an environmental assessment is a step in the NEPA process to determine whether or not impacts of the Federal action are significant and thus require an EIS. We have not predetermined the outcome of our environmental assessment. Rather, we have used the environmental assessment to establish whether or not impacts of the designation of critical habitat for the northern spotted owl are significant. Although there is a court-ordered schedule for completion of this critical habitat rule, if our environmental assessment had determined that impacts were significant, we would have sought an extension of time to complete our NEPA analysis. Our environmental analysis was consistent with the spirit and intent of NEPA, and was not predecisional. Further, our experience of evaluating the possible effects of critical habitat under NEPA suggested that an environmental assessment was the appropriate place to start.

Comment (218): One commenter described errors in public scoping in that we did not disclose our purpose and need during the scoping process.

Our Response: Public scoping is not required for the development of an environmental assessment. As stated in the environmental assessment, we used internal scoping (internal discussions among Service divisions regionally and nationally, and among staff with long-term experience with land-use activities conducted within critical habitat on Federal and non-Federal lands) to identify concerns, potential impacts, relevant effects of past actions, and possible alternative actions (October 15, 2008; FR 73 61292).

Comment (219): One commenter described several errors and inaccuracies in defining the purpose and need. Specifically: (1) The stated purpose of achieving the greatest conservation and recovery for the northern spotted owl is erroneous and more than required to meet the Act, and is also too narrow, overly restricting the range of reasonable alternatives; (2) the court-ordered due date of November 15 does not drive the need but rather the need is whatever was the Service's motivation in arranging the date with the court; and (3) the purpose of complying with the Act is not a purpose but an agency duty.

Our Response: Regarding item number 1, the commenter only partially described the purpose. The full purpose stated in the draft environmental assessment was to ''achieve the greatest relative conservation and recovery goals for the northern spotted owl but simultaneously minimize effects to other land and resources uses.'' We disagree that the purpose, as a whole, is more than required to meet the Act. Rather, our intent is to designate lands meeting the definition of critical habitat (i.e., areas occupied at the time of listing that contain the features essential to the species' conservation or unoccupied areas that are themselves essential to the species' conservation), determining what is essential in a way that minimizes effects on resource uses to the extent possible, and then using the exclusion process provided by section 4(b)(2) of the Act to weigh the benefits of inclusion versus the benefits of exclusion. This is what we mean by using the term ''relative.'' This balance does not result in more action than is required to meet the provisions of the Act, and we have clarified this in the environmental assessment. Regarding item number 2, we did not mean to imply that the court deadline drives the need. The need is to revise critical habitat pursuant to a court-ordered remand of the 2008 designation (Carpenters' Industrial Council (CIC) v. Salazar, 734 F. Supp. 2d126 (D.D.C. 2010) * * *); we have clarified this point in the final environmental assessment, available at *http://www.regulations.gov* and at *http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/CriticalHabitat/default.asp.* Regarding item number 3, the purpose of an action proposed by the Service or any other Federal agency, based on common NEPA practice and Federal NEPA guidance includes but is not limited to statutory authority. The Service cannot carry out an action that is inconsistent with our authorities, hence our purpose explicitly included reference to those authorities.

Comment (220): One commenter believed there was an inadequate range of alternatives. Furthermore, they believed that the alternatives the Service noted in the draft environmental assessment as considered but not fully developed were not fully considered because there was no environmental review of these alternatives.

Our Response: NEPA requires that we must analyze those alternatives necessary to permit a reasoned choice (40 CFR 1502.14). When there are potentially a very large number of alternatives, NEPA requires that we analyze only a reasonable number to cover the full spectrum of alternatives that are consistent with the purpose and need. We did consider but excluded some modeling outcomes from further analysis. NEPA allows the elimination of an action alternative from detailed analysis for a variety of reasons including ineffectiveness, technical or economic infeasibility, inconsistency with management objectives of the area, remote or speculative implementation, and substantial similarity in design and effects of an alternative that has been analyzed. We disagree with the commenter in that NEPA does not require an ''environmental review'' of alternatives eliminated from detailed study, but rather, a brief discussion of the reasons for their having been eliminated (40 CFR 1502.16(a)). We have further clarified our reasons for eliminating these alternatives from further analysis in the final NEPA document.

Comment (221): One commenter believed we did not adequately identify the range of issues that could be affected by critical habitat designation. They further pointed out that limiting our analysis to threatened and endangered species and stating in the environmental assessment that it is not possible to analyze effects on the other 1,200 species is wrong because it is possible and has been done for such actions as the NWFP.

Our Response: Only potentially significant issues must be the focus of the environmental analysis. Issues that are not significant (i.e., related to potentially significant effects) can be eliminated from detailed study, ''narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment.'' (40 CFR 1501.7(a)(2), 40 CFR 1501.7(a)(3)). We have further elaborated in the final environmental assessment (available at *www.regulations.gov* and at *http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/CriticalHabitat/default.asp*) why we found that these issues will not have a significant effect on the human environment. Regarding our statement that it is not possible to analyze effects on 1,200 species given that such an analysis was done in the NWFP, we agree this was in error and will remove that language from the final environmental assessment. However, we do not find that this impels us to analyze effects on all 1,200 late-successional species. In the case of the NWFP, the intent of the revision to USFS and BLM land management plans was to provide comprehensive management of habitat for late-successional and old-growth forest species. Thus, it was prudent to examine those species as part of the NWFP analysis. We do not believe that such a level of analysis is necessary for this purpose and have thus limited our analysis to effects on listed species to ensure critical habitat designation does not reduce their potential for recovery.

Comment (222): Three commenters believed the analysis failed to disclose that current habitat set-asides have not produced measurable success in northern spotted owl recovery, and that expanding critical habitat will also fail because barred owls are the primary causal factor in the northern spotted owl decline. On a related topic, one commenter felt the environmental assessment failed to describe how the proposed action would lead to recovery and why other alternatives would not.

Our Response: Threats to northern spotted owls are described in the Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011) as habitat loss and competition from the barred owl. We acknowledge in this rule and the final environmental assessment that we need to address both of these threats if we are to recover the northern spotted owl. As to the need to describe how the proposed action would lead to recovery while other alternatives would not, we do not need to show that alternatives not chosen would not lead to recovery; we merely need to disclose the effects of each alternative on the relevant issues, in this case, primarily northern spotted owl populations, to provide information to decisionmakers. Recovery of northern spotted owls will require addressing multiple issues, of which habitat loss is only one and will be partly addressed through critical habitat designation.

Comment (223): One commenter noted we did not analyze the effects of eliminating LSRs as part of the critical habitat designation.

Our Response: This comment is based on a misunderstanding of the critical habitat designation, which does not eliminate the Late-Successional Reserve Network of the Northwest Forest Plan.

Comment (224): One commenter believed we failed to fully disclose the existing regulatory structure, and also failed to fully disclose the disincentives to landowners to retain habitat, resulting in the potential elimination of northern spotted owl habitat.

Our Response: We noted in the draft environmental assessment the potential for landowners to prematurely harvest existing habitat, maintain shorter harvest rotations, or change from forest management to development. We received several comments from landowners indicating their intention to deforest their property if designated as critical habitat. We acknowledge that possibility for some landowners in the final environmental assessment (available at *www.regulations.gov* and at *http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/CriticalHabitat/default.asp*) based on these comments, but cannot describe the extent or degree of these effects based on the comments we received. We also note that, in our preferred alternative, all private lands were excluded from this designation.

Comment (225): One commenter disagreed with what effects we considered speculative and not reasonably foreseeable, and believed we are obligated to display environmental consequences of potential effects even if actual outcomes are unknown.

Our Response: DOI NEPA regulations define reasonably foreseeable future action as, ''activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These Federal and non-Federal activities that must be taken into account include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite.'' 43 CFR 46.30. We contend that the actions we consider not reasonably foreseeable meet this definition.

Comment (226): Two commenters indicated we failed to examine cumulative and connected actions in an economic and social context.

Our Response: We have completed an economic analysis that addresses economic and social aspects of the designation of critical habitat. In addition, the Council on Environmental Quality's implementing regulations indicate that economic and social effects are not by themselves intended to require preparation of an EIS, but should be considered if an EIS is prepared (40 CFR 1508.14). Our purpose in preparing an environmental assessment was to determine whether an EIS should be prepared. Because we determined that the critical habitat revision resulted in a finding of no significant impact (FONSI), it was determined that an EIS was not necessary to evaluate social and economic impacts.

Comment (227): One commenter noted we failed to analyze the economic effects of the northern spotted owl listing decision as a cumulative and connected action of critical habitat designation.

Our Response: We agree that the environmental assessment should consider all relevant cumulative effects, which may include the effects of past actions, as necessary to determine whether a finding of no significant impact is warranted. One element of that determination is ''[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.'' 40 CFR 1508.27(b)(7). As discussed in the previous comment, ''human environment'' is defined to include the natural and physical environment and the relationship of people with that environment except that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. 40 CFR 1508.14. In this environmental assessment we have considered the potential effects of the designation added to other past, present, and reasonably foreseeable future actions that would affect the identified resources of concern to determine whether this would result in significant

impacts to the human environment as defined for purposes of an environmental assessment. We have added the past action of listing the northern spotted owl to our cumulative effects analysis and considered those effects on the resources of concern identified in the environmental assessment.

Comment (228): One commenter contended that just because future action will undergo NEPA analysis does not relieve the Service of its NEPA duty to analyze the effects of the critical habitat proposal.

Our Response: We can analyze the indirect effects of the critical habitat designation only to the degree that we are reasonably certain of the actions that may occur within critical habitat, how they might be modified as a result of the section 7 process, and what the environmental impacts of those modifications might be. To that end, we have met our NEPA obligation. As individual Federal actions are developed with more information on location, activity type, magnitude, duration, and intensity, all things we cannot assess at this point in time, those actions will be subject to NEPA and analyzed in further detail.

Comment (229): One commenter believed it was incorrect for the Service to assume agencies will implement 100% of actions in the recovery plan [Revised Recovery Plan for the Northern Spotted Owl (USFWS 2011)] and that we must assume agencies will implement NWFP requirements without further matrix restrictions.

Our Response: We have included as part of our range of possible outcomes the possibility that agencies will implement only the NWFP requirements, without implementing any additional recovery plan actions that may restrict actions in the matrix. However, we believe that is not the only possible scenario, given that we have examples of agencies implementing discretionary actions from the northern spotted owl recovery actions that are in addition to the Standards and Guidelines of the NWFP.

XIII. 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 Office of Information and Regulatory Affairs has determined that this rule is significant because it will raise novel legal or policy issues.

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 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.

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; and small businesses (13 CFR 121.201). 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 forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine if potential economic impacts to small entities may result from this designation, and whether these potential impacts may be significant, we considered the types of activities that might trigger regulatory impacts under this designation 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.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect 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 regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, E.O.'s 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

We acknowledge that in some cases, third-party proponents of the action subject to permitting or funding, though not directly regulated, may participate in a section 7 consultation with the Federal action agency. Moreover, E.O.'s 12866 and 13563 direct Federal agencies to assess all costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and

qualitative terms. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While the Service does not consider this regulation to directly regulate these entities, in our draft economic analysis, we have conducted an evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the potential incremental effects of this rule in the context of the RFA. As discussed earlier in our March 8, 2012, proposed rule (77 FR 14062), our notice of availability of the draft economic analysis (77FR 32483; June 1, 2012), and in the draft economic analysis itself, we determined that the incremental effects of this revised designation are relatively small due to the extensive conservation measures already in place for the species, due to its being listed under the Act, and because of measures provided under the NWFP and other conservation programs. The FEA affirms these conclusions, and we have determined that these conclusions are applicable to this final revised designation of critical habitat for the northern spotted owl. Thus, even taking into account those entities not directly regulated, we certify that the revised designation of critical habitat for the northern spotted owl will not have a significant economic impact on a substantial number of small entities.

Importantly, the incremental regulatory and economic impacts of the rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of a regulatory flexibility analysis. If a substantial number of small entities are affected by the critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify. Because per-entity impacts are currently uncertain, our evaluation focused on the number of small entities potentially affected as third parties to consultation with Federal agencies that may be directly regulated by the designation

While developing our draft economic analysis (DEA), we determined that there may be third-party participants to consultations involved with timber harvest and linear projects. In estimating the potential number of entities involved with consultations on timber harvest, we used the projection of 1,000 consultations over the 20-year time horizon of the DEA related to timber harvest management, providing an assumption of 50 consultations per year. We predict that many of these consultations will not involve third parties, but data is lacking about third-party participation rates. For the sake of our evaluation, we took a more inclusive approach and assumed that third parties are involved with these consultations and that each party is a small entity, providing an annual estimate of 50 small entities that may be involved over the 20-year time horizon of the study. This is likely an overestimate of the number of third parties involved with timber management consultations and therefore an even greater overestimate of the number of small entities involved because many of those third parties will not be small entities. The DEA further explored the projection of small businesses in timber-related sectors in the geographic areas overlapping the critical habitat designation, which differed depending on the specific data sets used, either 7,140 entities or 2,616 entities. Using our conservative estimate of 50 small entities involved annually, the proportion of entities in the timber harvest management sector potentially impacted by the designation would be 0.70 percent and 1.9 percent, respectively, over the 20-year time horizon of the study.

The RFA does not explicitly define the specific proportion of any given sector that would represent a substantial number, but leave that determination to the discretion of the agency issuing the regulation. While the Service or the Department of Interior does not have a specific policy concerning what proportion of any given sector impacted would represent a substantial number, the Service, as a matter of practice, uses a value of 3% to evaluate whether the regulation may impact a substantial number. In other words, if a regulation is determined to have an impact on less than 3% of entities in a given sector, then the agency makes a determination that a substantial number is not affected. Whereas, if it is determined that the proportion of entities impacted by a given regulation is equal to or greater than 3%, then the agency further evaluates available data to make a specific determination for that regulation.

Applying the aforementioned criteria to the specific proportion of the timber harvest management sector, we have concluded that these proportions do not represent a substantial number of small business entities potentially affected in the timber harvest management sector. Please refer to Appendix A of the FEA for further details of our evaluation.

Next, we explored the potential impact to third parties that may be involved with consultations related to linear projects (i.e., roads, pipelines, and powerlines). On the basis of similar conservative assumptions explained in the DEA, we concluded that there may be a total of 11 projects in a given year that may involve third parties. If we similarly assume that each of these parties represent small entities, then we estimate that 11 small entities in a given year could be impacted by the designation. While there is greater uncertainty as to the number of small entities involved with linear projects, we believe that the relative proportion these 11 entities represent is unlikely to constitute a substantial number. Further, the projected impacts to third parties resulting from the consultations on linear projects are anticipated to be solely administrative in nature. Thus, even with the uncertainty as to whether the proportion of entities potentially effected is may be substantial (although we think that it is not), we have determined that the potential impacts to these entities would not be significant as they would only be the result of additional administrative costs, which are relatively minor. Therefore, based on our conservative estimates in identifying third parties in this sector that potentially may be impacted, the projected number of entities and types of impacts, we concluded that the designation would not result in a significant impact to a substantial number of small business entities in this sector.

These conclusions were reaffirmed in our FEA. Please refer to Appendix A of the FEA for further details of our evaluation. In development of the final economic analysis (FEA) and taking into consideration all information and comments received, and based on our conservative evaluation of the number of entities in the timber management and linear project sectors potentially impacted, the proportion of the affected entities to those representing the sector in the study area, and the types of impacts, we again determined that the revised critical habitat designation will not have a significant economic impact on a substantial number of small business entities. In Appendix A of the FEA, we acknowledge that the primary economic impact of the project modifications resulting from the consultations described above is a change in Federal revenues generated by timber sales. In other words, if harvests are increased or decreased as a result of the designation, the USFS and BLM will

receive more or less revenues, respectively, from the sale of this timber. However, these Federal agencies are not, as noted, small businesses. Furthermore, entities bidding for new timber sales on Federal lands would not incur costs as a result of this critical habitat designation because they will only pay for the value of the sale after any modifications are made as part of the section 7 consultation process. In other words, any impact of this regulation on those entities would be indirect.

In the FEA, we evaluated the potential indirect economic effects on small business entities resulting from conservation actions related to the listing of the northern spotted owl and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking, as described in Chapters 4 through 8 and Appendix A of the analysis, and evaluates the potential for economic impacts related to: (1) Timber management, (2) barred owl management, (3) northern spotted owl surveys and monitoring, (4) fire management, (5) linear projects (i.e., roads, pipelines, and powerlines), (6) restoration, (7) recreation, and (8) administrative costs associated with consultations under section 7 of the Act.

With respect to Federal lands, consultations with Federal land managers, the Service, and other experts indicate varying opinions regarding potential critical habitat effects on timber management practices, and noted the difficulty and limitations of deriving precise measures of positive or negative incremental change. Therefore, the FEA considered three alternative scenarios, which are described in Chapter 4 and summarized in Exhibit ES–4 of the FEA. These scenarios include: (1) Administrative costs only; (2) potential positive incremental impacts to timber harvest on Federal lands; and (3) potential negative incremental impacts to timber harvest on Federal lands. Furthermore, the economic analysis presents a potential low impact and high impact outcome for each of the three scenarios. Thus under the positive impact scenario, the estimated annualized *increase* in timber harvest revenue on Federal lands range from $1,230,000 to $3,070,000. Under the negative impact scenario, the annualized *decrease* in timber harvest revenue on Federal lands ranges $2,460,000 to $614,000,000. In all three scenarios, the estimated annualized administrative costs on Federal lands are from $185,000 to $316,000.

In response to public comment, a sensitivity analysis was performed on the baseline timber harvest projections, to better inform the alternative impact scenarios in the FEA. The economic analysis uses a baseline harvest projection of approximately 122.80 million board feet (MMBF) per year. In the sensitivity analyses, the baseline timber harvest projection increases by up to an additional 27.99 MMBF per year. Therefore, the range of incremental impacts to Federal timber harvest widens from a potential increase in stumpage value of $3,580,000 (under the increased timber harvest scenario) to a potential decrease of $7,860,000 (under the decreased timber harvest scenario) per year.

In addition, Exhibit ES–4 of the FEA presents our qualitative conclusions concerning potential timber harvest impacts to private lands, and notes that there may be possible negative impacts associated with regulatory uncertainty, and new regulation in the State of Washington, and concludes that zero timber harvest impacts are likely to occur on State lands. Finally, Exhibit ES–4 notes the potential incremental administrative costs related to linear projects, which are estimated to be between $10,800 on the low end and $19,500 on the high end.

The FEA also confirms our conclusion that between less than one percent and two percent of potentially effected small entities in the 56 county study area may participate as third parties in section 7 consultations related to timber harvests on an annual basis. In addition, approximately 11 electricity transmission or natural gas pipeline companies may participate in section 7 consultations in a given year. While we believe that this number does not represent a significant proportion of entities in this sector, the impacts to these entities are expected not to be significant as they are anticipated to be solely administrative in nature.

The FEA also explains that these estimates almost certainly overstate rather than understate the number of affected entities, perhaps to a significant degree, because: (1) Not all section 7 consultations will involve a third party; (2) not all third parties will be small entities; and (3) the same entity may consult more than once in a single year. We have also constrained the population of potentially affected entities to those found in counties overlapping critical habitat, as opposed to including others within the States of Washington, Oregon, and California. In addition, as described elsewhere in this rule, the greatest impact of section 7 will likely occur in unoccupied habitat, due to the fact that consultation would already occur in occupied habitat due to the presence of the listed species. We estimate that the vast majority of the areas being designated in this rule were occupied at the time of listing.

Finally, our analysis of potential impacts to small entities is overestimated because it was based on the proposed designation, which has been reduced by 4,197,484 ac (1,697,903 ha) in this final rule. Designated Federal lands are reduced by 2,849,745 ac (1,151,297 ha) due to the elimination of lands that we have determined do not meet the definition of critical habitat, the exemption of DOD lands under section 4(a)(3) of the Act, and the exclusion of Congressionally-reserved lands under section 4(b)(2) of the Act. Designated State and private lands are reduced by 1,647,170 ac (665,843 ha) due to the elimination of some lands that do not meet the definition of critical habitat and the exclusion of State parks and private lands under section 4(b)(2) of the Act.

In summary, we considered whether this designation would result in a significant economic impact on a substantial number of small entities. Based on the above reasoning, relevant case law, and currently available information, we concluded that this rule will not result in a significant economic impact on a substantial number of small entities. We are reaffirming our certification that this revised designation of critical habitat for the northern spotted owl 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. While this final rule to designate revised critical habitat for the northern spotted owl is a significant regulatory action under Executive Order 12866, it 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 Indian 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 Indian 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 Indian 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 Indian 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 have determined that this rule will not significantly or uniquely affect small governments because the designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required. Further, 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.

Takings (Executive Order 12630)

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the northern spotted owl in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding or 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 takings implications assessment concludes that this designation of critical habitat for the northern spotted owl 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), we have determined that this rule does not have direct federalism implications that would require a federalism summary impact statement; however, we are aware of the State-level interest in this rule, and we both summarize below and explain in more detail in other parts of this package activities and responsibilities on Federal, State, and private lands.

From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. As explained in detail earlier, section 7(a)(2) of the Act requires Federal agencies—and only Federal agencies—to ensure that the actions they authorize, fund, or carry out are not likely to destroy or adversely modify critical habitat. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. However, in keeping with Department of the Interior and Department of Commerce policy and the federalism principles set forth in Executive Order 13132, we requested information from, and coordinated development of, this revised critical habitat designation with appropriate State resource agencies in Washington, Oregon, and California, on the effects of revised designation of critical habitat. We received comments from the Washington State Department of Natural Resources, Washington Department of Fish and Wildlife, Oregon Department of Forestry, the State of Oregon, and California Department of Forestry and Fire Protection (CALFIRE), as discussed in the Summary of Comments and Responses section of the rule, above. In addition, we received comments from the following counties:

- Washington: Jefferson County, Klickitat County, Skamania County, and Skagit County;
- Oregon: Hood River County, Jackson County, Linn County, Douglas County, and the Association of O&C Counties; and
- California: Del Norte County, Tehama County, Regional Council of Rural Counties, Siskiyou County, and Trinity County.

We used this information to more thoroughly evaluate the probable economic and regulatory effects of the proposed designation in our final economic analysis, to inform the development of our final rule, and to consider the appropriateness of excluding specific areas from the final rule. We found that the revised designation of critical habitat for the northern spotted owl has little incremental impact on State and local governments and their activities.

The revision of critical habitat also is not expected to have substantial indirect impacts. As explained in more detail above, activities within the areas proposed to be designated as critical habitat are already subject to a broad range of requirements, including: (1) The various requirements of the Northwest Forest Plan, including those

applicable to its Late-successional Reserves, Riparian Reserves, and ''survey and manage'' restrictions; (2) the prohibition against ''taking'' northern spotted owls under sections 4(d) and 9 of the Act; (3) the prohibition against Federal agency actions that jeopardize the continued existence of the northern spotted owl under section 7(a)(2) of the Act; (4) the prohibition against taking other federally listed species that occur in the area of the designated critical habitat (e.g., salmon, bull trout, and marbled murrelets); and (5) the prohibition against Federal agency actions that jeopardize the continued existence of such other listed species. All of these requirements are currently in effect and will remain in effect after the final revision of critical habitat.

Some indirect impacts of the rule on States are, of course, possible. Section 7(a)(2) of the Act requires Federal agencies (action agencies) to consult with the Service whenever activities that they undertake, authorize, permit, or fund may affect a listed species or designated critical habitat. States or local governments may be indirectly affected if they require Federal funds or formal approval or authorization from a Federal agency as a prerequisite to conducting an action. In such instances, while the primary consulting parties are the Service and the Federal action agency, State and local governments may also participate in section 7 consultation as an applicant. It is therefore possible that States may be required to change project designs, operation, or management of activities taking place within the boundaries of the designation in order to receive Federal funding, assistance, permits, approval, or authorization from a Federal agency. Also, to the extent that the designation of critical habitat affects timber harvest amounts on Federal land, county governments that receive a share of the receipts from such harvests may be affected. However, 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.

On the other hand, the designation of critical habitat will likely have some benefit to State and local governments because 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. It may also assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

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 requirements of sections 3(a) and 3(b)(2) of the Order. We have revised critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* in connection with designating critical habitat under the Act for the reasons outlined in a notice published in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (in a challenge to the first rulemaking designating critical habitat for the northern spotted owl. *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

However, at our discretion, we undertook an environmental assessment for this revised critical habitat designation, and notified the public of the availability of the draft environmental assessment for the proposed rule, for review and comment. We took all substantive comments into consideration, both to make revisions or corrections in the environmental assessment, and in the decisionmaking process made in finalizing the determination. In our final environmental assessment, we were able to make a finding of no significant impact (FONSI) from this rulemaking action. The final environmental assessment is available at *www.regulations.gov* and at *http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/CriticalHabitat/default.asp.*

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (November 6, 2000, and as reaffirmed November 5, 2009), 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. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination, and recognizes the need to consult with tribal officials when developing regulations that have tribal implications. 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 Indian 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. Even though we have determined that there are no Indian lands that meet the definition of critical habitat for the northern spotted owl, and therefore no Indian lands are included in this designation, we will continue to coordinate and consult with tribes regarding resources within the revised designation that are of cultural significance to them.

XIV. References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Oregon Fish

and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Oregon Fish and Wildlife 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—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. Amend § 17.95(b) by revising the critical habitat entry for ''Northern Spotted Owl *(Strix occidentalis caurina)*'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Northern Spotted Owl *(Strix occidentalis caurina)*

(1) Critical habitat units are depicted for the States of Washington, Oregon, and California on the maps below.

(2) Critical habitat for the northern spotted owl includes the following four primary constituent elements set forth in paragraph (2)(i) (primary constituent element 1) through paragraph (2)(iv) (primary constituent element 4) of this entry. Each critical habitat unit must include primary constituent element 1 and primary constituent element 2, 3, or 4:

(i) Primary constituent element 1: Forest types that may be in early-, mid-, or late-seral stages and that support the northern spotted owl across its geographical range. These forest types are primarily:

(A) Sitka spruce;

(B) Western hemlock;

(C) Mixed conifer and mixed evergreen;

(D) Grand fir;

(E) Pacific silver fir;

(F) Douglas-fir;

(G) White fir;

(H) Shasta red fir;

(I) Redwood/Douglas-fir (in coastal California and southwestern Oregon); and

(J) The moist end of the ponderosa pine coniferous forest zones at elevations up to approximately 3,000 ft (900 m) near the northern edge of the range and up to approximately 6,000 ft (1,800 m) at the southern edge.

(ii) Primary constituent element 2: Habitat that provides for nesting and roosting. In many cases the same habitat also provides for foraging (primary constituent element (3)). Nesting and roosting habitat provides structural features for nesting, protection from adverse weather conditions, and cover to reduce predation risks for adults and young. This primary constituent element is found throughout the geographical range of the northern spotted owl, because stand structures at nest sites tend to vary little across the northern spotted owl's range. These habitats must provide:

(A) Sufficient foraging habitat to meet the home range needs of territorial pairs of northern spotted owls throughout the year; and

(B) Stands for nesting and roosting that are generally characterized by:

(1) Moderate to high canopy cover (60 to over 80 percent).

(2) Multilayered, multispecies canopies with large (20–30 inches (in) (51–76 centimeters (cm)) or greater diameter at breast height (dbh)) overstory trees.

(3) High basal area (greater than 240 ft^2/acre; 55 m^2/ha).

(4) High diversity of different diameters of trees.

(5) High incidence of large live trees with various deformities (e.g., large cavities, broken tops, mistletoe infections, and other evidence of decadence).

(6) Large snags and large accumulations of fallen trees and other woody debris on the ground.

(7) Sufficient open space below the canopy for northern spotted owls to fly.

(iii) Primary constituent element 3: Habitat that provides for foraging, which varies widely across the northern spotted owl's range, in accordance with ecological conditions and disturbance regimes that influence vegetation structure and prey species distributions. Across most of the owl's range, nesting and roosting habitat is also foraging habitat, but in some regions northern spotted owls may additionally use other habitat types for foraging as well. The foraging habitat PCEs for the four ecological zones within the geographical range of the northern spotted owl are generally the following:

(A) *West Cascades/Coast Ranges of Oregon and Washington.*

(1) Stands of nesting and roosting habitat; additionally, owls may use younger forests with some structural characteristics (legacy features) of old forests, hardwood forest patches, and edges between old forest and hardwoods.

(2) Moderate to high canopy cover (60 to over 80 percent).

(3) A diversity of tree diameters and heights.

(4) Increasing density of trees greater than or equal to 31 in (80 cm) dbh increases foraging habitat quality (especially above 12 trees per ac (30 trees per ha)).

(5) Increasing density of trees 20 to 31 in (51 to 80 cm) dbh increases foraging habitat quality (especially above 24 trees per ac (60 trees per ha)).

(6) Increasing snag basal area, snag volume (the product of snag diameter, height, estimated top diameter, and including a taper function), and density of snags greater than 20 in (50 cm) dbh all contribute to increasing foraging habitat quality, especially above 10 snags/ha.

(7) Large accumulations of fallen trees and other woody debris on the ground.

(8) Sufficient open space below the canopy for northern spotted owls to fly.

(B) *East Cascades.*

(1) Stands of nesting and roosting habitat.

(2) Stands composed of Douglas-fir and white fir/Douglas-fir mix.

(3) Mean tree size (quadratic mean diameter greater than 16.5 in (42 cm)).

(4) Increasing density of large trees (greater than 26 in (66 cm)) and increasing basal area (the cross-sectional area of tree boles measured at breast height), which increases foraging habitat quality.

(5) Large accumulations of fallen trees and other woody debris on the ground.

(6) Sufficient open space below the canopy for northern spotted owls to fly.

(C) *Klamath and Northern California Interior Coast Ranges.*

(1) Stands of nesting and roosting habitat; in addition, other forest types with mature and old-forest characteristics.

(2) Presence of conifer species such as incense-cedar, sugar pine, and Douglas-fir and hardwood species such as bigleaf maple, black oak, live oaks, and madrone, as well as shrubs.

(3) Forest patches within riparian zones of low-order streams and edges between conifer and hardwood forest stands.

(4) Brushy openings and dense young stands or low-density forest patches within a mosaic of mature and older forest habitat.

(5) High canopy cover (87 percent at frequently used sites).

(6) Multiple canopy layers.

(7) Mean stand diameter greater than 21 in (52.5 cm).

(8) Increasing mean stand diameter and densities of trees greater than 26 in (66 cm) increases foraging habitat quality.

(9) Large accumulations of fallen trees and other woody debris on the ground.

(10) Sufficient open space below the canopy for northern spotted owls to fly.

(D) *Redwood Coast.*

(1) Nesting and roosting habitat; in addition, stands composed of hardwood tree species, particularly tanoak.

(2) Early-seral habitats 6 to 20 years old with dense shrub and hardwood cover and abundant woody debris; these habitats produce prey, and must occur in conjunction with nesting, roosting, or foraging habitat.

(3) Increasing density of small-to-medium sized trees (10 to 22 in; 25 to 56 cm), which increases foraging habitat quality.

(4) Trees greater than 26 in (66 cm) in diameter or greater than 41 years of age.

(5) Sufficient open space below the canopy for northern spotted owls to fly.

(iv) Primary constituent element 4: Habitat to support the transience and colonization phases of dispersal, which in all cases would optimally be composed of nesting, roosting, or foraging habitat (PCEs 2 or 3), but which may also be composed of other forest types that occur between larger blocks of nesting, roosting, and foraging habitat. In cases where nesting, roosting, or foraging habitats are insufficient to provide for dispersing or nonbreeding owls, the specific dispersal habitat PCEs for the northern spotted owl may be provided by the following:

(A) Habitat supporting the transience phase of dispersal, which includes:

(1) Stands with adequate tree size and canopy cover to provide protection from avian predators and minimal foraging opportunities; in general this may include, but is not limited to, trees with at least 11 in (28 cm) dbh and a minimum 40 percent canopy cover; and

(2) Younger and less diverse forest stands than foraging habitat, such as even-aged, pole-sized stands, if such stands contain some roosting structures and foraging habitat to allow for temporary resting and feeding during the transience phase.

(B) Habitat supporting the colonization phase of dispersal, which is generally equivalent to nesting, roosting and foraging habitat as described in PCEs 2 and 3, but may be smaller in area than that needed to support nesting pairs.

(3) Critical habitat does not include:

(i) manmade structures (such as buildings, aqueducts, runways, roads, other paved areas, or surface mine sites) and the land on which they are located; and

(ii) meadows, grasslands, oak woodlands, or aspen woodlands as described below existing on January 3, 2013 and not containing primary constituent elements 1 and 2, 3, or 4 as described in paragraph (2) of this entry.

(A) Meadows and grasslands include: dry, upland prairies and savannas in valleys and foothills of western Washington, Oregon, and northwest California; subalpine meadows; and grass and forb dominated cliffs, bluffs and grass balds found throughout these same areas. These areas are dominated by native grasses and diverse forbs, and may include a minor savanna component of Oregon white oak, Douglas-fir, or Ponderosa pine.

(B) Oak woodlands are characterized by an open canopy dominated by Oregon white oak. These areas may also include ponderosa pine, California black oak, Douglas-fir, or canyon live oak. The understory is relatively open with shrubs, grasses and wildflowers. Oak woodlands are typically found in drier landscapes and on south-facing slopes. This exception for oak woodlands does not include tanoak (*Notholithocarpus densiflorus*) stands, closed-canopy live oak (*Quercus agrifolia*) woodlands and open-canopied valley oak (*Quercus lobata*) and mixed-oak woodlands in subunits ICC–6 and RDC–5 in Napa, Sonoma, and Marin Counties, California.

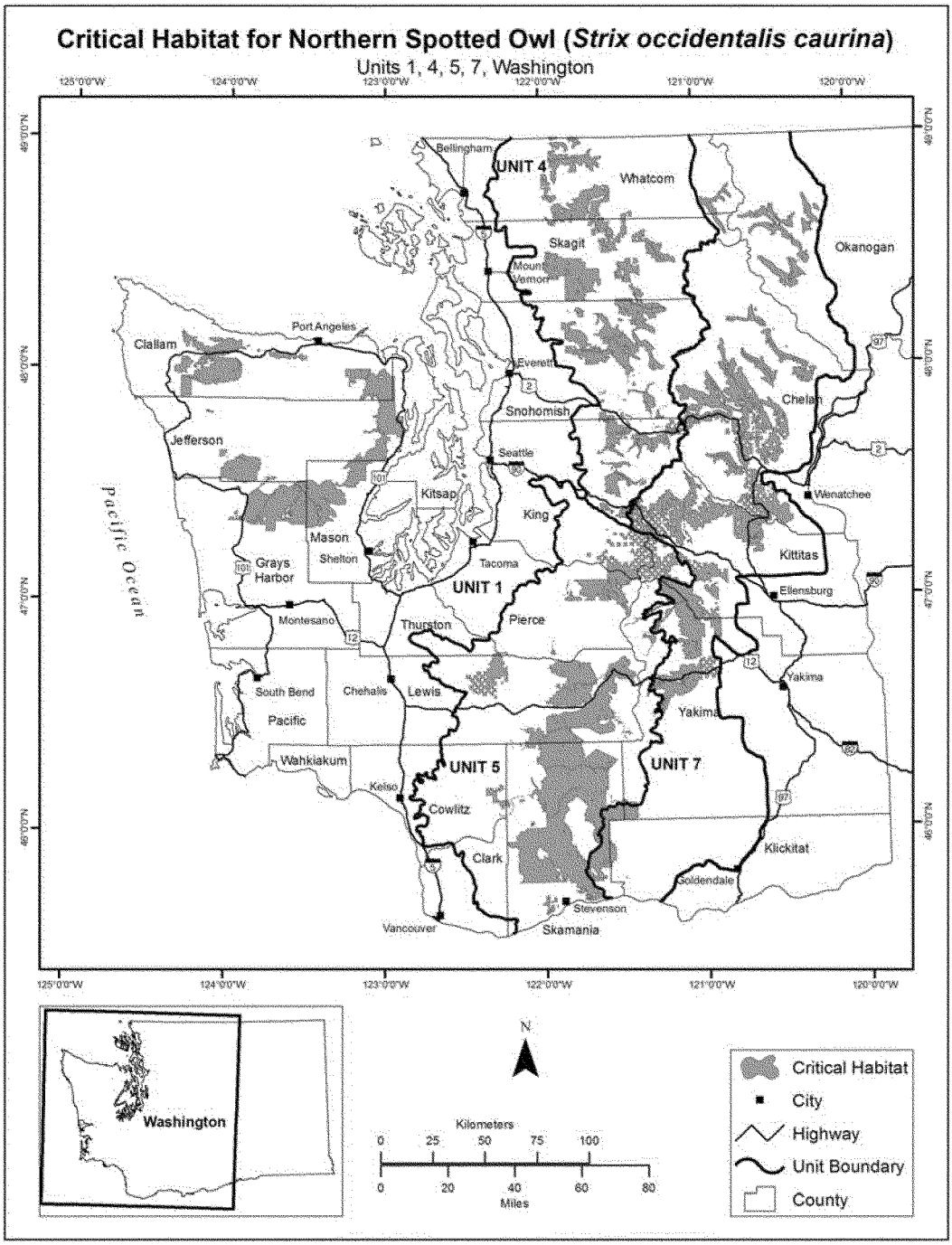
(C) Aspen (*Populus* spp.) woodlands are dominated by aspen trees with a forb, grass or shrub understory and are typically found on mountain slopes, rock outcrops and talus slopes, canyon walls, and some seeps and stream corridors. This forest type also can occur in riparian areas or in moist microsites within drier landscapes.

(4) We have determined that the physical and biological features in habitat occupied by the species at the time it was listed, as represented by the primary constituent elements, may require special management considerations or protection as required by 16 U.S.C. 1532(5)(A). However, nothing in this rule requires land managers to implement, or precludes land managers from implementing, special management or protection measures.

(5) *Critical habitat map units.* The designated critical habitat units for the northern spotted owl are depicted on the maps below. The coordinates or plot points or both on which each map is based are available at the field office Internet site (*http://www.fws.gov/oregonfwo*), *http://www.regulations.gov* at Docket No. FWS–R1–ES–2011–0112, and at the Service's Oregon Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(6) **Note:** Index map of critical habitat units for the northern spotted owl in the State of Washington follows:

Index Map of Critical Habitat Units in the State of Washington



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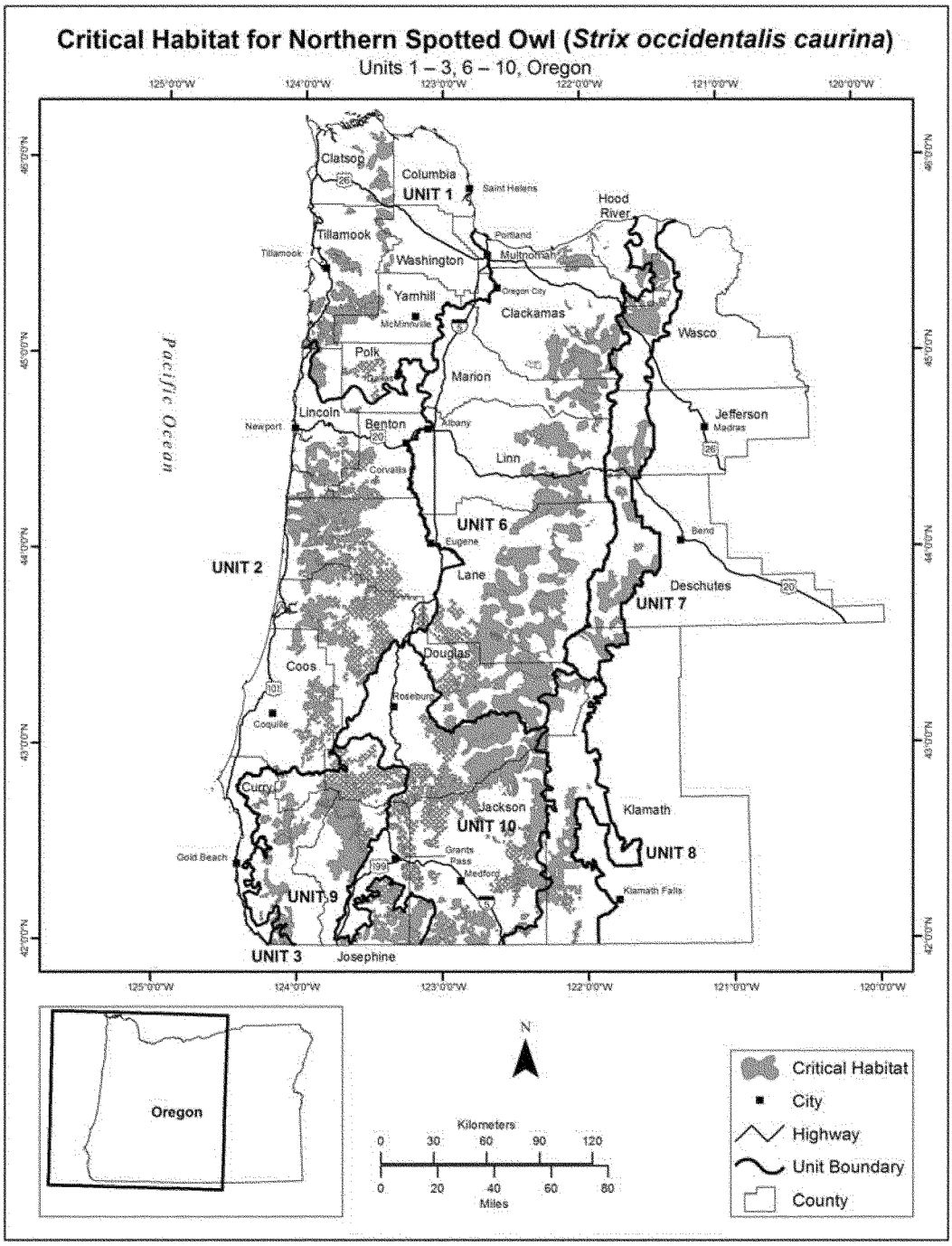
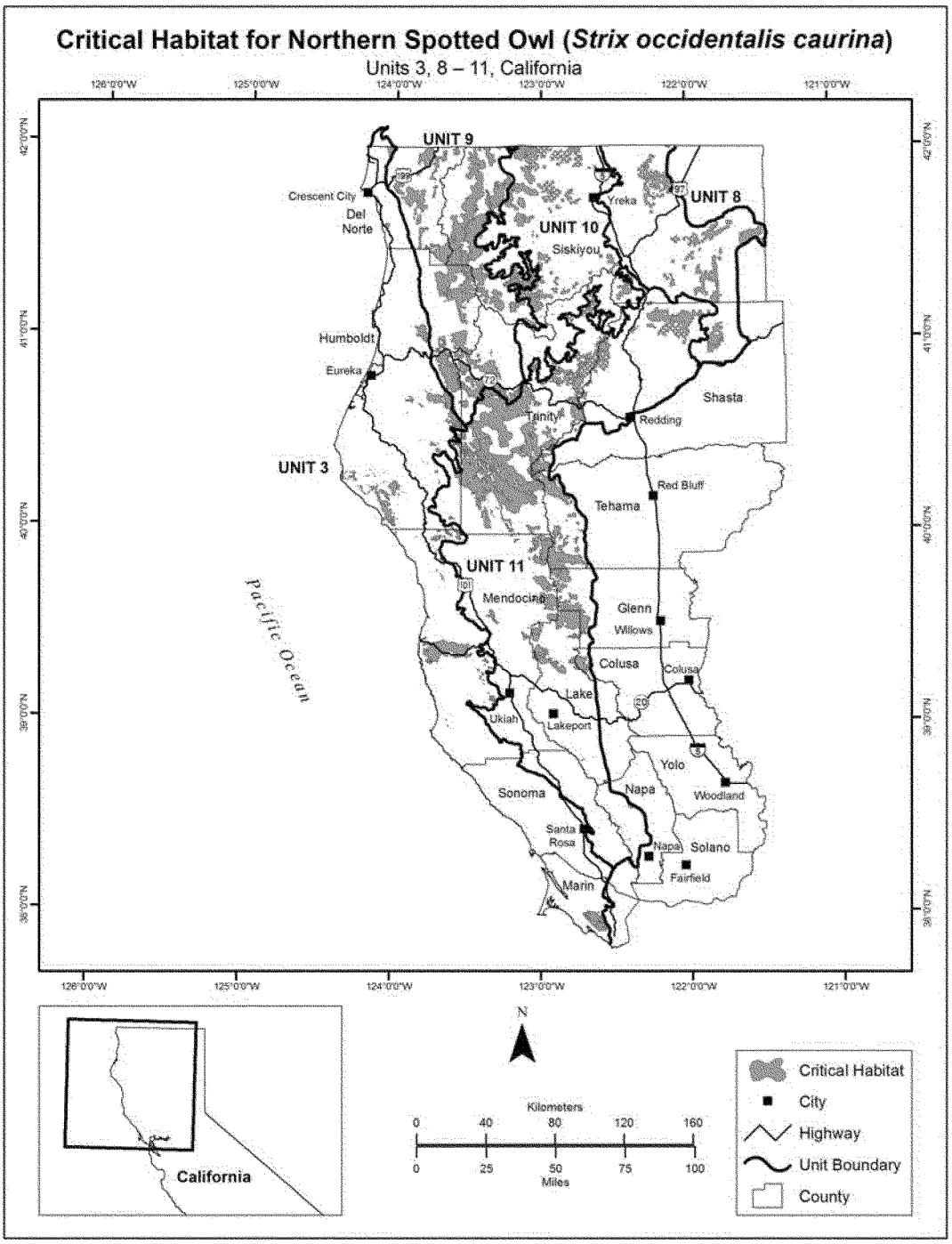
(7) **Note:** Index map of critical habitat units for the northern spotted owl in the State of Oregon follows:

Index Map of Critical Habitat Units in the State of Oregon

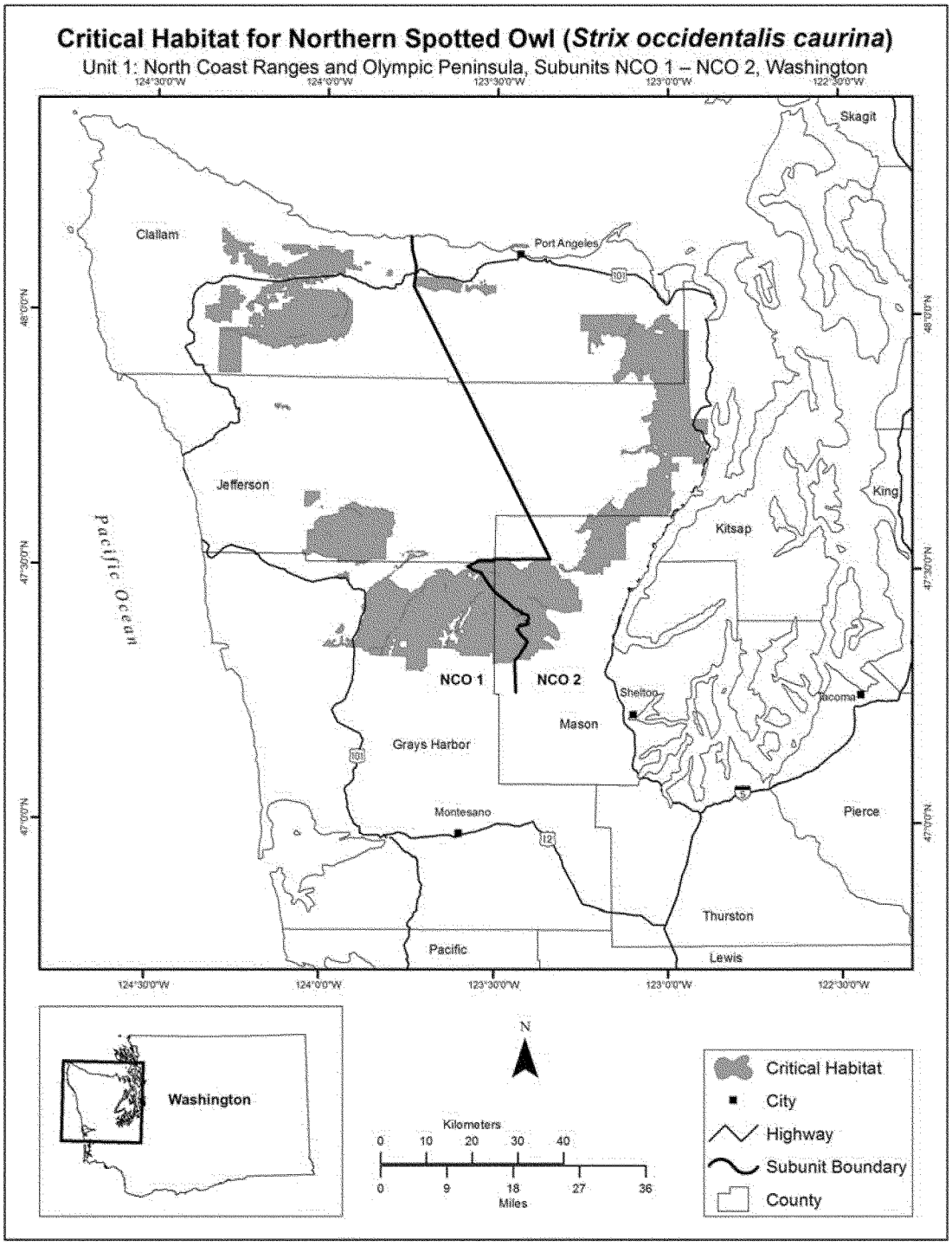


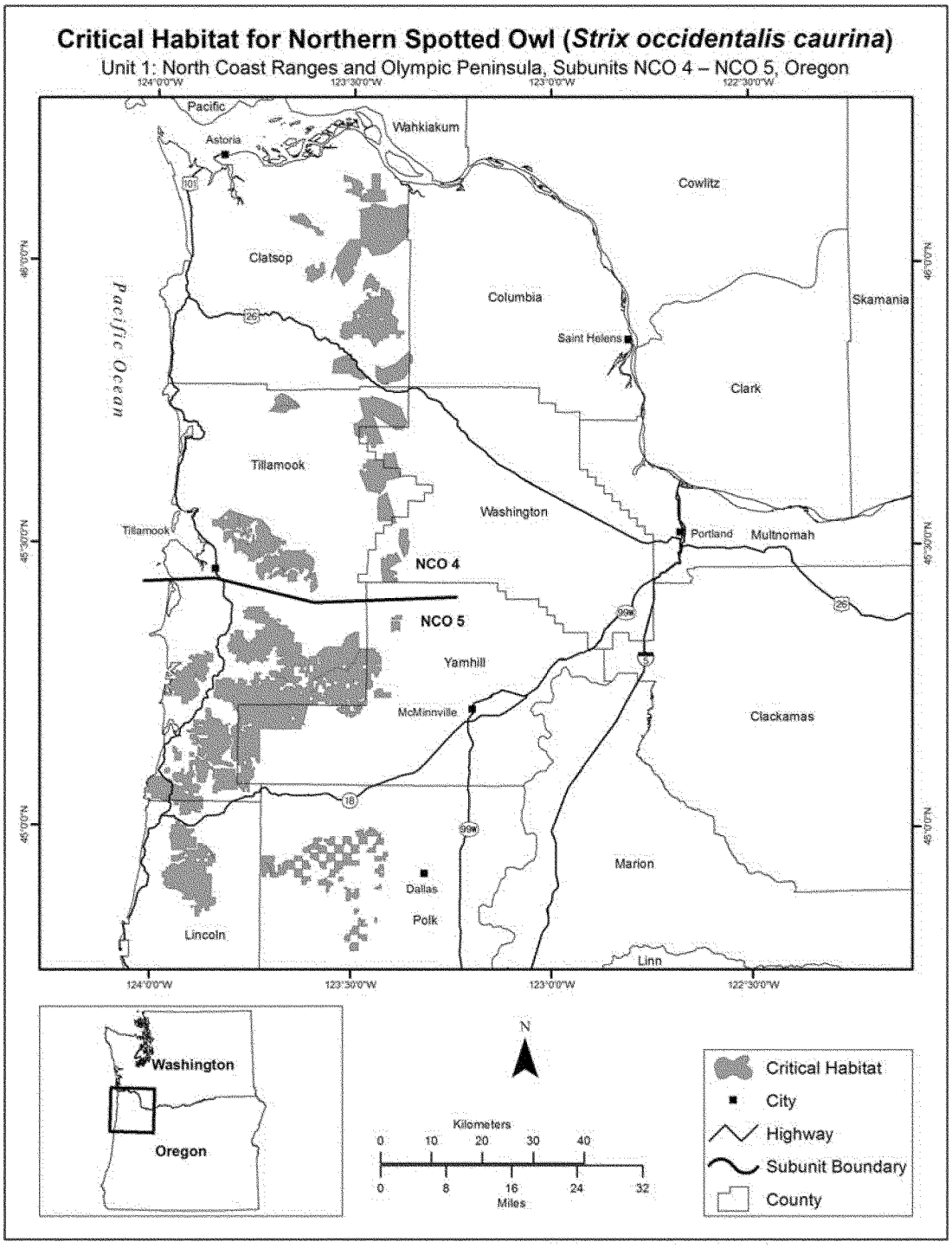
(8) **Note:** Index map of critical habitat units for the northern spotted owl in the State of California follows:

Index Map of Critical Habitat Units in the State of California

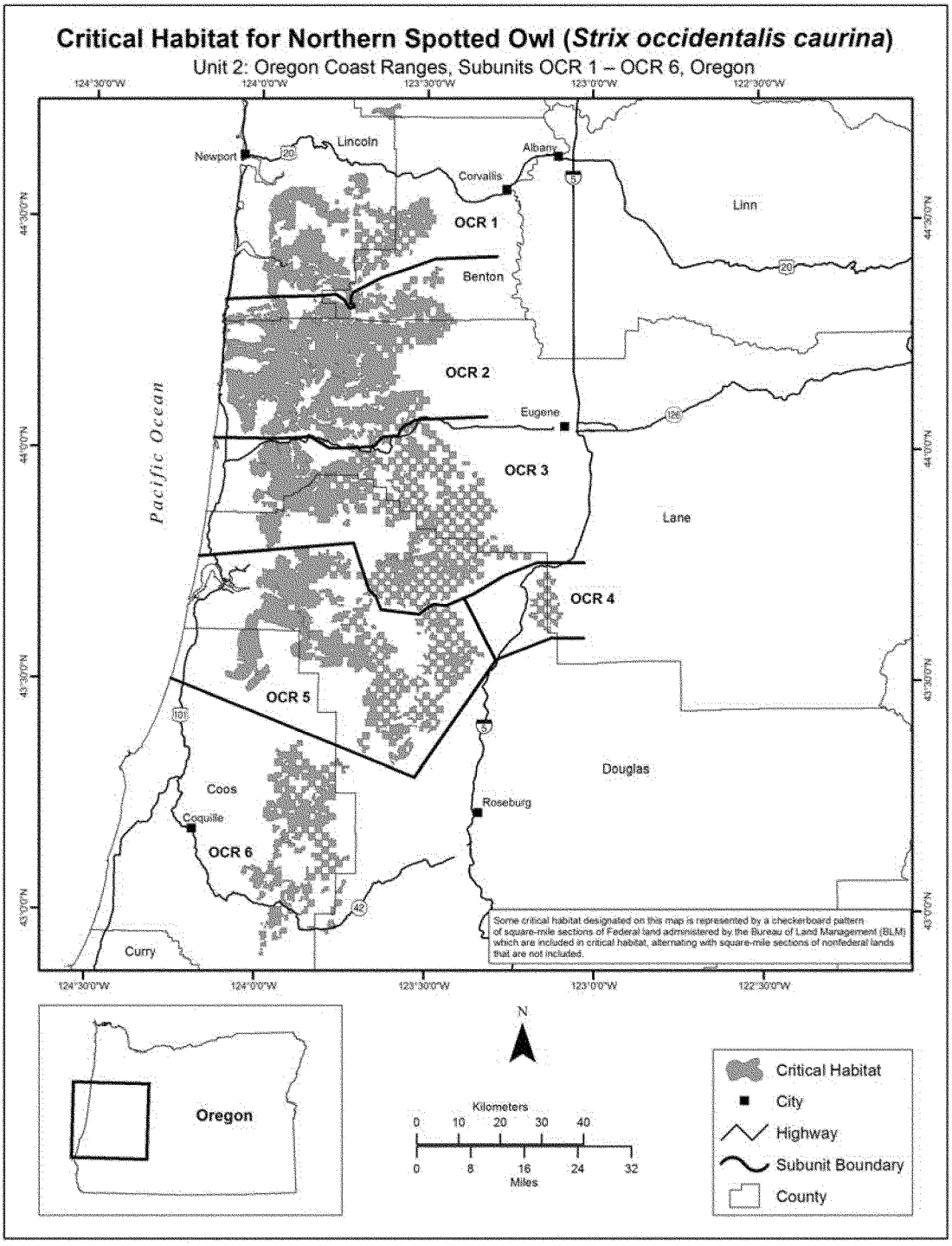


(9) Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and Washington. Maps of Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and Washington, follow:

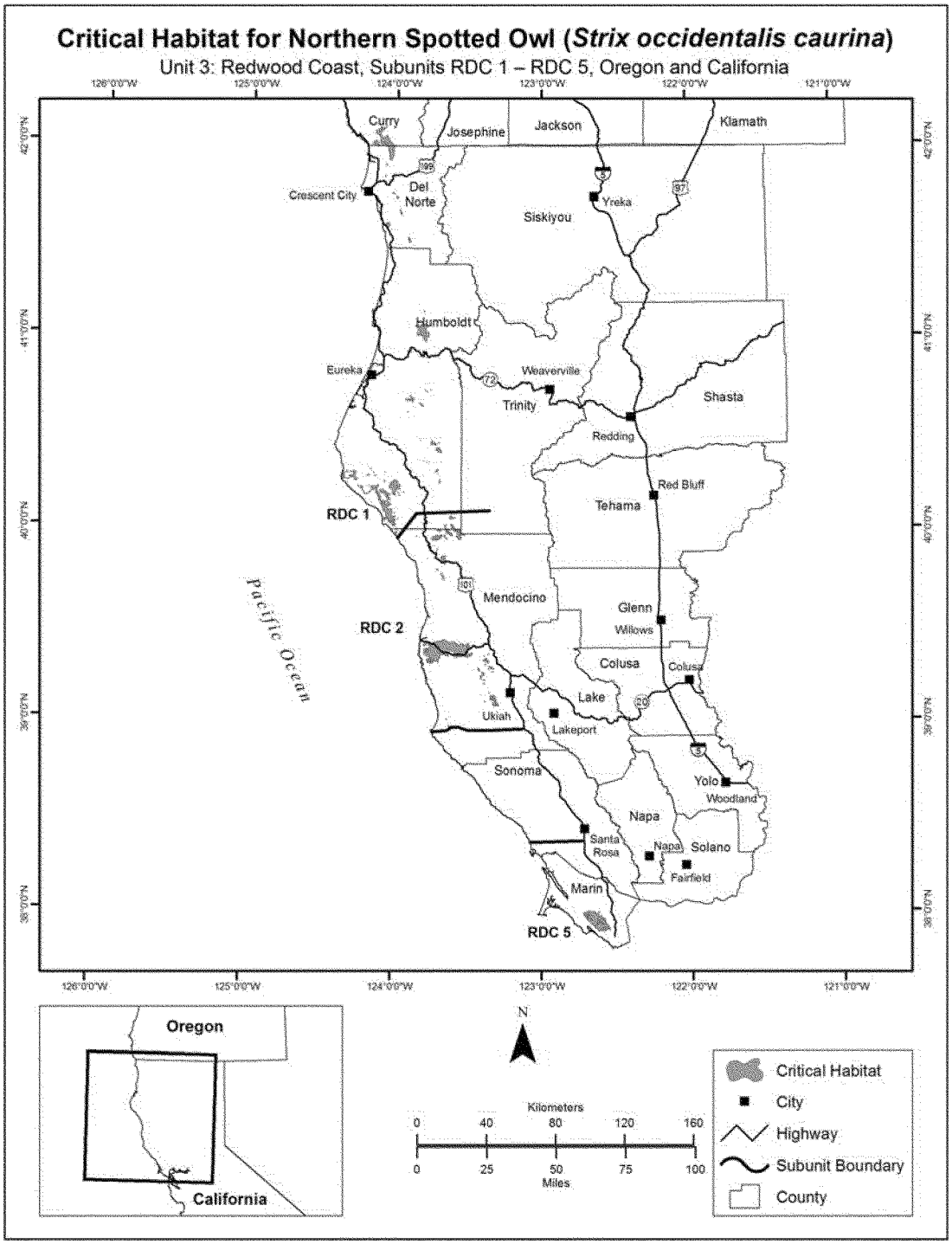

Critical Habitat for Northern Spotted Owl (*Strix occidentalis caurina*)
Unit 1: North Coast Ranges and Olympic Peninsula, Subunits NCO 1 – NCO 2, Washington
124°30'0"W
124°0'0"W
123°30'0"W
123°0'0"W
122°30'0"W
48°0'0"N
47°30'0"N
47°0'0"N
Skagit
Clallam
Port Angeles
101
Jefferson
King
Kitsap
Pacific Ocean
NCO 1
NCO 2
Shelton
Tacoma
Mason
Grays Harbor
Montesano
12
5
Pierce
Thurston
Pacific
Lewis
Washington
N
Kilometers
0 10 20 30 40
0 9 18 27 36
Miles
Critical Habitat
City
Highway
Subunit Boundary
County


Critical Habitat for Northern Spotted Owl (Strix occidentalis caurina)
Unit 1: North Coast Ranges and Olympic Peninsula, Subunits NCO 4 – NCO 5, Oregon
124°0'0"W
123°30'0"W
123°0'0"W
122°30'0"W
46°0'0"N
45°30'0"N
45°0'0"N
Pacific
Astoria
Wahkiakum
Cowlitz
Clatsop
Columbia
Skamania
Pacific Ocean
Saint Helens
Clark
Tillamook
Washington
Tillamook
Portland
Multnomah
NCO 4
NCO 5
Yamhill
McMinnville
Clackamas
Marion
Dallas
Polk
Lincoln
Linn
101
26
99W
5
18
Washington
Oregon
N
Kilometers
0 10 20 30 40
0 8 16 24 32
Miles
Critical Habitat
City
Highway
Subunit Boundary
County

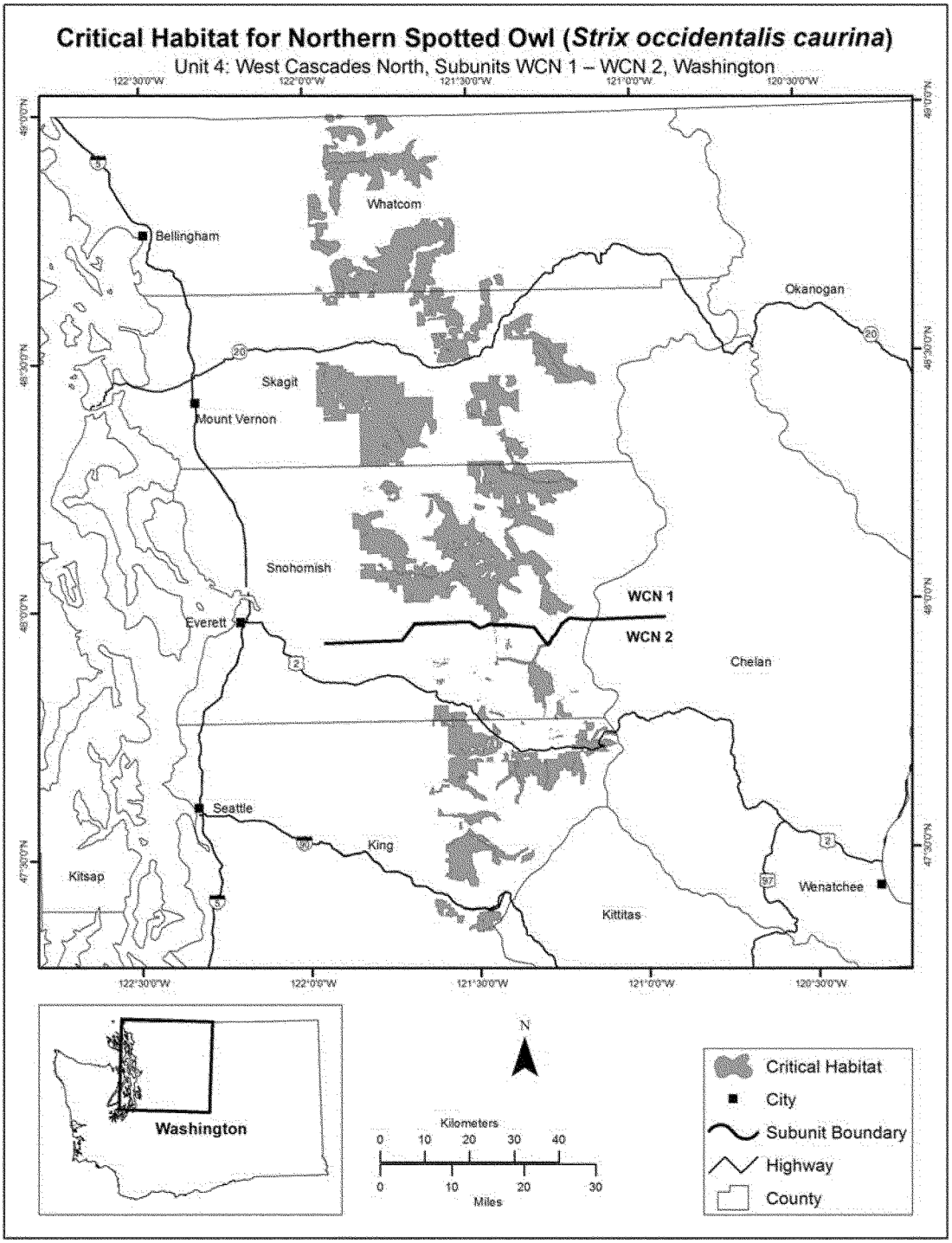
(10) Unit 2: Oregon Coast Ranges, Oregon. Map of Unit 2, OregonCoast Ranges, Oregon, follows:



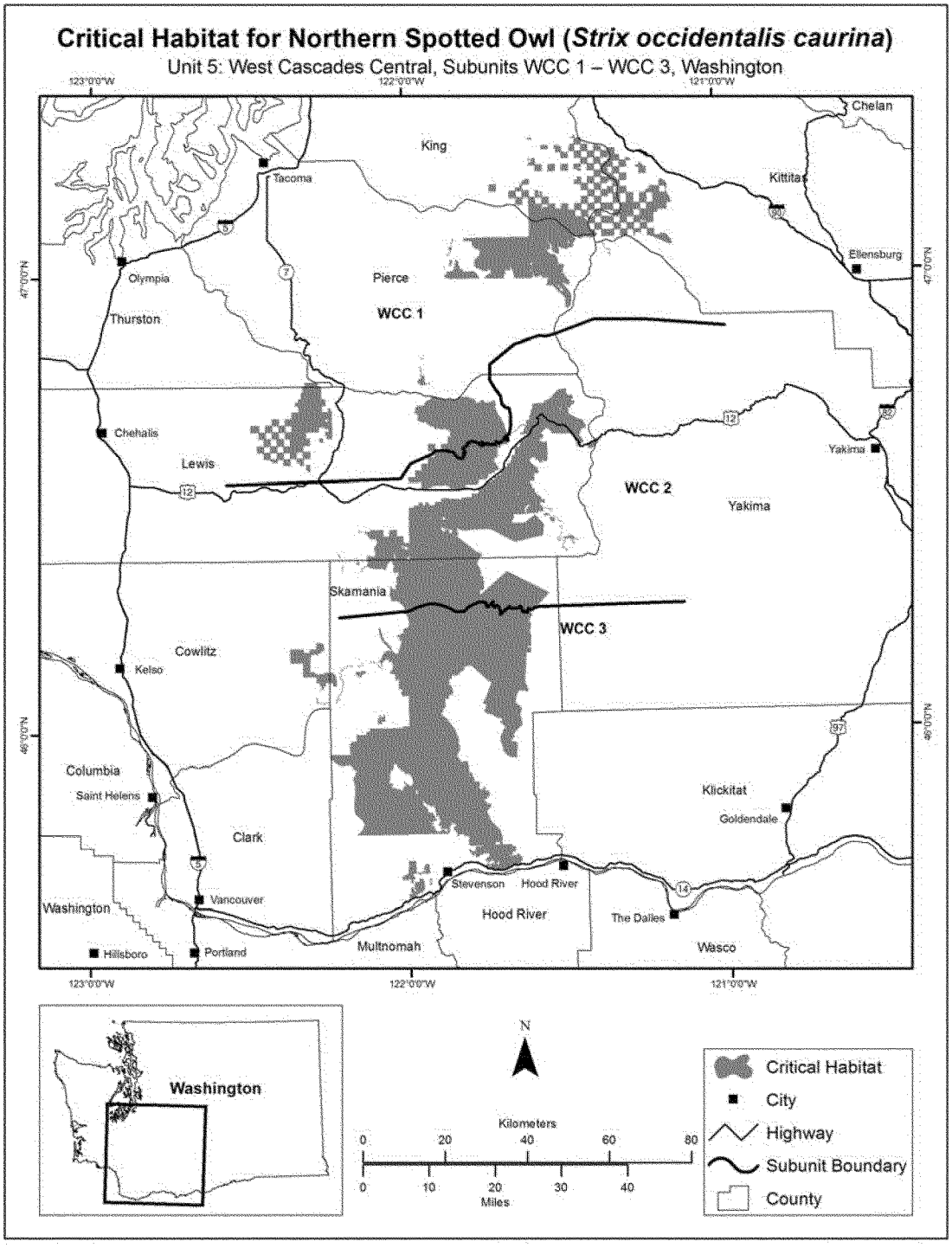
(11) Unit 3: Redwood Coast, Oregon and California. Map of Unit 3, Redwood Coast, Oregon and California, follows:



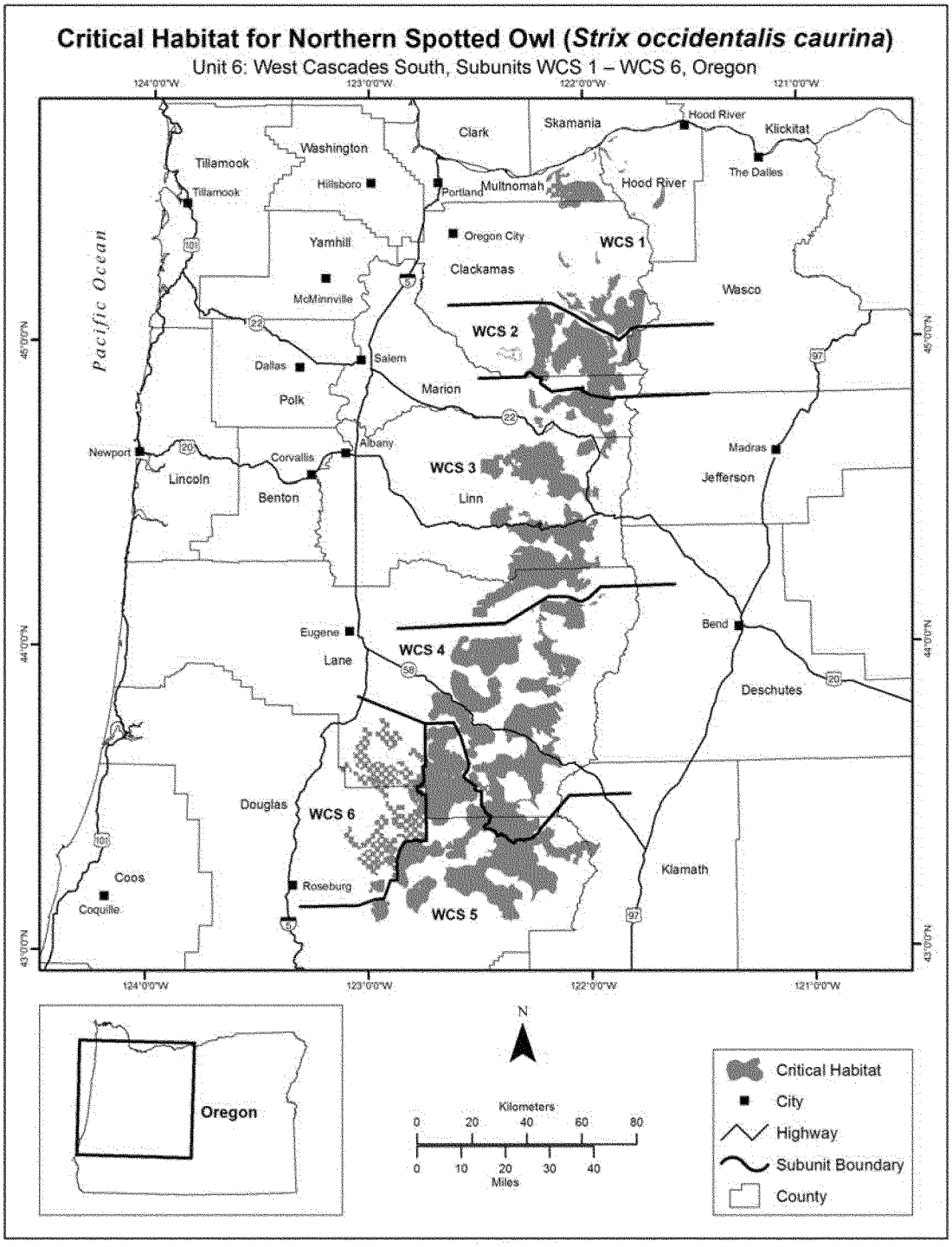
(12) Unit 4: West Cascades North, Washington. Map of Unit 4, West Cascades North, Washington, follows:



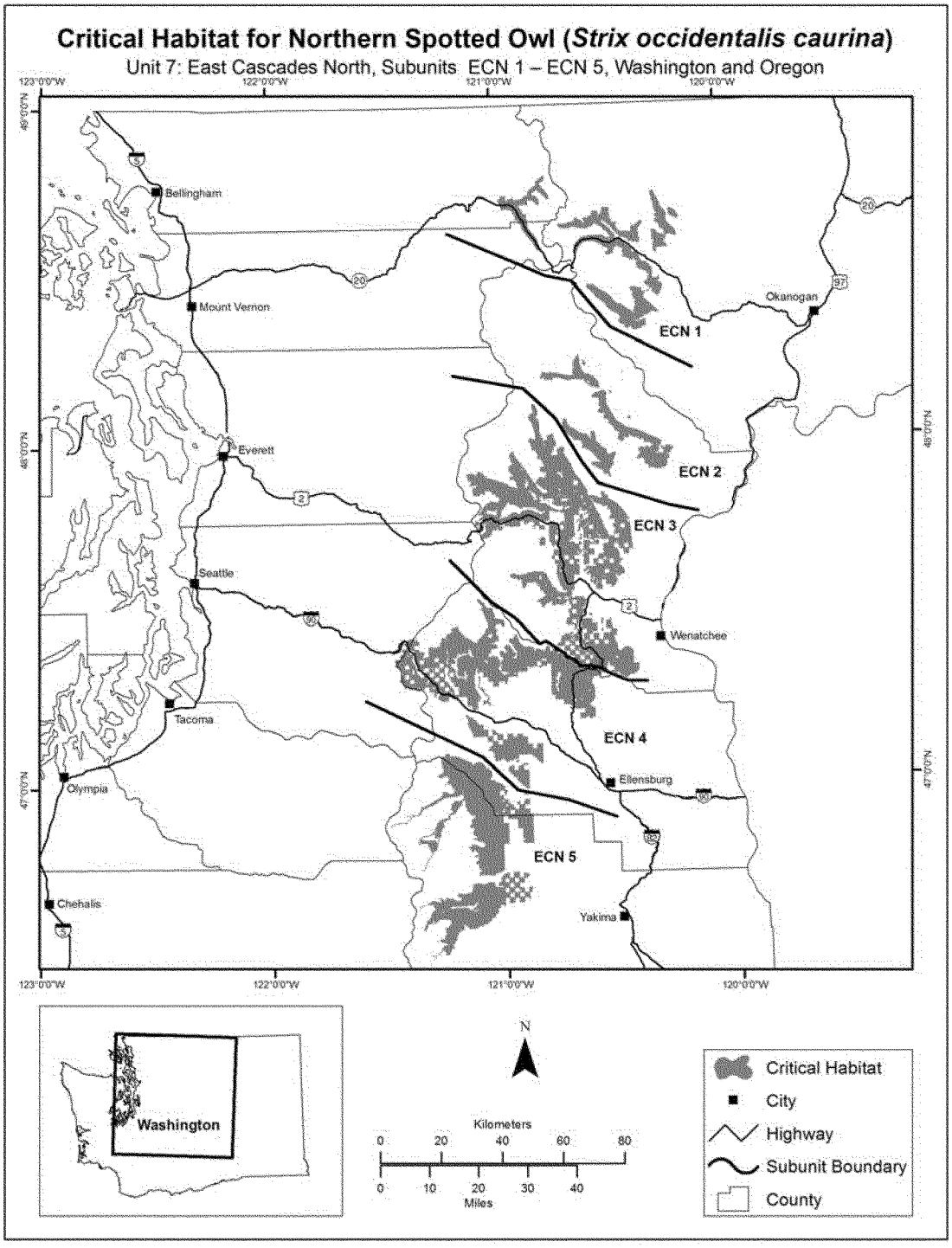
(13) Unit 5: West Cascades Central, Washington. Map of Unit 5, West Cascades Central, Washington, follows:

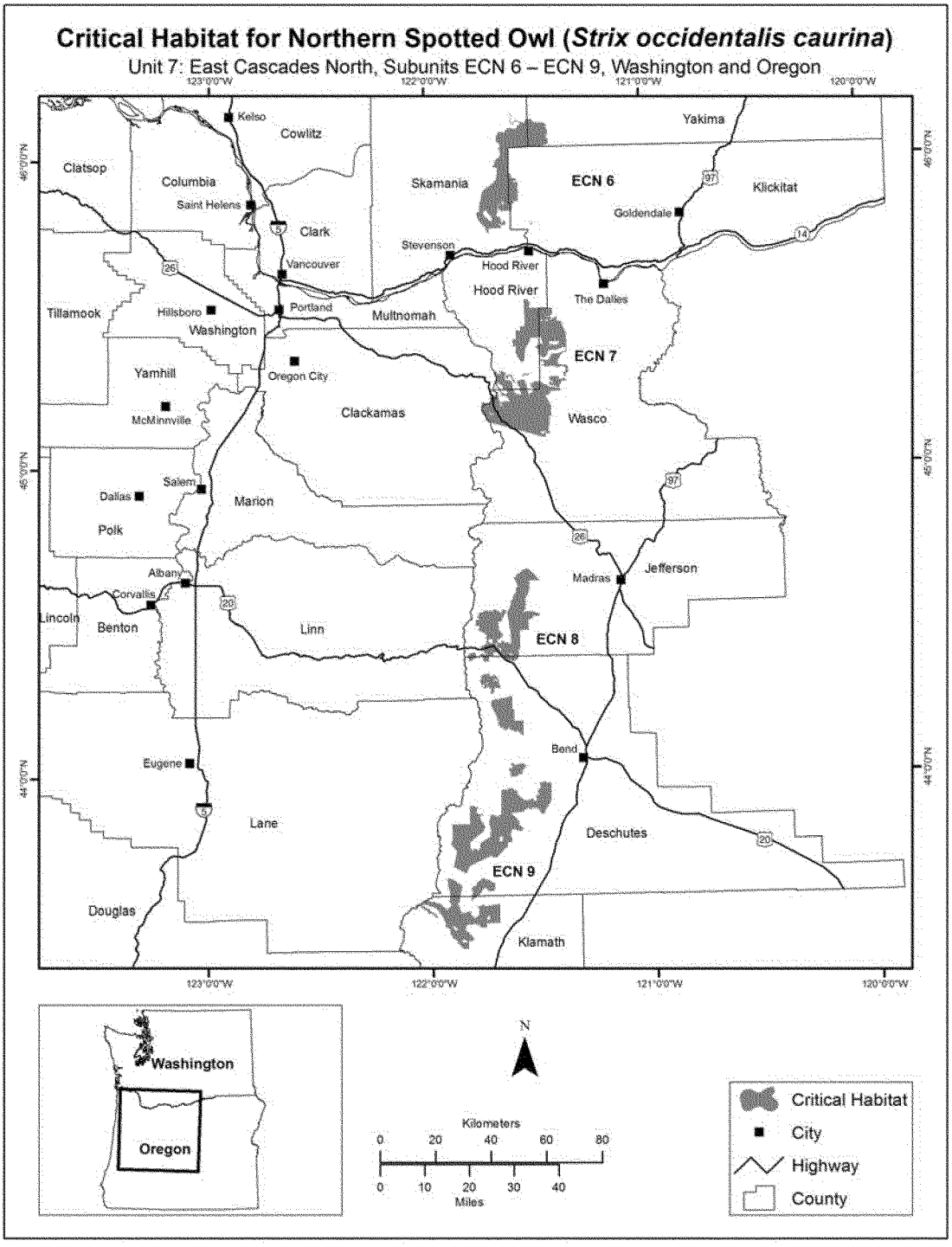


(14) Unit 6: West Cascades South, Washington. Map of Unit 6, West Cascades South, Washington, follows:

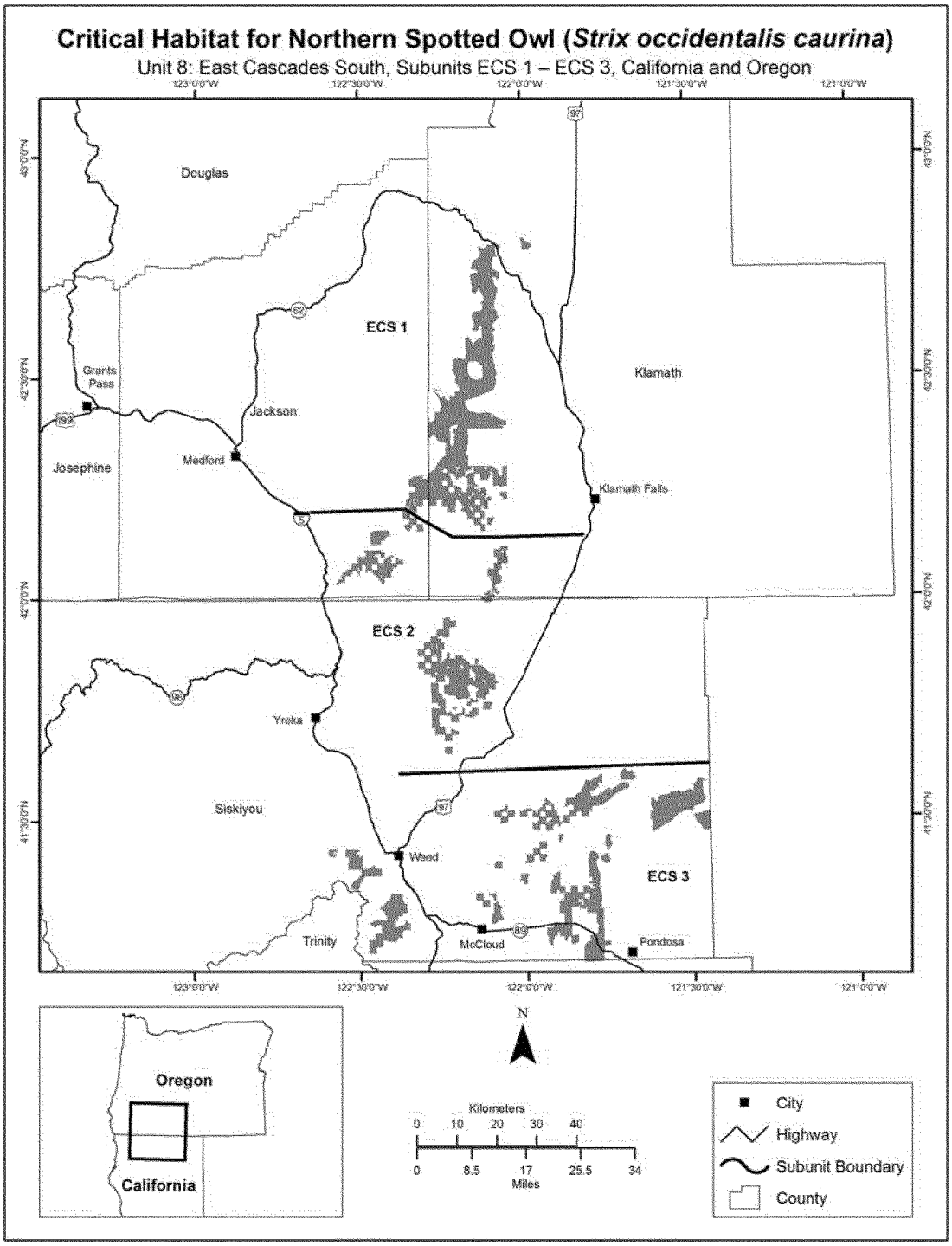


(15) Unit 7: East Cascades North, Washington and Oregon. Maps of Unit 7, East Cascades North, Washington and Oregon, follow:

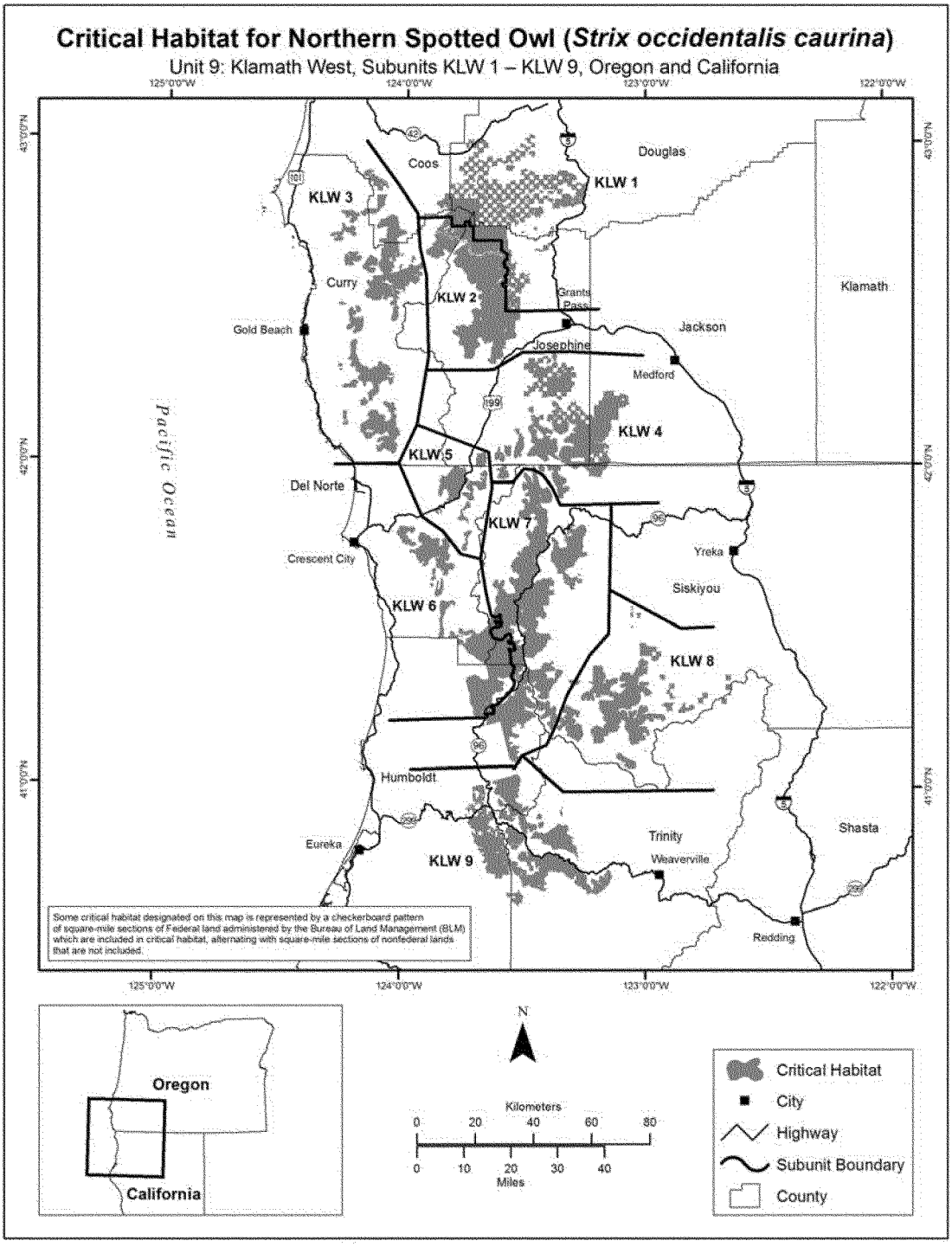



Critical Habitat for Northern Spotted Owl (*Strix occidentalis caurina*)
Unit 7: East Cascades North, Subunits ECN 6 – ECN 9, Washington and Oregon
123°0'0"W
122°0'0"W
121°0'0"W
120°0'0"W
46°0'0"N
45°0'0"N
44°0'0"N
Kelso
Cowlitz
Yakima
Clatsop
Columbia
Skamania
ECN 6
Klickitat
Saint Helens
Goldendale
Clark
Stevenson
Hood River
Vancouver
Hood River
The Dalles
Tillamook
Hillsboro
Portland
Multnomah
Washington
ECN 7
Yamhill
Oregon City
Clackamas
Wasco
McMinnville
Salem
Dallas
Marion
Polk
Madras
Jefferson
Albany
Corvallis
Lincoln
Benton
Linn
ECN 8
Bend
Eugene
Lane
Deschutes
ECN 9
Douglas
Klamath
Washington
Oregon
N
Kilometers
0 20 40 60 80
0 10 20 30 40
Miles
Critical Habitat
City
Highway
County

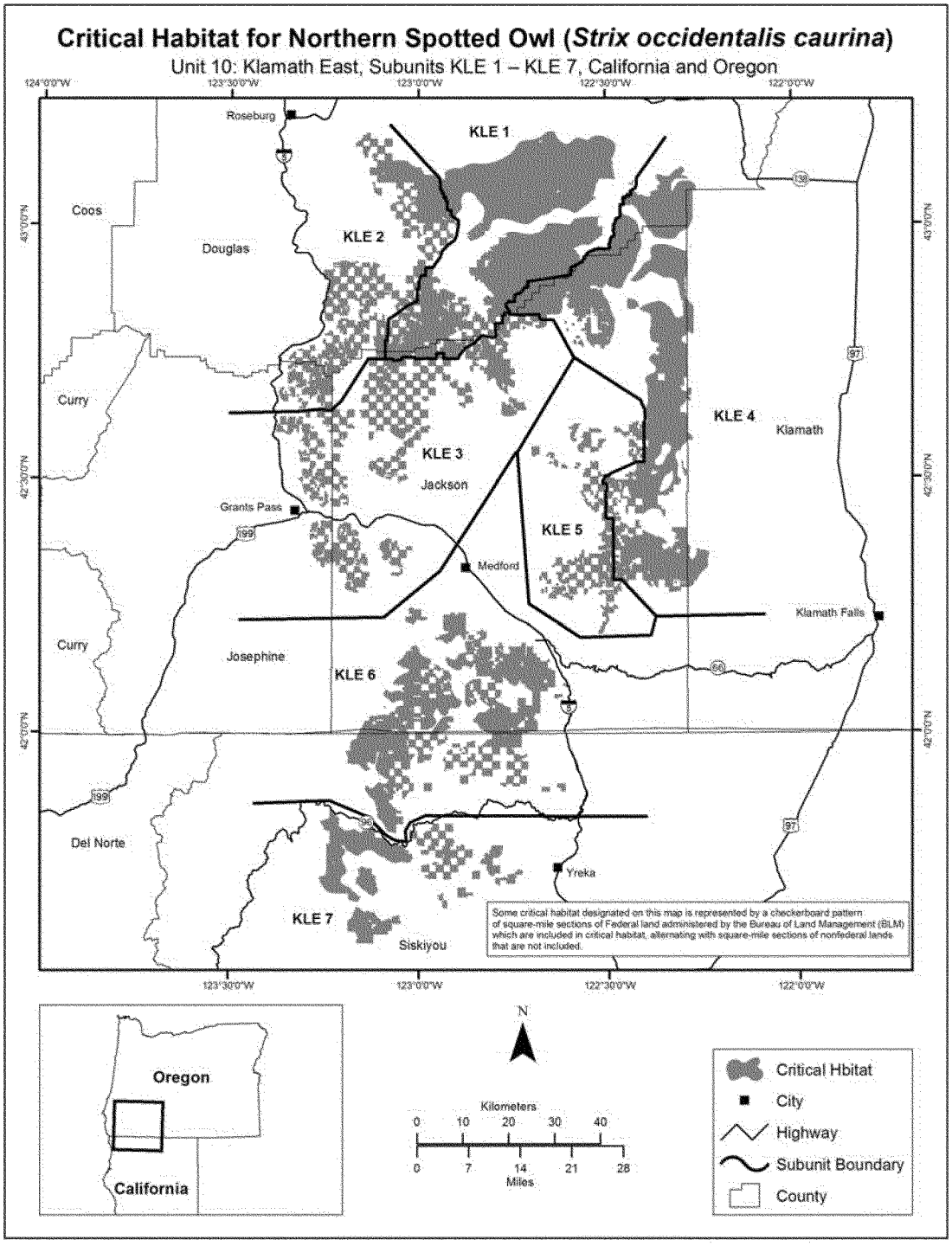
(16) Unit 8: East Cascades South, California and Oregon. Map of Unit 8, East Cascades South, California and Oregon, follows:



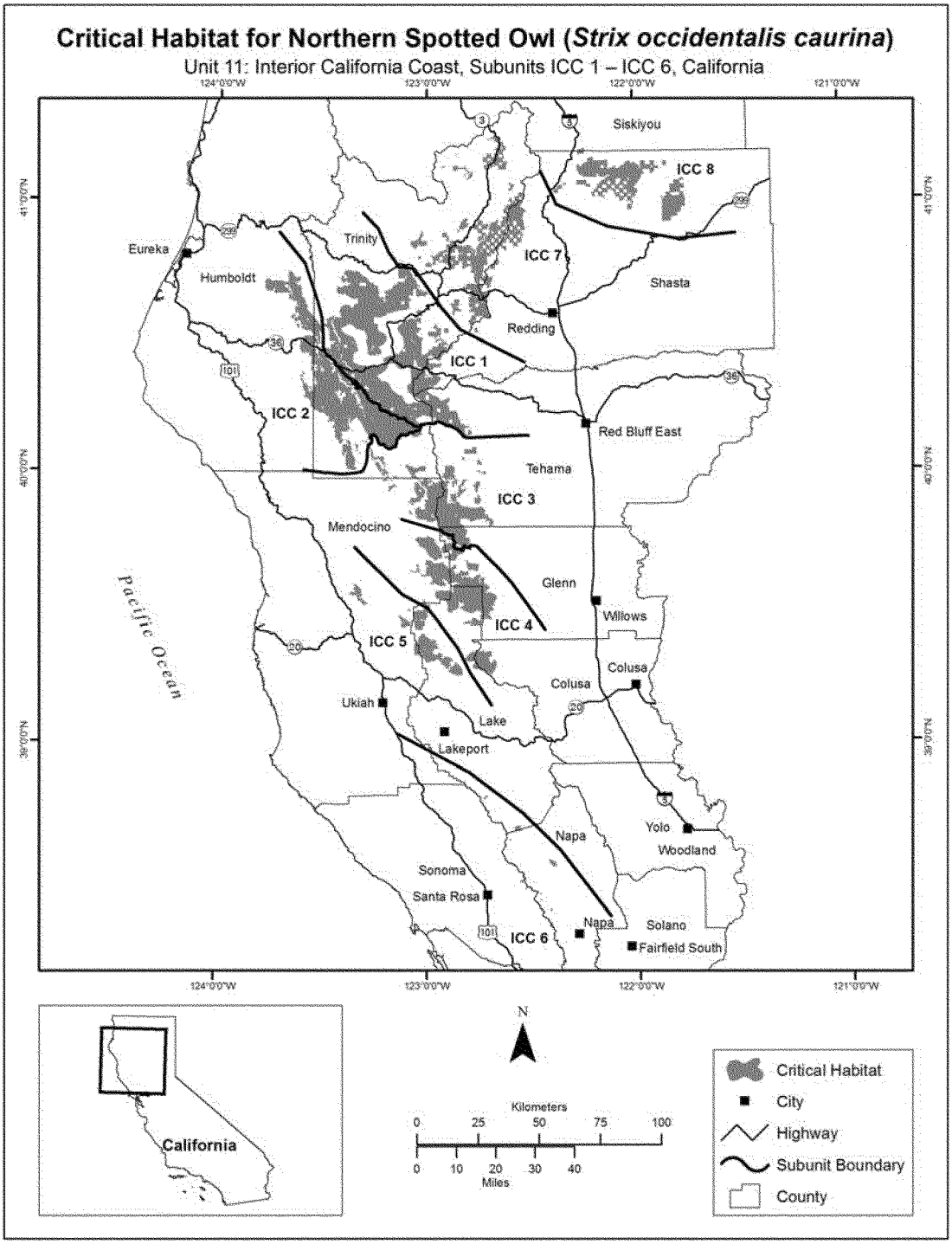
(17) Unit 9: Klamath West, Oregon and California. Map of Unit 9: Klamath West, Oregon and California, follows:



(18) Unit 10: Klamath East, California.
Map of Unit 10: Klamath East, California, follows:



(19) Unit 11: Interior California Coast, California. Map of Unit 11: Interior California Coast, California, follows:



* * * * *

Dated: November 20, 2012.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–28714 Filed 12–3–12; 8:45 am]

BILLING CODE 4310–55–C

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 233 December 4, 2012

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Riverside Fairy Shrimp; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2011–0013; 4500030114]

RIN 1018–AX15

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Riverside Fairy Shrimp

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, revise the critical habitat for the Riverside fairy shrimp under the Endangered Species Act of 1973, as amended. The previous critical habitat consisted of land in four units in Ventura, Orange, and San Diego Counties, California. We now designate land in three units in Ventura, Orange, and San Diego Counties, California, for a total of approximately 1,724 ac (698 ha), which represents critical habitat for this species. Areas in Riverside County are excluded from critical habitat in this final revised rule.

DATES: This rule becomes effective on January 3, 2013.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov.* 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, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

The coordinates or plot points or both from which the maps for this critical habitat designation were generated are included in the administrative record and are available on our Internet site (*http://www.fws.gov/carlsbad/*), at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0013, and at the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information developed for this critical habitat designation is available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule and the basis for our action. Under the Endangered Species Act (Act), any species that is determined to be endangered or threatened shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Designations and revisions of critical habitat can only be completed by issuing a rule. We listed Riverside fairy shrimp as an endangered species on August 3, 1993 (58 FR 41384). We published our first rule designating critical habitat on May 30, 2001 (66 FR 29384). In response to a settlement agreement, we revised critical habitat in a final rule published April 12, 2005 (70 FR 19154). That rule was also challenged in court, and based on the provisions of the new settlement agreement, we are publishing this final revised critical habitat rule.

The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for Riverside fairy shrimp. We are designating:

- Approximately 466 acres (ac) (189 hectares (ha)), in 2 subunits, as critical habitat in Ventura County.
- Approximately 396 ac (160 ha), in 4 subunits, as critical habitat in Orange County.
- Approximately 862 ac (348 ha), in 7 subunits, as critical habitat in San Diego County.

In total, we are designating approximately 1,724 ac (698 ha) as critical habitat for this species. We are also:

- Exempting 1,988 ac (804 ha) from critical habitat designation in Orange County and San Diego County.
- Excluding 1,259 ac (510 ha) from critical habitat designation in Orange County, Riverside County, and San Diego County.

We have prepared an economic analysis of the designation of critical habitat. We announced the availability of the draft economic analysis (DEA) on March 1, 2012 (77 FR 12543), allowing the public to provide comments on our analysis. We have incorporated the comments and completed the final economic analysis (FEA).

Peer reviewer and public comment. We sought comments from four independent specialists to ensure that our designation is based on scientifically sound data and analysis. We also considered all comments and information we received during the public comment periods.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the revision of critical habitat for the Riverside fairy shrimp under the Act (16 U.S.C. 1531 *et seq.*). For more information on the taxonomy, biology, and ecology of Riverside fairy shrimp, please refer to the final listing rule published in the **Federal Register** on August 3, 1993 (58 FR 41384); the first and second rules proposing critical habitat published in the **Federal Register** on September 21, 2000 (65 FR 57136), and April 27, 2004 (69 FR 23024), respectively; and the subsequent final critical habitat designations published in the **Federal Register** on May 30, 2001 (66 FR 29384), and April 12, 2005 (70 FR 19154). Additionally, more species information can be found in the 1998 Recovery Plan for the Vernal Pools of Southern California (1998 Recovery Plan) finalized on September 3, 1998 (Service 1998a, pp. 1–113), in the City of San Diego's 2002–2003 Vernal Pool Inventory (City of San Diego 2004, pp. 1–125), and in the Riverside fairy shrimp 5-year review (Service 2008, pp. 1–57). For new information on Riverside fairy shrimp genetics across the species' range and on the status and distribution of Riverside fairy shrimp, see the most recent proposed critical habitat rule published on June 1, 2011 (76 FR 31686). Information on the associated draft economic analysis (DEA) for the proposed rule to designate revised critical habitat was published in the **Federal Register** on March 1, 2012 (77 FR 12543).

Previous Federal Actions

The Riverside fairy shrimp was listed as an endangered species on August 3, 1993 (58 FR 41384). For a history of Federal actions prior to 2001, please refer to the September 21, 2000, proposed critical habitat rule (65 FR 57136). On May 30, 2001, we published a final rule designating critical habitat for the Riverside fairy shrimp (66 FR 29384). On November 6, 2001, the Building Industry Legal Defense Foundation, Foothill/Eastern Transportation Corridor Agency, National Association of Home Builders, California Building Industry Association, and Building Industry Association of San Diego County filed a lawsuit in the U.S. District Court for the District of Columbia challenging the

designation of Riverside fairy shrimp critical habitat and alleging errors in our promulgation of the May 30, 2001, final rule. We requested a voluntary remand, and on October 30, 2002, critical habitat for this species was vacated by order of the U.S. District Court for the District of Columbia, and the Service was ordered to publish a new final rule with respect to the designation of critical habitat for the Riverside fairy shrimp (*Building Industry Legal Defense Foundation,* et al., v. *Gale Norton, Secretary of the Interior,* et al., *and Center for Biological Diversity, Inc. and Defenders of Wildlife, Inc.* Civil Action No. 01–2311 (JDB) (U.S. District Court, District of Columbia)).

On April 27, 2004, we again proposed to designate critical habitat for the Riverside fairy shrimp (69 FR 23024). The final critical habitat rule was published in the **Federal Register** on April 12, 2005 (70 FR 19154). On January 14, 2009, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California challenging our 2005 designation of critical habitat for Riverside fairy shrimp (*Center for Biological Diversity* v. *U.S. Fish and Wildlife Service and Dirk Kempthorne, Secretary of the Interior,* Case No. 3:09–CV–0050–MMA–AJB). A settlement agreement was reached with the plaintiffs (Case No. 3:09–cv–00051–JM–JMA; November 16, 2009) in which we agreed to submit a proposed revised critical habitat designation for the Riverside fairy shrimp to the **Federal Register** by May 20, 2011, and submit a final revised critical habitat designation to the **Federal Register** by November 15, 2012. The proposed revised critical habitat designation was delivered to the **Federal Register** on May 20, 2011, and published on June 1, 2011 (76 FR 31686). This rule complies with the conditions of the settlement agreement.

Summary of Changes From Proposed Rule

(1) We added updated information on the general impacts of climate change and its potential impacts to Riverside fairy shrimp in the *Climate Change* section of this document. We also performed a climate change analysis using software available through Climate Wizard, a web-based climate change prediction program jointly produced by The Nature Conservancy, the University of Washington, and University of Southern Mississippi. We incorporated the results of our analysis into the *Climate Change* section of this rule.

(2) We added a discussion to the *Criteria Used To Identify Critical Habitat* section to supplement our discussion in the proposed rule (76 FR 31686; June 1, 2011) and the March 1, 2012, publication that made available our DEA of the proposed rule (77 FR 12543) and to clarify the rationale for designation of critical habitat units. At the time of listing, we did not have surveys confirming the presence of Riverside fairy shrimp in each critical habitat unit and subunit. However, we confirm that the vernal pool complexes within each unit and subunit were in existence at the time of listing (with the exception of Subunit 3g (Johnson Ranch Created Pool)), and the units and subunits in which the vernal pool complexes are found are within the geographical area occupied by the species at the time of listing and contain the physical or biological features essential to the conservation of the species. Therefore, we consider Unit 1 (1a, 1b), Unit 2 (2c, 2dA, 2dB, 2e, 2f, 2g, 2h, 2i), Unit 3 (3c, 3d, 3e, 3f, 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h) to meet the definition of critical habitat under section 3(5)(A)(i) of the Act (i.e., to be areas within the geographical area occupied by the Riverside fairy shrimp at the time of listing) for the reasons explained in the March 1, 2012, publication (77 FR 12543) despite the absence of proof of occupancy at the time of listing.

Regardless of the occupancy status (documented or presumed; pre- or post-listing) of each unit, in Table 1 of the March 1, 2012, publication (77 FR 12543), we provided our justification for determining why these areas are essential for the conservation of the species under section 3(5)(A)(ii) of the Act. For those units for which we lack data confirming occupancy at the time of listing, we are alternatively designating them under section 3(5)(A)(ii) because they are essential for the conservation of Riverside fairy shrimp and a designation limited to areas confirmed to be occupied at the time of listing would be inadequate to ensure the conservation of the species. We provide further explanation of our method and rationale for defining critical habitat boundaries in the *Criteria Used To Identify Critical Habitat* section below.

(3) Based on a public comment, we updated the name of the vernal pool complex at Marine Corps Air Station (MCAS) Miramar from ''AA 1–7, 9–13 East Miramar (Pool 10) (AA1 East)'' to its recommended name ''East Miramar (AA1 South + Group) (Pool 4786; previously Pool 12).''

(4) In the proposed revised critical habitat rule, Table 4 incorrectly identified 6 ac (3 ha) of land in Subunit 4c as State-owned. The land is actually owned by the North [San Diego] County Transit District. Table 3 in this final revised rule has been updated to show the correct land ownership.

(5) We are now excluding lands owned by the Department of Homeland Security (DHS) in Subunit 5b (29 ac (12 ha)) and a portion of the lands in Subunit 5h (11 ac (4 ha)) from this final critical habitat designation based on national security. This exclusion is consistent with the exclusion of DHS lands in our previous final critical habitat rule published April 12, 2005 (70 FR 19154), due to national security concerns related to the operation and maintenance of the Border Infrastructure System (BIS).

In our proposed revised critical habitat rule published June 1, 2011 (76 FR 31686), we sought comments on whether or not these Federal lands should be considered for exclusion under section 4(b)(2) of the Act for national security reasons, whether such exclusion is or is not appropriate, and whether the benefits of excluding any specific area outweigh the benefits of including that area as critical habitat and why. On October 16, 2012, DHS commented that designation of these lands could interfere with U.S. Customs and Border Patrol Protection activities along the border and urged exclusion of the lands for national security reasons. Based on the national security importance of DHS maintaining access to these border areas, the Secretary is exercising his discretion to exclude lands owned by DHS in this final critical habitat rule. Details on our rationale can be found in the ''Exclusions Based on National Security Impacts'' section below.

(6) In the June 1, 2011, proposed revised rule, we stated that we were considering excluding lands owned by or under the jurisdiction of the Orange County Central-Coastal Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP), the Orange County Southern Subregion HCP, the Western Riverside County MSHCP, City of Carlsbad Habitat Management Plan (HMP) under the San Diego Multiple Habitat Conservation Program (MHCP), and County of San Diego Subarea Plan under the MSCP. We have now made a final determination that the benefits of exclusion outweigh the benefits of inclusion of lands covered by these plans. Therefore, the Secretary is exercising his discretion to exclude approximately 89 ac (36 ha) covered by the Orange County Central-Coastal NCCP/HCP, 233 ac (94 ha) covered by the Orange County Southern Subregion

HCP, 865 ac (350 ha) covered by the Western Riverside County MSHCP, 9 ac (4 ha) covered by the City of Carlsbad HMP, and 23 ha (9 ac) covered by the County of San Diego Subarea Plan under the MSCP. In all, the Secretary is exercising his discretion to exclude a total of 1,259 ac (510 ha). For a complete discussion of the benefits of inclusion and exclusion, see the Exclusions section below.

TABLE 1—SUBUNIT OCCUPANCY STATUS AND JUSTIFICATIONS FOR DETERMINING SPECIFIC AREAS ESSENTIAL FOR THE CONSERVATION OF RIVERSIDE FAIRY SHRIMP [1]

Unit/subunit [2]	Service status at listing [3]	Current status [4]; year of first record [5]	Act section 3(5)(A)(i) justification [6]	Act section 3(5)(A)(ii) justification [7]
Ventura County				
1a: Tierra Rejada Preserve.	Presumed occupied ...	Occupied; 1998 (CNDDB, EO 9).	Primary Constituent Elements (PCEs) 1–3; may require management.	Necessary to stabilize Riverside fairy shrimp populations per Recovery Plan (RP); possesses unique soils and habitat type; disjunct population maintains genetic diversity and population stability at species' northernmost distribution.
1b: South of Tierra Rejada Valley.	Presumed occupied ...	Presumed occupied; no protocol surveys have been completed.	PCEs 1–3; may require management.	Provides appropriate inundation ponding; proximity and connectivity to 1a at northern distribution; protects existing vernal pool composition; ecological linkage.
Orange County				
2c: MCAS El Toro	Confirmed occupied ...	Occupied; 1993 (Service 1993, MCAS El Toro survey).	PCEs 1–3; may require management.	
2dA: Saddleback Meadow.	Presumed occupied ...	Occupied; 1997 (HELIX 2009 Report #10537).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; maintains current geographical, elevational, and ecological distribution; maintains current population structure; provides connectivity; large continuous block; ecological linkage.
2dB: O'Neil Regional Park (near Trabuco Canyon).	Presumed occupied ...	Occupied; 2001 (CNDDB, EO 17).	PCEs 1–3; may require management.	Maintains current geographical, elevational, and ecological distribution; maintains current population structure; provides connectivity.
2e: O'Neil Regional Park (near Cañada Gobernadora).	Presumed occupied ...	Occupied; 1997 (CNDDB, EO 4).	PCEs 1–3; may require management.	Maintains current geographical, elevational, and ecological distribution; maintains current population structure; provides connectivity.
2f: Chiquita Ridge	Presumed occupied ...	Occupied; 1997 (CNDDB, EO 5).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; maintains current geographical, elevational, and ecological distribution; maintains current population structure; provides connectivity.
2g: Radio Tower Road	Presumed occupied ...	Occupied; 2001 (CNDDB, EO 15, 16).	PCEs 1–3; may require management.	Maintains current geographical, elevational, and ecological distribution; maintains current population structure; provides connectivity.
2h: San Onofre State Beach, State Park leased land.	Presumed occupied ...	Occupied; 1997 (CNDDB, EO 6).	PCEs 1–3; may require management.	Unique soils and wetland type; maintains habitat function, genetic diversity, and species viability; ecological linkage.
2i: SCE Viejo Conservation Bank.	Presumed occupied ...	Occupied; 1998 (CNDDB, EO 10).	PCEs 1–3; may require management.	Maintains current geographical, elevational, and ecological distribution; maintains current population structure; provides connectivity.
Riverside County				
3c: Australia Pool	Presumed occupied ...	Occupied; 1998 (CNDDB, EO 11).	PCEs 1–3; may require management.	Maintains habitat function, genetic diversity, and species viability; ecological linkage.
3d: Scott Road Pool ..	Presumed occupied ...	Occupied; 2002 (CNDDB, EO 24).	PCEs 1–3; may require management.	Maintains current geographical, elevational, and ecological distribution; disjunct habitat.
3e: Schleuniger Pool	Presumed occupied ...	Occupied; 1998 (CNDDB, EO 8).	PCEs 1–3; may require management.	Maintains current geographical, elevational, and ecological distribution.
3f: Skunk Hollow and Field Pool.	Confirmed occupied ...	Skunk Hollow: Occupied; 1988 (CNDDB, EO 3). Field Pool: Occupied; 1988 (Service, GIS ID 9).	PCEs 1–3; may require management.	

TABLE 1—SUBUNIT OCCUPANCY STATUS AND JUSTIFICATIONS FOR DETERMINING SPECIFIC AREAS ESSENTIAL FOR THE CONSERVATION OF RIVERSIDE FAIRY SHRIMP [1]—Continued

Unit/subunit [2]	Service status at listing [3]	Current status [4]; year of first record [5]	Act section 3(5)(A)(i) justification [6]	Act section 3(5)(A)(ii) justification [7]
3g: Johnson Ranch Created Pool.	Created (in 2002)	Occupied; 2003 (Service, GIS ID 13).	PCEs 1–3; may require management.	Provides connectivity among pools; maintains current population structure.
3h: Santa Rosa Plateau-Mesa de Colorado.	Presumed occupied ...	Occupied; 2009 (Selheim and Searcy 2010, Report # 11005).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; unique soils and habitat type; large continuous blocks of occupied habitat; ecological linkage.
San Diego County				
4c: Poinsettia Lane Commuter Train Station (JJ2).	Presumed occupied ...	Occupied; 1998 (CNDDB, EO 7).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; unique soils and habitat type; disjunct habitat; provides protection for existing vernal pool composition and structure.
5a: J33 (Sweetwater High School).	Presumed occupied ...	Occupied; 2003 (City of San Diego 2004).	PCEs 1–3; may require management.	Maintains current population structure; genetic diversity.
5b: J15 (Arnie's Point)	Presumed occupied ...	Occupied; 2006 (ERS, Report #8639).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; maintains current population structure; ecological linkage.
5c: East Otay Mesa ...	Presumed occupied ...	Occupied; 2000 GIS ID 4; 2001 (EDAW 2001) (CNDDB, EO 25).	PCEs 1–3; may require management.	Unique soils and habitat type; maintains current geographical, elevational, and ecological distribution; disjunct habitat; protects existing vernal pool composition.
5d: J29–31	Confirmed occupied ...	Occupied; 1986 (Bauder 1986a); (Simovich and Fugate 1992) (CNDDB, EO 2).	PCEs 1–3; may require management.	
5e: J2 N, J4, J5	Presumed occupied ...	Occupied; 2003 (City of San Diego, 2004).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; provides connectivity among pools; maintains current population structure.
5f: J2 S and J2 W	Presumed occupied ...	Occupied; 2001 (CNDDB, EO 18).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; provides connectivity among pools; maintains current population structure.
5g: J14	Presumed occupied ...	Occupied; 2002 (HELIX 2002, Report #2386).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; provides connectivity among pools; maintains current population structure.
5h: J11, J12, J16–18	Presumed occupied ...	Occupied; 2002 (City of San Diego 2004).	PCEs 1–3; may require management.	Necessary to stabilize populations per RP; provides connectivity among pools; maintains current population structure.

[1] As discussed above, we consider the areas for which we lack positive survey results to be "areas within the geographical area occupied by the species" under section 3(5)(A)(i) of the Act as explained in the March 1, 2012, publication at 77 FR 12543, pp. 12545–49. Table 1 summarizes the bases for that conclusion. However, we are alternatively designating areas that lack positive occupancy data at the time of listing under section 3(5)(A)(ii) of the Act because these areas are essential to the conservation of the species and a designation limited to known occupied areas would be inadequate to ensure the conservation of the species.

[2] Unit/Subunit name as it appears in Table 1 of proposed revised rule (76 FR 31698). For additional information, see the Recovery Plan (RP) for Vernal Pools of Southern California (Service 1998a, 113+ pp.).

[3] Service status: "Confirmed occupied" indicates that there is a record of occupancy at or before the time of listing; "Presumed occupied" indicates no documentation of occupancy for the specific areas (subunits) prior to 1993, but the areas are presumed to have been occupied at the time of listing based on best available science and post-1993 positive survey results in the possession of the Service. "Created" refers to a vernal pool enhancement or restoration after the time of listing.

[4 5] Current status: "Occupied" indicates a positive survey result documenting species occurrence and "Presumed occupied" indicates no protocol surveys have been completed. The listed year is the year of first record followed by source. EO (element occurrence) is the number assigned to that occurrence, as defined and described according to the California Natural Diversity Data Base (CNDDB 2011). GIS ID is the occurrence information number for multiple species within jurisdiction of the Carlsbad Fish and Wildlife Office (Service 2011). City of San Diego (2004) is from the "Vernal pool inventory 2002–2003" or Contractor, and Report # is the number from a section 10(A)(1)(a) survey report, available in Service files.

[6] Reasons determined essential to the conservation of the species, as defined according to criteria set forth in the proposed revised critical habitat rule, this document, and in section 3(5)(A)(i) of the Act, and based on current information on what we consider as the occupied geographic range of the species at the time of listing.

[7] Reasons determined essential for the conservation of the species, as defined according to criteria set forth in the proposed revised critical habitat rule, this document, in the Recovery Plan (Service 1998a, Appendix F, pp. F–1–F–5) and in section 3(5)(A)(ii) of the Act. An empty box in the "Act section 3(5)(A)(ii) justification" column indicates this subunit is not proposed under section 3(5)(A)(ii) of the Act, and was confirmed occupied at the time of listing (see footnote 3).

* PCE: primary constituent element; SCE: Southern California Edison; GIS: geographic information system.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies 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. Only where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat would the consultation requirements of section 7(a)(2) of the Act apply.

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. For these areas, critical habitat designations identify, 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 or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements (PCEs) such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. PCEs are those specific elements of the physical or biological features that provide for a species' life-history processes and 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 ensure 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.

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). 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. (For these and other examples, see IPCC 2007a, p. 30; and 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 (GHG) 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 GHGs 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 GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (for example, 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 GHG 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 GHG 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). (See IPCC 2007b, p. 8, for a summary of other global projections of climate-related changes, such as frequency of heat waves and changes in precipitation. Also see IPCC 2011(entire) for a summary of observations and projections of extreme climate events.)

Various changes in climate may 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 interactions of climate with other variables (for example, habitat fragmentation) (IPCC 2007b, 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.

Global climate projections are informative, and, in some cases, the only or the best scientific information available for us to use. However, projected changes in climate and related impacts can vary substantially across and within different regions of the world (for example, IPCC 2007a, pp. 8–12). Therefore, we use ''downscaled'' projections when they are available and have been developed through appropriate scientific procedures, because such projections provide higher resolution information that is more relevant to spatial scales used for analyses of a given species (see Glick *et al.* 2011, pp. 58–61, for a discussion of downscaling). The program Climate Wizard provides regional level projections of future climate patterns, using the World Climate Research Programme's (WCRP's) Coupled Model Intercomparison Project phase 3 (CMIP3) multi-model dataset (*http://www.climatewizard.org/*). These data project an average decrease of rainfall in coastal Southern California of approximately 5 percent by the year 2050.

Documentation of climate-related changes that have already occurred in California (Croke *et al.* 1998, pp. 2128, 2130; Breshears *et al.* 2005, p. 15144), and future drought predictions for California (for example, Field *et al.* 1999, pp. 8–10; Lenihen *et al.* 2003, p. 1667; Hayhoe *et al.* 2004, p. 12422; Breshears *et al.* 2005, p. 15144; Seager *et al.* 2007, p. 1181) and North America (IPCC 2007a, p. 9), indicate prolonged drought and other climate-related changes will continue in the future. While climate change was not discussed in the 1993 listing rule, drought was noted in the rule as a stochastic (random or unpredictable) event that could have drastic effects on Riverside fairy shrimp, given its fragmented and restricted range (58 FR 41384, August 3, 1993, p. 41389; Service 1998a, p. 34). Local climate-related changes or drought-induced impacts that may negatively affect limited ephemeral wetland habitats include alterations in seasonal timing, ponding durations, or patterns of inundation and draw down (the drying period of a vernal pool). However, the magnitude and frequency of these factors remain untested.

In southern California, climatic variables affecting vernal pool habitats are most influenced by distance from the coast, topography, and elevation (Bauder and McMillian 1998, p. 64). As presence and persistence of Riverside fairy shrimp appear to be associated with precipitation patterns, draw-down factors, and other regional climatic factors, including aridity (Eriksen and Belk 1999, p. 71), the likely impacts of climate change on ecological processes for Riverside fairy shrimp are most closely tied to availability and persistence of ponded water during the winter and spring. Vernal pools are particularly sensitive to slight increases in evaporation or reductions in rainfall due to their relative shallowness and seasonality (Field *et al.* 1999, p. 19). Based on existing data, weather conditions in which vernal pool flooding promotes hatching, but pools become dry (or too warm) before embryos are fully developed, are expected to have the greatest negative impact on Riverside fairy shrimp resistance and resilience. In the 2008 5-year review, we noted that climate change may potentially cause changes in vernal pool inundation patterns and pool consistency, and that drought may decrease or terminate reproductive output if pools fail to flood or dry up before reproduction is complete (Service 1998a, p. 34). Long-term or continuing drought conditions may deplete cysts (eggs) or cyst banks in affected pools due to the lack of new reproductive cysts.

Additionally, localized climate-related changes may alter the temporal

spatial array of occupied habitat patches across the species' geographic range (in other words, the presence of Riverside fairy shrimp across and between pool complexes). The ability of Riverside fairy shrimp to survive is likely to depend in part on their ability to disperse to pools where conditions are suitable (Bohonak and Jenkins 2003, p. 786) through passive dispersal mechanisms utilizing reproductive cysts (see the *Life History* section in the proposed rule, published June 1, 2011 (76 FR 31686)).

As discussed above, climate projections produced through Climate Wizard predict a decrease in annual rainfall by 2050. For a species that depends on long-term filling of vernal pools, any decrease in rainfall amount could affect the persistence of the species and the quality of available habitat. However, such projections are not straightforward, because filling of vernal pools may also depend on local watershed characteristics not directly related to annual rainfall. Additionally, the climate projections do not take storm events into account that could provide for filling of vernal pools. Therefore, designation of a wide variety of vernal pool habitat types is necessary to buffer against the projected future impacts of climate change. We find the designation herein provides for the array of habitat to provide for the conservation of the species.

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 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 Riverside fairy shrimp from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on June 1, 2011 (76 FR 31686), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on August 3, 1993 (58 FR 41384), and the 1998 Recovery Plan (Service 1998a). We have determined that the Riverside fairy shrimp requires the physical or biological features described below.

Space for Individual and Population Growth and for Normal Behavior

Riverside fairy shrimp require vernal pool habitat to grow and reproduce. Their life cycle requires periods of inundation as well as dry periods (Ripley *et al.* 2004, pp. 221–223). Habitats (ephemeral wetlands) that provide space for growth and persistence of Riverside fairy shrimp include areas that generally pond for 2 to 8 months and dry down for a period during the late spring to summer months. Habitats include natural and created pools (usually greater than 12 inches (in) (30 centimeters (cm)) deep) that support these longer inundation periods; some of these habitats are artificial pools (cattle watering holes and road embankments) that have been modified or deepened with berms (Hathaway and Simovich 1996, p. 670). Artificial depressions, often associated with degraded vernal pool habitat, are capable of functioning as habitat and can support vernal pool species, including Riverside fairy shrimp (Moran 1977, p. 155; Service 1998a, p. 22). Space for the Riverside fairy shrimp's normal growth and behavior requires an underlying soil series (typically clay soil inclusions with a subsurface claypan or hardpan component), which forms an impermeable layer that sustains appropriate inundation periods (water percolates slowly once filled) and provides necessary physiological requirements including, but not limited to, appropriate water temperature and water chemistry (mineral) regimes, a natural prey base, foraging opportunities, and areas for predator avoidance.

Intact vernal pool hydrology (including the seasonal filling and drying down of pools) is the essential feature that governs the life cycle of the Riverside fairy shrimp. An intact hydrological regime includes seasonal hydration (during most but not all years) followed by drying out of the substrate to promote overwintering of cysts and provide conditions for a viable cyst bank for the following season. Proper timing of precipitation and the associated hydrological and soil processes in the upland watershed contribute to the provision of space for growth and normal behavior. Seasonal filling and persistence of the vernal pool are necessary for cyst hatching and successful reproduction of Riverside fairy shrimp (see ''Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring'', below).

To maintain high-quality vernal pool ecosystems, the vernal pool basin (a specific vernal pool and surrounding landscape) or complex and its upslope watershed (adjacent vegetation and upland habitat) must be available and functional (Hanes and Stromberg 1998, p. 38). Adjacent upland habitat supplies important hydrological inputs to sustain vernal pool ecosystems. Protection of the upland habitat between vernal pools within the watershed is essential to maintain the space needs of Riverside fairy shrimp and to buffer the vernal pools from edge effects. Having the spatial needs that create pools of adequate depth also supports the temporal needs of Riverside fairy shrimp, as deep pools provide for inundation periods of adequate length to support the entire life-history function and reproductive cycles necessary for Riverside fairy shrimp.

Vernal pools generally occur in complexes, which are defined as two or more vernal pools in the context of a larger vernal pool watershed. The local watershed associated with a vernal pool complex includes all surfaces in the surrounding area that flow into the vernal pool complex. Within a vernal pool complex, vernal pools are hydrologically connected to one another within the local geographical context. These vernal pool complexes may connect by either surface or subsurface flowing water. Pools and complexes are dependent on adjacent geomorphology and microtopography for maintenance of their unique hydrological conditions (Service 1998a, p. 23). Water may flow over the surface from one vernal pool to another (over-fill or overbanking), throughout a network of swales or low-point depressions within a watershed. Due to an impervious clay or hardpan layer, water can also flow and collect below ground, such that the soil remains saturated with water. The result of the movement of water through vernal pool systems is that pools fill and hold water continuously for a number of days, weeks, or months following the initial rainfall (Hanes *et al.* 1990, p. 51). Some hydrological systems have watersheds covering a large area, which contributes to filling and the hydrological dynamics of the system,

while other hydrologic systems have very small watersheds and fill almost entirely from direct rainfall. It is also possible that subsurface inflows from surrounding soils within a watershed contribute to filling some vernal pools (Hanes *et al.* 1990, p. 53; Hanes and Stromberg 1998, p. 48).

Impervious subsurface layers of clay or hardpan soils, combined with flat to gently sloping topography, inhibit rapid infiltration of rainwater and result in ponded water in vernal pools (Bauder and McMillian 1998, pp. 57–59). These soils also act as a buffer that moderates the water chemistry and rate of water loss to evaporation (Zedler 1987, pp. 17–30). In Ventura County, soil series known to support Riverside fairy shrimp include, but are not limited to, the Azule, Calleguas, Cropley, and Linne soil series. In Orange County, soils series include the Alo, Balcom, Bosanko, Calleguas, Cieneba, Myford, and Soper soil series. In western Riverside County, vernal pool habitat known to support Riverside fairy shrimp includes the Altamont, Auld, Bosanko, Cajalco, Claypit, Murrietta, Porterville, Ramona, Traver, and Willows soil series. In San Diego County, vernal pool habitat known to support Riverside fairy shrimp includes the Diablo, Huerhuero, Linne, Placentia, Olivenhain, Salinas, Stockpen, and Redding soil series. Soil series data are based on 2008 Soil Survey Data and are available online at: *http://websoilsurvey.nrcs.usda.gov.* For additional information on soils, see the ''Primary Constituent Elements for Riverside Fairy Shrimp'' section below.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Many fairy shrimp species are filter feeders with a diet that consists mostly of algae, bacteria, and other microorganisms (Parsick 2002, pp. 37–41, 65–70). In a natural vernal pool setting, these food items are readily available. Typically, an undisturbed, intact surface and subsurface soil structure (not permanently altered by anthropogenic land use activities such as deep, repetitive discing or grading), and the associated hydrogeomorphic processes within the basin and upland watershed, are necessary to provide food, water, minerals, and other physiological needs for Riverside fairy shrimp. Water temperature, water chemistry, and length of time that vernal pools are inundated are the important factors in the hatching and temporal appearance of Riverside fairy shrimp (Gonzalez *et al.* 1996, pp. 315–316; Hathaway and Simovich 1996, p. 669). Riverside fairy shrimp hatch and reproduce in water at temperatures that range generally from 5 to 20 degrees Celsius (C) (41 to 68 degrees Fahrenheit (F)), and typically do not hatch at temperatures greater than 25 degrees C (77 degrees F) (Hathaway and Simovich 1996, pp. 674–675). Riverside fairy shrimp have a wider thermal tolerance than San Diego fairy shrimp (*Branchinecta sandiegonensis*), which allows Riverside fairy shrimp to hatch later in the season when deeper vernal pools are still filled with water.

Cover or Shelter

Ponding of vernal pool habitat (water) also provides cover and shelter for Riverside fairy shrimp. During the period when these habitats are inundated, water plays an important role in providing the necessary aquatic environment (shelter) for the fairy shrimp to complete its life-history requirements. Without water to protect them from desiccation, fairy shrimp would be unable to hatch, grow, mature, reproduce, and disperse within the vernal pool habitat (Helm 1998, p. 136; Service 1998a, p. 34; Eriksen and Belk 1999, pp. 71, 105). Additionally, the wet (ponding) period excludes plant and animal species that are exclusively terrestrial, providing a level of shelter from predation and competition for the fairy shrimp, which are adapted to short-lived, ephemeral wetland habitats.

The undisturbed soil bank also provides cover and shelter for fairy shrimp cysts during the draw-down period of the vernal pool habitat. The drying phase allows reproductive cysts to overwinter, as they lay dormant in the soil. Basin soils provide cover and shelter to Riverside fairy shrimp as the vernal pool dries out (Simovich and Hathaway 1997, p. 42; Eriksen and Belk 1999, p. 105). By maintaining the population in a dormant state, reproductive cysts and the undisturbed soil in which they rest protect Riverside fairy shrimp from predators and competitors during the vernal pool dry period. Cyst dormancy is an important life-history adaptation for surviving arid phases, and is important for synchronizing life cycles in unstable and ephemeral wetland habitats (Belk and Cole 1975, pp. 209–210). Like the wet period exclusion of terrestrial plants, the draw-down period excludes species that are exclusively aquatic (such as fish), providing shelter for specially adapted Riverside fairy shrimp.

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

Mature Riverside fairy shrimp are typically observed from mid-March through April (Eng *et al.* 1990, p. 259). In years with early or late rainfall, the hatching period may be extended. Riverside fairy shrimp can reach sexual maturity and begin mating approximately 8 weeks from the time a vernal pool fills with water (Hathaway and Simovich 1996, p. 673). Length of time to maturity restricts Riverside fairy shrimp to a small subset of relatively long-lasting vernal pools and ephemeral wetlands in southern California (Hathaway and Simovich 1996, p. 673). This maturation rate, which is distinctly longer than for other fairy shrimp, presumably restricts Riverside fairy shrimp typically to moderate to deep vernal pools and ephemeral basins (generally ranging from 12 in (30 cm) to 5 to 10 feet (ft) (1.5 to 3 meters (m)) in depth) (Hathaway and Simovich 1996, p. 675).

Because the length of time that pools remain filled in vernal pool ecosystems is highly variable, Riverside fairy shrimp have become adapted to some degree of unpredictability in their habitat (Eriksen and Belk 1999, pp. 104–105) and to a system where the requisite conditions are transitory. Depending on rainfall and environmental conditions, a vernal pool may fill and recede numerous times. Often, the pool may evaporate before Riverside fairy shrimp are able to mature and reproduce (Ripley *et al.* 2004, pp. 221–223). The females' eggs begin to develop as soon as they are fertilized and then the development stops at an early stage (after a few cell divisions) and the eggs enter diapause (become dormant) as cysts or resting eggs (Lavens and Sorgeloos 1987, p. 29; Ericksen and Belk 1999, p. 105). Riverside fairy shrimp cysts are smaller than a tip of a pencil and contain a dormant fairy shrimp embryo encased in a hard outer shell. Cysts are generally retained in a brood pouch on the underbelly of the female until she dies, when both drop to the bottom of the vernal pool to become part of a cyst bank in the soil. During subsequent filling events, eggs may emerge from dormancy and hatch, or continue to diapause. Signals that break diapause include temperature and oxygen concentrations (Belk and Cole 1975, p. 216; Thorp and Covich 2001, p. 767). Resting eggs of freshwater crustaceans such as fairy shrimp have been shown to survive drying, heat, freezing, and ingestion by birds (Fryer 1996, pp. 1–14). Resting stages (dormancy) appear to be an adaptation

to temporary habitats and may aid in long-distance dispersal because they can survive unfavorable conditions during dispersal by birds or tires of off-highway vehicles (OHVs) (Belk and Cole 1975, pp. 209, 222; Williams 1985, p. 97).

Researchers have found that only a small proportion of Riverside fairy shrimp cysts in the cyst bank hatch each time the vernal pool fills. Therefore, if the pool dries before the species is able to mature and reproduce, there are still many more cysts left in the soil that may hatch the next time the pool fills (Simovich and Hathaway 1997, p. 42). Simovich and Hathaway (1997, pp. 40–43) referred to this as bet-hedging and concluded that it allows fairy shrimp, including Riverside fairy shrimp, to survive in an unpredictable environment. Bet-hedging ensures that some cysts will be available for hatching when the vernal pools hold water for a period long enough for Riverside fairy shrimp to complete their entire life cycle. Thus, reproductive output is spread over several seasons for small aquatic crustaceans, such as fairy shrimp, living in variable environments. Allowing conditions within the above parameters to occur on a natural basis is essential for the survival and conservation of Riverside fairy shrimp.

Habitats That Are Protected From Disturbance or Are Representative of the Historical, Geographical, and Ecological Distributions of the Species

Pools that support Riverside fairy shrimp are generally found in flat or moderately sloping areas, primarily in annual, disturbed (such as grazed or deep disced) grassland and chaparral habitats. The majority of complexes and pools that currently support Riverside fairy shrimp have experienced some level of disturbance, primarily from agriculture, cattle, and OHV activity.

Estimates of the historical distribution of Riverside fairy shrimp suggest that 90 to 97 percent of vernal pool habitat has been lost in southern California (Mattoni and Longcore 1997, pp. 71–73, 86–88; Bauder and McMillan 1998, p. 66; Keeler-Wolf *et al.* 1998, p. 10; Service 1998a, p. 45). Consideration should be given to conserve much of the remaining Riverside fairy shrimp occurrences from further loss and degradation in a configuration that maintains habitat function and species viability (Service 1998a, p. 62). Historically, there were larger complexes of vernal pools, including areas on the Los Angeles coastal prairie (Mattoni and Longcore 1997, p. 88). In other places, such as Riverside County, which has not yet been developed and fragmented to the same extent as Los Angeles County, we believe it is possible that additional occurrences of the Riverside fairy shrimp may be documented through more intensive survey efforts and reporting.

The conservation of Riverside fairy shrimp is dependent on several factors including, but not limited to, maintenance of areas (of sufficient size and configuration to sustain natural ecosystem components, functions, and processes) that provide appropriate inundation and ponding durations, natural hydrological regimes and appropriate soils, intermixed wetland and upland watershed, connectivity among pools within geographic proximity to facilitate gene flow among complexes, and protection of existing vernal pool composition and structure.

In a few locations, two species of fairy shrimp—San Diego fairy shrimp and Riverside fairy shrimp—are known to co-occur (Hathaway and Simovich 1996, p. 670). However, where these species do co-occur, they rarely have been observed to coexist as adults (Hathaway and Simovich 1996, p. 670). San Diego fairy shrimp are usually found earlier in the season than Riverside fairy shrimp, due to the Riverside fairy shrimp's slower rate of development (Hathaway and Simovich 1996, p. 675). Maturation rates are responsible for the sequential appearance of the species as adults in pools where they co-occur (Hathaway and Simovich 1996, p. 675). Neither species is found in the nearby desert or mountain areas, as temperature has been shown to play an important role in the spatial and temporal appearance of fairy shrimp.

Primary Constituent Elements for Riverside Fairy Shrimp

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of Riverside fairy shrimp in areas occupied at the time of listing, focusing on the features' primary constituent elements. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to Riverside fairy shrimp are:

(1) Ephemeral wetland habitat consisting of vernal pools and ephemeral habitat that have wet and dry periods appropriate for the incubation, maturation, and reproduction of the Riverside fairy shrimp in all but the driest of years, such that the pools:

(a) Are inundated (pond) approximately 2 to 8 months during winter and spring, typically filled by rain, and surface and subsurface flow;

(b) Generally dry down in the late spring to summer months;

(c) May not pond every year; and

(d) Provide the suitable water chemistry characteristics to support the Riverside fairy shrimp. These characteristics include physiochemical factors such as alkalinity, pH, temperature, dissolved solutes, dissolved oxygen, which can vary depending on the amount of recent precipitation, evaporation, or oxygen saturation; time of day; season; and type and depth of soil and subsurface layers. Vernal pool habitat typically exhibits a range of conditions but remains within the physiological tolerance of the species. The general ranges of conditions include, but are not limited to:

(i) Dilute, freshwater pools with low levels of total dissolved solids (low ion levels (sodium ion concentrations generally below 70 millimoles per liter (mmol/l)))

(ii) Low alkalinity levels (lower than 80 to 1,000 milligrams per liter (mg/l)); and

(iii) A range of pH levels from slightly acidic to neutral (typically in range of 6.4–7.1).

(2) Intermixed wetland and upland habitats that function as the local watershed, including topographic features characterized by mounds, swales, and low-lying depressions within a matrix of upland habitat that result in intermittently flowing surface and subsurface water in swales, drainages, and pools described in PCE 1. Associated watersheds provide water to fill the vernal or ephemeral pools in the winter and spring months. Associated watersheds vary in size and therefore cannot be generalized, and they are affected by factors including surface and underground hydrology, the topography of the area surrounding the pool or pools, the vegetative coverage, and the soil substrates in the area. The size of associated watersheds likely varies from a few acres to greater than 100 ac (40 ha).

(3) Soils that support ponding during winter and spring which are found in areas characterized in PCEs 1 and 2 that have a clay component or other property that creates an impermeable surface or subsurface layer. Soil series with a clay component or an impermeable surface or subsurface layer typically slow percolation, increase water run-off (at

least initially), and contribute to the filling and persistence of ponding of ephemeral wetland habitat where the Riverside fairy shrimp occurs. Soils and soil series known to support vernal pool habitat include, but are not limited to:

(a) The Azule, Calleguas, Cropley, and Linne soils series in Ventura County;

(b) The Alo, Balcom, Bosanko, Calleguas, Cieneba, and Myford soils series in Orange County;

(c) The Cajalco, Claypit, Murrieta, Porterville, Ramona, Traver, and Willows soils series in Riverside County; and

(d) The Diablo, Huerhuero, Linne, Placentia, Olivenhain, Redding, Salinas, and Stockpen soils series in San Diego County.

This final rule identifies the PCEs necessary to support one or more of the life-history functions of Riverside fairy shrimp and those areas containing the PCEs. We conclude that conservation of the Riverside fairy shrimp is dependent upon multiple factors. We consider the criteria for conservation of Riverside fairy shrimp to include: (1) Conservation and management of areas across the species' range that maintain normal hydrological and ecological functions where existing populations survive and reproduce and that are representative of the geographical distribution of the species; (2) conservation of areas representative of the ecological distribution of Riverside fairy shrimp (various combinations of soil types, vernal pool chemistry, geomorphic surfaces, and vegetation community associations), and (3) conservation of areas that allow for the movement of cysts between areas representative of the geographical and ecological distribution of the species (within and between vernal pool complexes).

We are designating most of the known occupied habitat of Riverside fairy shrimp because: (1) Riverside fairy shrimp are not migratory; (2) disjunct populations likely represent unique, locally adapted populations (adapted to unique site-specific or habitat-specific environmental conditions); and (3) gene exchange that should naturally occur between populations or critical habitat units is likely infrequent. Where management units are sufficiently distant (16 to 159 miles (mi) (26 to 256 kilometers (km)) from one another, the likelihood of gene exchange is reduced. All of the areas designated contain all of the PCEs essential for the species that may require special management considerations or protection, and they: (1) Maintain the genetic variability of Riverside fairy shrimp across its known geographical range and allow for a varying nature and expression of the species; (2) allow for natural levels of gene flow and dispersal where possible, in order to accommodate natural processes of local extirpation and colonization over time (and thereby reduce the risk of extinction through random and natural events); and (3) maintain a full range of varying habitat types and characteristics for the species by encompassing the full extent of the physical, biological, and environmental conditions essential for the conservation of Riverside fairy shrimp.

Not all life-history functions require all of the PCEs. For example, Riverside fairy shrimp can persist as cysts for several years when the vernal pools are not filled to the proper depth (note also PCE 1c, which recognizes that vernal pools occupied by Riverside fairy shrimp may not fill every year). Therefore, at any given time and particularly in the dry summer months, not all areas designated as revised critical habitat will demonstrate all aspects of the PCEs. However, over the longer time scale that represents the normal life-history functions of Riverside fairy shrimp, all of the PCEs are present in all of the units. Therefore, in consideration of that longer scale, we confirm that all units in this final critical habitat designation contain all of the PCEs. Further, all units and subunits designated as critical habitat are currently known to be occupied by Riverside fairy shrimp (with the exception of Subunit 1b, which is presumed to be occupied by Riverside fairy shrimp although not every portion of every unit and subunit is occupied by Riverside fairy shrimp. As discussed above, Riverside fairy shrimp require a functioning local watershed that results in intermittently flowing surface and subsurface water to fill the vernal pool basins in which the species occurs (PCE 2). Thus each unit and subunit consists of occupied vernal pool basins and the surrounding local watersheds that intermittently fill those basins. See the Final Critical Habitat Designation section below for more details.

Special Management Considerations or Protection

When designating critical habitat, we first assess whether there are specific areas within the geographical area occupied by the species at the time of listing that contain features essential to the conservation of the species that may require special management considerations or protection before considering whether any areas outside the geographical area occupied by the species at the time of listing may be essential for its conservation. The determination that special management may be required is not a prerequisite to designating critical habitat in areas essential for the conservation of the species that are outside the geographical area occupied at the time of listing. However, all areas (units/subunits) we are designating as revised critical habitat in this final rule, whether or not confirmed occupied or unoccupied at the time of listing, contain essential features that require special management considerations or protection to address current and future threats to Riverside fairy shrimp, maintain or enhance the features, and ensure the recovery and survival of the species.

The physical or biological features in areas designated as revised critical habitat in this final rule all face ongoing threats that require special management considerations or protection. For Riverside fairy shrimp, such threats include vernal pool elimination due to agricultural and urban development, including activities associated with construction of infrastructure (such as highways, utilities, and water storage) (PCEs 1, 2, 3); construction of physical barriers or impervious surfaces around a vernal pool complex (PCEs 1, 2); altered water quality or quantity (PCEs 1, 3) due to channeling water runoff into a vernal pool complex or to the introduction of water, other liquids, or chemicals (including herbicides and pesticides) into the vernal pool basin; physical disturbance to the claypan and hardpan soils within the vernal pool basin (PCEs 1, 3), including discharge of dredged or fill material into vernal pools and erosion of sediments from fill material; disturbance of soil profile by grading, digging, or other earthmoving work within the basin or its upland slopes or by other activities such as OHV use, heavy foot traffic, grazing, vegetation removal, fire management, or road construction within the vernal pool watershed (PCEs 1, 2, 3); invasion of nonnative plant and animal species into the vernal pool basin (PCEs 1, 2), which alters hydrology and soil regimes within the vernal pool; and any activity that permanently alters the function of the underlying claypan or hardpan soil layer (PCE 3), resulting in disturbance or destruction of vernal pool flora or the associated upland watershed (PCEs 2, 3). All of these threats have the potential to permanently reduce or increase the depth of a vernal pool, ponding duration and inundation of the vernal pool, or other vernal pool features beyond the tolerances of Riverside fairy shrimp (PCE 1).

Loss and degradation of wetland habitat, most directly from conversion

to agriculture and development, was cited in the final listing rule as a cause for the decline of Riverside fairy shrimp (58 FR 41387, August 3, 1993). Most of the populations of this species are located in San Diego, Orange, and Riverside Counties. These counties have had (and continue to have) increasing human populations, development, and infrastructure needs. Natural areas in these counties are frequently near or bounded by urbanized areas. Grading, discing, and scraping for urbanization results in loss of vernal pool topography and soil surface, as well as the subsurface soil layers, to the degree that they will no longer support ponding for Riverside fairy shrimp (PCE 3). Urban development modifies and removes vernal pool topography, compacts or disturbs soils such that basins and upland watershed components are altered, and likely eliminates or fragments populations of Riverside fairy shrimp through direct crushing of cysts, disruption of soils and removal of the cyst bank, and modification of upland hydrology and topography, which may potentially isolate a pool or pools within a complex. Overall, habitat loss continues to be the greatest direct threat to Riverside fairy shrimp.

Because the flora and fauna in vernal pools or swales can change if the hydrological regime is altered (Bauder 1986b), human activities that reduce the extent of the watershed or alter runoff patterns (timing, amount, or flow of water) (PCE 2) may also eliminate Riverside fairy shrimp, reduce their population size or reproductive success, or alter the duration or filling of basins such that the location of sites inhabited by this species may shift. Changes to hydrological patterns due to cattle trampling, OHV use, human trampling, road development, military activities, and water management activities impact vernal pools (PCEs 1, 2, 3) (58 FR 41387, August 3, 1993). Impacts to Riverside fairy shrimp such as the species' genetic diversity and patterns of gene flow, persistence from reductions in air and water quality due to human urbanization, or changes in nutrient availability associated with altered hydrology may be exacerbated by the species' highly fragmented and restricted range (Bauder 1986b, pp. 209–211).

Unpredictable natural events, such as fire, can be especially devastating due to the fragmented and restricted range of the species (58 FR 41390, August 3, 1993). Vernal pool habitat is naturally subject to wildfires, and cysts of other fairy shrimp species are known to survive fire events (Zedler 1987, p. 96; Wells *et al.* 1997, p. 200). However, fire can have detrimental impacts on vernal pools from direct burning of dense surrounding vegetation (Bauder and Wier 1991, p. 5–10). Fire suppression can also damage vernal pools due to grading activities, suppression activities, crushing from vehicles associated with fire control, or from sediment runoff following fire (Bauder 1986a, p. 21; Bauder and Wier 1991, pp. 5–10–5–11; Hecht *et al.* 1998, p. 33). These threats may require special management considerations or protection.

Changes in hydrology that affect the Riverside fairy shrimp's PCEs are caused by activities that alter the surrounding topography or change historical water flow patterns in the watershed (PCEs 2, 3). Even slight alterations in the hydrology can change the depth, volume, and duration of ponding inundation; water temperature; soil; mineral and organic matter transport to the pool; and water quality and chemistry, which in turn can make the ephemeral wetland habitat (PCE 1) unsuitable for Riverside fairy shrimp. Activities that impact the hydrology include, but are not limited to, road building, grading and earth moving, impounding natural water flows, and draining of pools or their immediately surrounding upland watershed. Impacts to the hydrology of vernal pools can be managed through avoidance of such activities in and around the pools and the associated surrounding upland areas.

Disturbance to the impermeable substrate layer of claypan and hardpan soils within vernal pools occupied by Riverside fairy shrimp (PCE 3) may alter the depth, ponding inundation, water temperature, and water chemistry. Physical disturbances to claypan and hardpan soils may be caused by excavation of borrow material (soil or sediments), OHV use, military training activities, repeated or deep agricultural discing, drilling during construction activities, or creation of berms that obstruct the natural hydrological surface or subsurface flow of water runoff and precipitation. Impacts to the soils of vernal pools can be managed through avoidance of these activities in and around the pools and the associated surrounding upland areas.

Nonnative plant species may alter ponding inundation and water temperature by changing the evaporation rate and shading of standing water in vernal pools (PCEs 1, 2). Invasive plant species, such as *Cotula coronopifolia* (brass-buttons) and *Agrostis avenacea* (Pacific bentgrass), compete with native vernal pool plant species and may alter the physiochemical factors of the water (PCE 1), the ponding duration (PCE 1), and the upland habitat (PCE 2) in these vernal pools. Impacts from nonnative plants can be managed to maintain the appropriate hydrology and physiochemical nature of the vernal pools required by the life-history processes of Riverside fairy shrimp.

Further discussion of specific threats to the PCEs in individual critical habitat units is provided in the unit descriptions below. In these revised critical habitat units, special management considerations or protection may be needed to ensure the long-term existence and management of ephemeral and upland habitat sufficient for the Riverside fairy shrimp's successful reproduction and growth, adequate feeding habitat, proper physiochemical and environmental regimes, linked hydrology, and connectivity within the landscape.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of the Riverside fairy shrimp. In accordance with the Act and its implementing regulations at 50 CFR 424.12(e), we considered whether designating additional areas outside the geographical area occupied at the time of listing are essential to ensure the conservation of the species. At the time of listing, Riverside fairy shrimp were known to occupy nine vernal pool complexes within Orange, Riverside, and San Diego Counties, California, and Baja California, Mexico. Occupied complexes included four vernal pools in Riverside County, one population in Orange County, two complexes in San Diego County, and two locations in Baja California, Mexico (58 FR 41384; August 3, 1993).

In determining which areas within the geographical area occupied at the time of listing currently contain the physical or biological features essential to the conservation of Riverside fairy shrimp, we used all available scientific and commercial data, including information from the 1991 proposed listing rule (56 FR 57503, November 12, 1991), the 1993 final listing rule (58 FR 41384, August 3, 1993), the 1998 Recovery Plan (Service 1998a, pp. 1–113), the 2008 5-year review for Riverside fairy shrimp (Service 2008, pp. 1–57), the California Department of Fish and Game's (CDFG) California Natural Diversity Data Base

(CNDDB) records, published peer-reviewed articles, unpublished papers and reports, academic theses, survey results, geographic information system (GIS) data (such as species occurrences, soil data, land use, topography, and ownership maps), and correspondence to the Service from recognized experts. We solicited new information collected since publication of the 1998 Recovery Plan and 2005 final critical habitat designation (70 FR 19154), including information from State, Federal, and tribal governments; scientific data on Riverside fairy shrimp collected by academia and private organizations; information in reports submitted during consultations under section 7 of the Act; information contained in analyses for individual and regional HCPs where Riverside fairy shrimp is a covered species; and data collected from reports submitted by researchers holding recovery permits under section 10(a)(1)(A) of the Act.

We acknowledge the geographical area known to be occupied by the species in the United States as presented in the listing rule (58 FR 41384; August 3, 1993) is that area bounded by the coastline to the west, east to an area near tribal land of the Pechanga Band of Luiseño Mission Indians of the Pechanga Reservation, California, in western Riverside County, north into the central foothills of Orange County near the former Marine Corps Air Station (MCAS) El Toro, and south to coastal mesa tops along the United States-Mexico Border in San Diego County. However, as with many species, listing often results in greater efforts to conduct surveys that may reveal more information related to specific occurrences across a greater geographical area than were initially known (76 FR 31690; June 1, 2011). The current known range of Riverside fairy shrimp is from Ventura County to the United States-Mexico Border in San Diego County, a north-south distance of approximately 163 miles (mi) (262 kilometers (km)) within southern California and inland from the Pacific Coast 50 mi (80 km), based on all available species occurrence data pre- and post-listing. Two additional records documented Riverside fairy shrimp in northwestern Baja California, Mexico, at the time the species was listed (58 FR 41384). Extant occurrences are located within four counties in southern California: Ventura, Orange, Riverside, and San Diego.

When we developed our proposed critical habitat, we considered areas where Riverside fairy shrimp have been documented since listing (1993), including areas outside the geographical range of the species as presented in the listing rule, to be ''within the geographical area occupied by the species at the time of listing [in 1993]'' (see proposed rule at 76 FR 31689, June 1, 2011, and discussion below). Based on our review of the species' biology and life-history traits, we conclude that occurrences documented since the 1993 listing do not represent an expansion of the species' distribution and range, but rather reflect our better understanding of the distribution and range of the species at the time of listing (Service 2008, p. 9).

The life history of Riverside fairy shrimp supports the conclusion that many of the pools surveyed after publication of the listing rule were, in fact, occupied at the time of listing. Riverside fairy shrimp are relatively sedentary and possess limited dispersal capabilities (Davies *et al.* 1997, p. 157). Dispersal is assumed to be through passive means, including movement of diapausing cysts by rain and overponding of water (Zedler 2003, p. 602) and wind (Brendonck and Riddoch 1999, p. 67; Vanschoenwinkel 2008, pp.130–133), or through active means, such as animal-mediated transport (Keeler-Wolf *et al.* 1998, p. 11; Bohonak and Jenkins 2003, p. 784; Green and Figuerola 2005, p. 150). However, evidence of passive dispersal remains limited, and the relative role of vertebrate vectors requires additional studies (see Bohonak and Jenkins 2003, p. 786).

Riverside fairy shrimp have a relatively long maturation time (Simovich 1998, p. 111), which limits the species to deeper pools with longer ponding durations (Hathaway and Simovich 1996, p. 675). Riverside fairy shrimp exhibit a diversified bet-hedging reproductive strategy (Simovich and Hathaway 1997, p. 42). In other words, the species spreads reproductive effort over more than one ponding event through diapause of eggs (production of a cyst bank) and the hatching of a fraction of the cyst bank (Simovich and Hathaway 1997, p. 42; Philippi *et al.* 2001, p. 392; Ripley *et al.* 2004, p. 222).

Riverside fairy shrimp are restricted to certain pool types (deep, long-ponding, along coastal mesas or in valley depressions) with certain underlying soils (Bauder and McMillian 1998, p. 57), which have variable but specific water chemistry (Gonzalez *et al.* 1996, p. 317) and temperature regimes (Hathaway and Simovich 1996, p. 672). Suitable pools are geographically fixed and limited in number, and influenced by position, distance from coast, and elevation (Bauder and McMillian 1998, pp. 62, 64). Typically, mima mound topography (landscapes consisting of mounds of soil) and impervious soils with a subsurface clay or hardpan layer provide the necessary ponding opportunities during winter and spring (Zedler 1987, pp. 13, 17). Underlying soil types and pool size influence the wetland habitat physiochemical parameters, associated vegetation, and faunal communities; those latter three factors are also affected by regional climate (rainfall, temperature, evaporation rate) and elevational differences (Keeler-Wolf *et al.* 1998, p. 9). Vernal pools are discontinuously distributed in several regions in southern California, and Riverside fairy shrimp are well adapted to the ephemeral nature of their habitat and to the localized climate, topography, and soil conditions (Bauder and McMillian 1998, p. 56; Keeley and Zedler 1998, p. 6). These statements are supported by careful review of the species' habitat, ecology, and life-history requirements.

Based on these habitat and life-history traits, we conclude that the additional occurrences detected since listing, both within and to the north of the species' known geographical area at the time of listing, were likely present in those areas prior to listing, but the presence of the species was not known because protocol surveys had not been conducted prior to listing. Occurrences documented since the 1993 listing should not be construed to represent an expansion of the species' distribution and range, but rather to reflect our current and better understanding of the distribution and range of the species at the time of listing based on the best information available to us at this time (Service 2008, p. 9).

After publication of the June 1, 2011, proposed rule but before the March 1, 2012, publication, the Federal Circuit Court of Appeals for the District of Columbia invalidated a portion of the final rule designating critical habitat for the San Diego fairy shrimp under section 3(5)(A)(i) of the Act. The court concluded that the Service lacked adequate information to support its conclusion that the area in question was occupied at the time of listing and qualified as critical habitat under section 3(5)(A)(i) (*Otay Mesa Property, L.P. et al.* v. *U.S. Dept. of the Interior,* 646 F.3d 914 (D.C. Cir. 2011) (*Otay Mesa*)). The court noted, however, that its ruling was narrow and directed only at the Service's reliance on section 3(5)(A)(i) of the Act. The court pointed out that the Service could choose to designate the area in question under section 3(5)(A)(ii) of the Act as long as we provide adequate justification for designation under that provision (*Otay*

Mesa, 646 F.3d at 914). Because habitat containing the physical or biological features essential for the conservation of Riverside fairy shrimp overlaps with essential habitat for the San Diego fairy shrimp at issue in *Otay Mesa,* and because the species have similar life-history and habitat requirements, we applied the circuit court's reasoning in our March 1, 2012, publication (77 FR 12543), and apply it in this final designation of revised critical habitat for the Riverside fairy shrimp.

In light of that ruling, we reiterate that Unit 1 (1a, 1b), Unit 2 (2dA, 2dB, 2e, 2f, 2g, 2h, 2i), Unit 3 (3c, 3d, 3e, 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5e, 5f, 5g, 5h) meet the definition of critical habitat under section 3(5)(A)(i) of the Act (i.e., are areas within the geographical area occupied by the Riverside fairy shrimp at the time of listing) for the reasons explained in our March 1, 2012, publication (77 FR 12543) despite the absence of proof of occupancy at the time of listing. However, assuming such areas would not meet the definition of critical habitat under section 3(5)(A)(i) of the Act under the *Otay Mesa* court's application of ''occupancy'' under that provision due to the absence of prelisting surveys confirming the presence of Riverside fairy shrimp, we conclude that the areas alternatively meet the definition of critical habitat under section 3(5)(A)(ii) of the Act. These areas are essential for the conservation of the species, and a designation limited to areas documented to have been occupied at the time of listing would be inadequate to ensure the conservation of Riverside fairy shrimp. Nine occurrences of Riverside fairy shrimp were identified in the listing rule (58 FR 41384). One of those occurrences, located in Riverside County, has been lost due to development activities (Service 1998a, Appendix 1); a further two are in Baja California, Mexico, and therefore not subject to critical habitat designation (50 C.F.R. 424.12(h)). Based on a review of the best available scientific and commercial information, only five of those remaining six occurrences known at the time of listing currently contain the physical or biological features essential to the conservation of the species (see further details on identification of critical habitat units below). Those five occurrences are MCAS El Toro (Subunit 2c), Skunk Hollow Pool (Subunit 3f), Field Pool (Subunit 3f), complex J29–31 (Subunit 5d), and East Miramar (AA1 South+ Group)(Pool 4786; previously Pool 12). The latter occurrence is on MCAS Miramar and exempt from this final critical habitat rule. The sixth occurrence identified at the time of listing was a vernal pool partially within the Pechanga Band of Luiseño Mission Indians reservation and partially on private land abutting the reservation. That occurrence has been lost as a result of agricultural activities and construction of a gravel pit. In the proposed revised critical habitat rule published in 2011 (76 FR 31686; June 1, 2011), we requested comments from the public about these vernal pools, but received no information pertaining to them. Therefore, due to insufficient occurrence information and evidence of severely modified and impacted pools from years of discing and plowing, we are not proposing to designate critical habitat on tribal lands of the Pechanga Band of Luiseño Mission Indians.

These remaining five occurrences (representing three subunits) alone are not sufficient to conserve Riverside fairy shrimp. In addition, all of the areas that support extant occurrences of Riverside fairy shrimp face threats including development, habitat fragmentation, altered hydrology, livestock grazing, nonnative vegetation, military activities, pollution, dumping, human disturbance, and climate change (Service 2008, pp. 12–37; see also the *Climate Change* section above). Protecting a wide variety of habitat will provide a buffer against these threats and provide for the conservation of the species. Therefore, given the endangered status and the small number of extant Riverside fairy shrimp populations, and the need to protect the species' genetic and habitat variability to minimize the likelihood of a stochastic event eliminating most or all of the surviving populations, a critical habitat designation limited to areas known to be occupied at the time of listing would be inadequate to provide for the conservation of the species.

We identify three subunits (Subunit 2c, 3f, and 5d) as meeting the definition of critical habitat under section 3(5)(A)(i) of the Act because the areas were known to be occupied at the time of listing. We identify Subunit 3g as meeting the definition of critical habitat under section 3(5)(A)(ii) of the Act because the pool was created after the time of listing and because we consider it to be essential for the conservation of the species. We consider the remaining 21 subunits (Subunits 1a, 1b; Subunits 2dA, 2dB, 2e, 2f, 2g, 2h, 2i; Subunits 3c, 3d, 3e, 3h; Subunit 4c; Subunits 5a, 5b, 5c, 5e, 5f, 5g, 5h) to meet the definition of critical habitat under section 3(5)(A)(i) of the Act. However, because we lack definitive evidence of their occupancy at the time of listing, which under *Otay Mesa* could disqualify the areas from designation under section 3(5)(A)(i) of the Act, we alternatively identify these areas as meeting the definition of critical habitat under section 3(5)(A)(ii) of the Act. We identify them as such to make clear that we consider these specific areas to be essential for the conservation of Riverside fairy shrimp, notwithstanding the absence of surveys confirming the presence of Riverside fairy shrimp at the time of listing. Although we consider the available evidence sufficient to conclude that these subunits were occupied by Riverside fairy shrimp at the time the species was listed, due to the lack of documentation of occupancy, such as survey results prior to 1993, for the purposes of this rulemaking we determine that these subunits also alternatively meet the definition of critical habitat in section 3(5)(A)(ii) of the Act.

Our identification of these units and of habitat essential to the conservation of Riverside fairy shrimp takes into consideration the conservation approach described in the 1998 Recovery Plan and considers areas identified therein as necessary for the species' stabilization and recovery. The 1998 Recovery Plan identifies management areas on which the long-term conservation and recovery of Riverside fairy shrimp depend. Appendices F and G in the 1998 Recovery Plan defined known vernal pool complexes essential to the conservation of several vernal pool species, including Riverside fairy shrimp (Service 1998a, pp. F1–G3). Eight distinct management areas were identified based on plant and animal distribution, soil types, and climatic variables (Service 1998a, pp. 38–39). Management areas include vernal pools and complexes known to be occupied and essential to the conservation of Riverside fairy shrimp.

We have used these same eight management areas and names, where possible, to assist us in identifying specific areas essential to the conservation of the Riverside fairy shrimp. In cases where new occurrence data identify occupied vernal pools not identified in the 1998 Recovery Plan, we have relied on the best available scientific data to update map coverage (for example, in Orange and Riverside Counties). Our 2005 final rule (70 FR 19154) used locations identified in Appendices F and G of the 1998 Recovery Plan; however, for this final revised critical habitat rule (due to revisions to the PCEs and improvements in mapping methodologies), some additions and subtractions have

occurred in areas previously identified as essential either in the 1998 Recovery Plan or in the 2005 final critical habitat designation (Table 2). In some cases, areas within subunits have been removed because, based on new information, they no longer contain the physical or biological features or PCEs that are essential to the conservation of Riverside fairy shrimp. Specific differences from the 2005 final rule are summarized in the Summary of Changes from Previously Designated Critical Habitat section of the proposed rule published on June 1, 2011 (76 FR 31686).

We are designating critical habitat in specific areas that include ephemeral wetland habitat and intermixed wetland and upland habitats of various sizes; possess appropriate soils and topography that support ponding during winter and spring; are within the known geographical and elevational range of Riverside fairy shrimp; are geographically distributed throughout the range of the species; represent unique ecological or biological features and associations; and will help protect against stochastic extirpation, allow for local adaptation, and provide connectivity to facilitate dispersal and genetic exchange. By protecting a variety of habitats throughout the species' range, we increase the probability that the species can adjust in the future to various limiting factors that may affect the population, such as changes in abundance and timing of precipitation.

As required by section 4(b)(2) of the Act, we used the best scientific data available to designate critical habitat. The steps we followed in identifying critical habitat are described in detail below.

(1) We determined, in accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, the physical or biological features that are essential to the conservation of the species (see the *Physical or Biological Features* section above).

(2) We compiled all available observational data on Riverside fairy shrimp into a GIS database. Data on locations of Riverside fairy shrimp occurrences are based on collections and observations made by biologists, biological consultants, and academic researchers. We compiled data from the following sources to create our GIS database for Riverside fairy shrimp: (a) Data used in the 1998 Recovery Plan, 2005 final critical habitat rule for Riverside fairy shrimp, and 2008 5-year review for Riverside fairy shrimp; (b) the CNDDB data report and accompanying GIS records for Riverside fairy shrimp (CNDDB 2010, pp. 1–9); (c) data presented in the City of San Diego's Vernal Pool Inventory for 2002–2003 (City of San Diego 2004, pp. 1–125); (d) monitoring reports for Riverside fairy shrimp from Marine Corps Base (MCB) Camp Pendleton and MCAS Miramar; (e) the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) species GIS database; and (f) the Carlsbad Fish and Wildlife Office's (CFWO) internal species GIS database, which includes the species data used for the County of San Diego Multiple Species Conservation Plan (MSCP) and Western Riverside County MSHCP, reports from section 7 consultations, and Service observations of Riverside fairy shrimp (CFWO internal species GIS database). Compiled data were reviewed to ensure accuracy. Each data point in our database was checked to ensure that it represented an original collection or observation of Riverside fairy shrimp and that it was mapped in the correct location. Data points that did not match the description for the original collection or observation were remapped in the correct location or removed from our database.

(3) We determined which occurrences were extant at the time of listing, based on the 1993 listing rule, as well as information that has become available since the time of listing. We considered several sources in compiling the best available data on Riverside fairy shrimp vernal pool distribution and species' occurrence. We have concluded that, with the exception of Johnson Ranch Created Pool (Subunit 3g, which was created using cysts salvaged from a nearby historical occurrence at Redhawk development), all currently occupied vernal pools were also occupied and extant at the time of listing (see Background section and the specific unit descriptions below). We have drawn this conclusion because Riverside fairy shrimp have limited dispersal capabilities, and because surveys for the species at the time of listing were incomplete. We conclude that the documentation of additional occurrences within the range of Riverside fairy shrimp after it was listed was due to an increased survey effort for this species. However, as described above, we also find these areas are essential for the conservation of the species.

(4) We identified which areas contain the PCEs for Riverside fairy shrimp, and identified those areas that may require special management considerations or protection. Units were identified based on sufficient PCEs being present to support Riverside fairy shrimp life-history processes. Some units contain all of the identified PCEs and support multiple life stages (resting cyst, nauplii (recently hatched larvae), and adult). Areas that we have identified as having one or more PCEs: (a) Contain large interconnected ephemeral wetlands, large numbers of individuals, or habitat areas that allow for connections between existing occurrences of Riverside fairy shrimp; (b) represent important occurrences of this species on the geographic edge of its distribution; (c) contain occurrences that are more isolated from other occurrences by geographic features, but may represent unique adaptations to local features (biogeochemistry, hydrology, microclimate, soil mineralogy, soil fertility, soil formation processes, evolutionary time scale); or (d) exist within the distribution of the species and provide connections between occupied areas. The conservation of stable and persistent occurrences throughout the species' range helps to maintain connectivity and gene flow between occurrences that are in proximity to one another, as well as by preserving unique genetic assemblages in vernal pools across the range, including those pools not within close proximity to one another.

(5) We circumscribed boundaries of potential critical habitat, based on information obtained from the above steps. For areas containing the physical or biological features essential to the conservation of the species, we mapped the specific areas that contain the PCEs for Riverside fairy shrimp. First, we mapped the ephemeral wetland habitat in the occupied area using occurrence data, aerial imagery, and 1:24,000 topographic maps. We then mapped the intermixed wetland and upland habitats that function as the local watersheds and the topography and soils that support the occupied ephemeral wetland habitat. We mapped these areas to identify the gently sloping area associated with ephemeral wetland habitat and any adjacent areas that slope directly into the ephemeral wetland habitat, and that contribute to the hydrology of the ephemeral wetland habitat. We delineated the border of the revised critical habitat around the occupied ephemeral wetlands and associated local watershed areas to follow natural breaks in the terrain such as ridgelines, mesa edges, and steep canyon slopes.

(6) We removed all areas not containing the physical or biological features essential to the conservation of Riverside fairy shrimp. For example, when determining critical habitat boundaries, we made every effort to

avoid including developed areas, such as lands covered by buildings, pavement, and other structures, because such lands lack physical or biological features for Riverside fairy shrimp. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the final rule and are not designated as critical habitat. Therefore, in this final revised critical habitat rule, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect any adjacent critical habitat.

(7) We exempted areas within the boundaries of MCB Camp Pendleton and MCAS Miramar in this final rule because we determined that these areas are exempt under section 4(a)(3)(B)(i) of the Act from critical habitat designation (see Exemptions section below).

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. The coordinates or plot points or both on which each map is based are available to the public on *http://www.regulations.gov* at Docket No. FWS–ES–R8–2011–0013, on our Internet site (*http://www.fws.gov/carlsbad/*), and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

TABLE 2—AREAS IDENTIFIED AS NECESSARY FOR STABILIZING RIVERSIDE FAIRY SHRIMP POPULATIONS

[As listed in Appendix F of 1998 Recovery Plan, and as identified as essential and as containing the PCEs in the 2005 final critical habitat designation and this 2012 final revised critical habitat designation]

Name/Location	Listed in Appendix F of 1998 Recovery Plan	2005 final critical habitat designation (subunit)	2012 final revised critical habitat (subunit)
Unit 1: Ventura County (Goleta and Transverse MA)			
Tierra Rejada Preserve (*RP: Carlsberg (Ranch)).	Yes	1a	1a.
South of Tierra Rejada Valley (east of Hwy 23).	No	1b	1b.
Cruzan Mesa (*RP: Cruzan Mesa)	Yes	1c; Removed	Not proposed; not designated.
Unit 2: Los Angeles Basin—Orange County Foothills (Los Angeles Basin—Orange MA)			
(MCAS) El Toro (*RP: El Toro)	Yes	2c; 4(b)(2) exclusion	2c; 4(b)(2) exclusion.
SCE Viejo Conservation Bank	No	No subunit #; 4(b)(2) exclusion	2i; 4(b)(2) exclusion.
Saddleback Meadow (*RP: Saddleback Meadow).	Yes**	2d; 4(b)(2) exclusion	2dA; partial 4(b)(2) exclusion.
O'Neill Regional Park (near Trabuco Canyon).	Yes**	2d; 4(b)(2) exclusion	2dB; partial 4(b)(2) exclusion.
O'Neill Regional Park (near Cañada Gobernadora).	Yes**	2	2e; partial 4(b)(2) exclusion.
Chiquita Ridge (*RP: Chiquita Ridge)	Yes	2f; 4(b)(2) exclusion	2f; 4(b)(2) exclusion.
RP: "Orange County Foothills (undescribed)".	Yes**	Not proposed	2h; partial designation 2dB, 2e, 2g, 2h, 2i; 4(b)(2) exclusion.
Radio Tower Road	No	2g; 4(b)(2) exclusion	2g; 4(b)(2) exclusion.
San Onofre State Beach, State Park-leased land (near Christianitos Creek foothills).	No	2h; 4(a)(3)(B) exemption	2h; partial 4(a)(3)(B) exemption.
Unit 3: Riverside Inland Valleys (Riverside MA)			
March Air Reserve Base	No	3a; Removed	Not proposed; not designated.
March Air Reserve Base	No	3b; 4(a)(3)(B) exemption	Not proposed; not designated.
Australia Pool	No	No subunit #; 4(b)(2) exclusion	3c; 4(b)(2) exclusion.
Scott Road Pool	No	No subunit #; 4(b)(2) exclusion	3d; 4(b)(2) exclusion.
Schleuniger Pool	No	No subunit #; 4(b)(2) exclusion	3e; 4(b)(2) exclusion.
Skunk Hollow and Field Pool (Barry Jones Wetland Mitigation Bank) (*RP: Skunk Hollow/Murrieta).	Yes	No subunit #; 4(b)(2) exclusion	3f; 4(b)(2) exclusion.
Johnson Ranch Created Pool	No	No subunit #; 4(b)(2) exclusion	3g; 4(b)(2) exclusion.
Santa Rosa Plateau—Mesa de Colorado (*RP: Santa Rosa Plateau).	Yes	Not proposed	3h; 4(b)(2) exclusion.
No Unit #: Northern San Diego County Military Land, Exempted (San Diego North Coastal Mesa MA)			
.			
Stuart Mesa, MCB Camp Pendleton (*RP: Stuart Mesa).	Yes	No subunit #; 4(a)(3)(B) exemption	4(a)(3)(B) exemption.
Cockleburr, MCB Camp Pendleton (*RP: Cockleburr).	Yes	No subunit #; 4(a)(3)(B) exemption	4(a)(3)(B) exemption.

TABLE 2—AREAS IDENTIFIED AS NECESSARY FOR STABILIZING RIVERSIDE FAIRY SHRIMP POPULATIONS—Continued

[As listed in Appendix F of 1998 Recovery Plan, and as identified as essential and as containing the PCEs in the 2005 final critical habitat designation and this 2012 final revised critical habitat designation]

Name/Location	Listed in Appendix F of 1998 Recovery Plan	2005 final critical habitat designation (subunit)	2012 final revised critical habitat (subunit)
Las Pulgas, MCB Camp Pendleton (*RP: Las Pulgas).	Yes	No subunit #; 4(a)(3)(B) exemption	4(a)(3)(B) exemption.
Land south of San Onofre State Park	Yes	No subunit #; 4(b)(2) exclusion for National Security.	4(a)(3)(B) exemption.
San Mateo, MCB Camp Pendleton (*RP: San Mateo).	Yes	No subunit #; 4(a)(3)(B) exemption	Not proposed; not designated.
Wire Mountain, MCB Camp Pendleton (*RP: Wire Mountain).	Yes	4(a)(3)(B) exemption	Not proposed; not designated.
Portion of San Onofre State Beach, State Park-leased land (near Christianitos Creek foothills) (*RP: State Park Lease Area).	No	No subunit #; 4(b)(2) exclusion for National Security.	4(a)(3)(B) exemption.
No Unit Number: Central Sand Diego County, Military Land, Exempted (San Diego Central Coastal Mesa MA)			
East Miramar (AA1 South+ Group)(Pool 4786; previously Pool 12).	Yes	4(a)(3)(B) exemption	4(a)(3)(B) exemption.
Unit 4: San Diego North Coastal Mesas (San Diego: North Coastal MA)			
Poinsettia Lane Commuter Train Station (JJ 2) (*RP: JJ2 Poinsettia Lane).	Yes	4c	4c; 4(b)(2) exclusion.
Unit 5: San Diego Southern Coastal Mesas (San Diego: South Coastal MA)			
J33 (Sweetwater High School)	No	5a; 4(b)(2) exclusion	5a.
J15 (Arnie's Point) (*RP: J2, J5, J7, J11–21, J23–30).	Yes**	5b; 4(b)(2) exclusion	5b; 4(b)(2) exclusion.
East Otay Mesa (*RP: Otay Mesa undescribed).	Yes	5c; partial 4(b)(2) exclusion	5c.
"Otay Mesa vernal pool complexes" (*RP: J2, J5, J7, J11–21, J23–30).	Yes**	No subunit #; 4(b)(2) exclusion	Designated as subunits below.
J29–31 (*RP: J2, J5, J7, J11–21, J23–30)	Yes**	No subunit #; 4(b)(2) exclusion	5d; partial 4(b)(2) exclusion.
J2 N, J4, J5 (Robinhood Ridge–J2) (*RP: J2, J5, J7, J11–21, J23–30).	Yes	No subunit #; 4(b)(2) exclusion	5e.
J2 S and J2 W (Hidden Valley, Cal Terraces, Otay Mesa Road) (*RP: J2, J5, J7, J11–21, J23–30).	Yes	No subunit #; 4(b)(2) exclusion	5f.
J14	No	No subunit #; 4(b)(2) exclusion	5g.
J11–12, J16–18 (Goat Mesa) (*RP: J2, J5, J7, J11–21, J23–30).	Yes	No subunit #; 4(b)(2) exclusion	5h; partial 4(b)(2) exclusion.

MA: Management Area as defined in 1998 Recovery Plan.
*(*RP):* name of pool (or pool complex) as stated in the 1998 Recovery Plan.
No: not in 1998 Recovery Plan; occurrence not identified until after 1998.
Yes: location was identified in the 1998 Recovery Plan.
*Yes **:* location was considered in the 1998 Recovery Plan, but at that time was grouped (lumped) as multiple vernal pool complexes. These locations have now been separated in this 2012 final rule.

Final Critical Habitat Designation

We are designating 3 units, containing 13 subunits, as critical habitat for Riverside fairy shrimp. The three units are: Unit 1 (Ventura County), Unit 2 (Los Angeles Basin—Orange County Foothills), and Unit 5 (San Diego Southern Coastal Mesas). All of Unit 3 (Riverside County) and Unit 4 (San Diego North and Central Coastal Mesas) are excluded in this final rule. Table 3 shows all of the critical habitat units, including excluded acreages.

TABLE 3—FINAL CRITICAL HABITAT FOR RIVERSIDE FAIRY SHRIMP IS SHOWN IN THE LAST COLUMN OF THE TABLE.

[This table does not include habitat exempted under Section 4(a)(3) of the Act but does identify habitat excluded under Section 4(b)(2) in column 6.]

Critical habitat unit	Federal land	State land	Local land [1]	Private land	Total area containing essential features	Area excluded	Final critical habitat
Unit 1: Ventura County			31 ac (13 ha)	435 ac (176 ha)	466 ac (189 ha)		466 ac (189 ha).
1a. Tierra Rejada Preserve				18 ac (7 ha)	18 ac (7 ac)		18 ac (7 ac).
1b. South of Tierra Rejada Valley			31 ac (13 ha)	417 ac (169 ha)	448 ac (182 ha)		448 ac (182 ha).
Unit 2: Los Angeles Basin—Orange County Foothills			142 ac (58 ha)	576 ac (233 ha)	718ac (291 ha)	322 ac (130 ha)	396 ac (160 ha).
2c. (MCAS) El Toro			18 ac (7 ha)	8 ac (3 ha)	26 ac (11 ac)	26 ac (11 ha)	
2dA. Saddleback Meadow			4 ac (2 ha)	252 ac (102 ha)	256 ac (104 ha)	4 ac (2 ha)	252 ac (102 ha).
2dB. O'Neill Regional Park (near Trabuco Canyon)			75 ac (30 ha)	15 ac (6 ha)	90 ac (37 ha)	75 ac (30 ha)	15 ac (6 ha).
2e. O'Neill Regional Park (near Cañada Gobernadora)			45 ac (18 ha)	24 ac (10 ha)	69 ac (28 ha)	47 ac (19 ha)	22 ac (9 ha)
2f. Chiquita Ridge				56 ac (23 ha)	56 ac (23 ha)	56 ac (23 ha)	
2g. Radio Tower Road				51 ac (21 ha)	51 ac (21 ha)	51 ac (21 ha)	
2h. San Onofre State Beach, State Park-leased land (near Christianitos Creek foothills).				107 ac (43 ha)	107 ac (43 ha)		107ac (43 ha).
2i. SCE Viejo Conservation Bank				63 ac (25 ha)	63 ac (25 ha)	63 ac (25 ha)	
Unit 3: Riverside Inland Valleys		54 ac (22 ha)		811 ac (328 ha)	865 ac (350 ha)	865 ac (350 ha)	
3c. Australia Pool				19 ac (8 ha)	19 ac (8 ha)	19 ac (8 ha)	
3d. Scott Road Pool				9 ac (4 ha)	9 ac (4 ha)	9 ac (4 ha)	
3e. Schleuniger Pool				23 ac (9 ha)	23 ac (9 ha)	23 ac (9 ha)	
3f. Skunk Hollow and Field Pool (Barry Jones Wetland Mitigation Bank).				163 ac (66 ha)	163 ac (66 ha)	163 ac (66 ha)	
3g. Johnson Ranch Created Pool		54 ac (22 ha)			54 ac (22 ha)	54 ac (22 ac)	
3h. Santa Rosa Plateau—Mesa de Colorado				597 ac (242 ha)	597 ac (242 ha)	597 ac (242 ha)	
Unit 4: San Diego North and Central Coastal Mesas			6 ac (3 ha)	3 ac (1 ha)	9 ac (4 ha)	9 ac (4 ha)	
4c. Poinsettia Lane Commuter Train Station			6 ac (3 ha)	3 ac (1 ha)	9 ac (4 ha)	9 ac (4 ha)	
Unit 5: San Diego Southern Coastal Mesas	40 ac (16 ha)	256 ac (104 ha)	157 ac (64 ha)	472 ac (191 ha)	925 ac (375 ha)	63 ac (25 ha)	862 ac (348 ha).
5a. Sweetwater (J33)			2 ac (less than 1 ha).	less than 1 ac (0 ha).	2 ac (less than 1 ha).		2 ac (less than 1 ha).
5b. Arnie's Point (J15)	29 ac (12 ha)				29 ac (12 ha)	29 ac (12 ha)	
5c. East Otay Mesa				57 ac (23 ha)	57 ac (23 ha)		57 ac (23 ha).
5d. J29–31	less than 1 ac (0 ha).	211 ac (85 ha)		159 ac (64 ha)	370 ac (149 ha)	23 ac (9 ha)	347 ac (140 ha).
5e. J2 N, J4, J5 (Robinhood Ridge)			32 ac (13 ha)	12 ac (5 ha)	44 ac (18 ha)		44 ac (18 ha).
5f. J2 W and J2 S: (Hidden Trails, Cal Terraces, Otay Mesa Road).			22 ac (9 ha)	11 ac (4 ha)	33 ac (13 ha)		33 ac (13 ha).
5g. J14		45 ac (18 ha)	18 ac (7 ha)	72 ac (29 ha)	135 ac (55 ha)		135 ac (55 ha).
5h. J11 E and J11 W, J12, J16–18 (Goat Mesa)	11 ac (4 ha)		83 ac (34 ha)	161 ac (65 ha)	255 ac (103 ha)	11 ac (4 ha)	244 ac (99 ha).
Totals	40 ac (16 ha)	310 ac (126 ha)	336 ac (138 ha)	2,297 ac (929 ha)	2,984 ac (1,208 ha).	1,259 ac (510 ha)	1,724 ac (698 ha).

Note: Sums of land areas may not total due to rounding.
Details on excluded acres and HCPs are given in Table 5.
[1] Local land includes land owned by local government agencies.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for Riverside fairy shrimp, below.

Unit 1: Ventura County Unit (Transverse Range)

Unit 1 is located in central Ventura County and consists of two occupied subunits totaling approximately 466 ac (189 ha), with 31 ac (13 ha) of local land and 435 ac (176 ha) of private land. Unit 1 is within the geographical area occupied by the species at the time of listing. This unit includes vernal pools near the City of Moorpark in Ventura County at Tierra Rejada Preserve (formerly Carlsberg Ranch) on the west side of State Highway 23, and a basin to the southeast of the Carlsberg Ranch site called South of Tierra Rejada Valley, east of State Highway 23. This unit occurs within the larger Santa Clara-Calleguas/Calleguas-Conejo Tierra Rejada Valley watershed, within the east-west trending Transverse (mountain) Range. The Transverse Range system was formed by the interaction of an east-west oceanic fault zone with the San Andreas Fault. Because the interaction of the two fault systems has been extensive and continues with rapid local uplift, Riverside fairy shrimp habitat within the Transverse Range reflects past activities of tectonic processes and their effects on watershed development. Accelerated erosion, sedimentation, and debris processes, such as mud and rock flows, landslides, wind flows, and debris flows (soil development processes), contribute to a unique set of physiochemical and geomorphic features for pools occupied by Riverside fairy shrimp.

Subunit 1a: Tierra Rejada Preserve

Subunit 1a is located near the City of Moorpark in southeastern Ventura County, California. This subunit is located on what was formerly known as the Carlsberg Ranch, at the north end of the Tierra Rejada Valley and just west of State Highway 23. It is near the northeast intersection of Moorpark Road and Tierra Rejada Road in a residential housing development. Subunit 1a consists of 18 ac (7 ha) of privately owned land. The vernal pool (pond), 4.6 acres (1.7 ha) in size, is located in the Tierra Rejada Vernal Pool Preserve, owned and managed by Mountains Recreation and Conservation Authority (MCRA). Subunit 1a contains areas identified in the 1998 Recovery Plan (Appendix F) as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp.

We consider this subunit to have been occupied at the time of listing, and it is currently occupied. Subunit 1a is within the geographical area occupied by the species at the time of listing. Resting cysts were detected in recent soil analyses (C. Dellith 2010, pers. comm.) and adult fairy shrimp were observed on April 7, 2011 (J. Tamasi 2011, pers. comm.), the first observation of adults since the 2000–2001 ponding season. This area is essential to the conservation of this species for several reasons. The pool supports endangered *Orcuttia californica* (Orcutt's grass), which is an indicator of the longer ponding duration necessary to support the life-history needs of Riverside fairy shrimp. This pool is fundamentally different in terms of size, origin, depth, and duration of ponding, contributing areas (watershed), and the thickness of the underlying sediments compared to flat areas of older soils with highly developed claypans and hardpans throughout the State (Hecht *et al.* 1998, p. 47). This pool was formed primarily by tilting and subsidence along the Santa Rosa fault (Hecht *et al.* 1998, p. 5). Given its geological and hydrological features and associated wetland vegetation within the subunit, this pool possesses a set of physical and biological factors unique to this occurrence to which the Riverside fairy shrimp has likely become adapted. The present biological resources and value of the pool have been sustained despite ''substantial disturbance and change [in] the general area of the vernal pool'' and given the history of land and water use and analysis of 60 years of aerial photography (Hecht *et al.* 1998, p. 6 and Appendix A). Although Lahti *et al.* (2010) did not survey this pool during their completion of a rangewide genetic analysis, this occurrence represents the northernmost extension of the species' occupied range within a notably unique vernal wetland type (Hecht *et al.* 1998, p. 5, and see discussion below).

Subunit 1a contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including appropriate soil series (Azule, Calleguas, Linne; PCE 3) situated on a saturated fault between rocks of different permeability (''tectonogenic''; Hecht *et al.* 1998, p. 5), and it is ''sediment-tolerant'' given that it possesses a watershed with reasonably steep slopes (10–50 percent) that yield substantial amounts of sediment that provide nutrients and minerals (Hecht *et al.* 1998, p. 6). The fine clay sediment deposited in the basin settles and allows the pool to fill; this is in contrast to most other vernal pools, where hydrology is maintained through clay soils created by soil forming processes (Hecht *et al.* 1998, p. 5). Additionally, because of adjacent urban development, altered hydrology, and potential for runoff, the PCEs in this subunit may require special management considerations or protection for the recovery of Riverside fairy shrimp. This subunit has one large ponding feature, and is essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65) at the species' northernmost geographical distribution.

Due to its unique geographic location and other features stated above, Subunit 1a is essential to the conservation of Riverside fairy shrimp. Although preliminary genetic studies are not definitive with regard to gene flow and genetic variability across the range of this species, populations at the edge of a species' distribution have been demonstrated to be important sources of genetic variation, may provide an important opportunity for colonization or recolonization of unoccupied vernal pools, and, thus, contribute to long-term conservation (and recovery) of the species (Gilpin and Soule´ 1986, pp. 32–33; Lande 1999, p. 6). Research on genetic differentiation among fairy shrimp species across their known distributions has demonstrated that geographically distinct populations may or may not be genetically distinct, but that they have unique genetic characteristics that may allow for adaption to environmental changes (Bohonak 2003, p. 3; Lahti *et al.* 2010, p. 17). These characteristics may not be present in other parts of a species' range (Lesica and Allendorf 1995, p. 756), making preservation of this subunit and the unique genetic diversity it contains essential for the recovery of the species.

We are lacking specific documentation of Riverside fairy shrimp occupancy in Subunit 1a at the time of listing. However, Subunit 1a contains the physical or biological features necessary to the conservation of the species, and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 1a under section 3(5)(A)(ii) of the Act because the subunit is essential for the conservation

of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 1a meets the definition of critical habitat in section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species (nonnative grasses and *Schinus molle* (Peruvian pepper) groves) and alterations to the hydrological cycle, including type conversion of habitat; activities that remove or destroy the habitat assemblage of the pools, such as creation of fuel breaks, mowing, and grading; and human encroachment that occurs in the area. These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2). For example, inundation from artificial water sources can cause pools to stay inundated longer than normal or even convert vernal pools into perennial pools that are not suitable for Riverside fairy shrimp (Service 2008, p. 16). Please see *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 1b: South of Tierra Rejada Valley

Subunit 1b is located near the City of Moorpark in Ventura County, California. This subunit is approximately 1 mi (1.5 km) southeast of Subunit 1a and east of State Highway 23. Subunit 1b consists of 31 ac (13 ha) of locally owned land and 417 ac (169 ha) of private land. We assume that Subunit 1b was not identified in the 1998 Recovery Plan (Appendix F) because at that time we were unable to confirm occupancy. To the best of our knowledge, this subunit has never been protocol surveyed to confirm the presence or absence of Riverside fairy shrimp (C. Dellith 2010, pers. comm.). This subunit, however, was proposed and designated as critical habitat in the 2005 final revised critical habitat rule because we considered it occupied (see discussion below) and because the necessary PCEs were present. We continue to presume that Subunit 1b is occupied, despite the absence of protocol survey results, and have determined that the subunit contains the PCEs.

Subunit 1b is located approximately 1 mile to the south of Tierra Rejada Preserve (Subunit 1a) within the Tierra Rejada Valley watershed. Like Subunit 1a, this pool is one of the last representatives of what is believed to be a historical distribution of coastal terrace vernal pools common to the marine terraces and inland area of Ventura County prior to the 1950s (Hecht *et al.* 1998, p. 6 and Appendix A). This subunit is considered occupied based on several factors that strongly suggest the likelihood of Riverside fairy shrimp occurrence. As discussed in the 2005 proposed rule (70 FR 19154; April 12, 2005), these are: (1) The important biotic and abiotic conditions (soil type, geology, morphology, local climate, topography, and plant associations, for example, *Orcuttia californica,* which suggests the presence of vernal pool ponding at the appropriate season and for the appropriate duration); (2) topographic features and ponding evidence based on aerial surveys that confirm a ponding pool basin; (3) several large permanent and semipermanent pools observed within the subunit's local watershed; (4) proximity (less than 1 mi (< 1 km)) to a known Riverside fairy shrimp occurrence, and likely within the known dispersal distance expected for an invertebrate species with a resistant cyst stage; and (5) the determination that Subunit 1a and Subunit 1b are adjoined, based on fluvial and geomorphic evidence that suggest the Tierra Rejada Valley river system once likely connected the two pools and would have provided the connectivity to disperse cysts between the two subunits.

Subunit 1b is designated as revised critical habitat because we have determined it is essential for the conservation of the species. It includes one or more pools capable of maintaining habitat function, genetic diversity, and species viability (Service 1998a, p. 65) for Riverside fairy shrimp at the northern limit of its current distribution, and is near, and likely has connectivity with, a known occupied location of ecological and distributional significance. It is also essential because the best supporting evidence indicates the basin contains the appropriate depth and ponding duration (PCE 1), soils and topography (PCEs 2 and 3), elevation, and water chemistry (pH, temperature, salinity, etc.; PCE 1) to satisfy the life-history needs of existing Riverside fairy shrimp populations.

Though the life history of Riverside fairy shrimp suggests that Subunit 1b was occupied at the time of listing, specific documentation of occupancy is lacking. Based on the biology and life history of Riverside fairy shrimp, we believe that the subunit was indeed occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing and contains all of the PCEs. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 1b under section 3(5)(A)(ii) of the Act because we consider this subunit essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 1b meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

Unit 2: Los Angeles Basin—Orange County Foothills

Unit 2 is located in central coastal Orange County and consists of 4 subunits totaling approximately 396 ac (160 ha) of privately owned land. Unit 2 falls within the Los Angeles Basin-Orange County Management Area as outlined in the 1998 Recovery Plan. The majority of vernal pools in this management area were extirpated prior to 1950, and only a small number of vernal pools remain in Los Angeles and Orange Counties (Service 1998a, p. 40).

This unit includes the vernal pools and vernal pool-like ephemeral ponds located along a north-south band in the Orange County Foothills. It includes examples of the historical distribution of coastal terraces at moderate elevations (183 to 414 m (600 to 1,358 ft)), and includes ephemeral ponds formed by landslides and fault activity, and remnant stream (fluvial) terraces along foothill ridgelines (Taylor *et al.* 2006, pp. 1–2). Occupied Riverside fairy shrimp pools occur on former MCAS El Toro; Southern California Edison (SCE) Viejo Conservation Bank; Saddleback Meadows; O'Neill Regional Park (near Trabuco Canyon east of Tijeras Creek at the intersection of Antonio Parkway and the Foothill Transportation Corridor (FTC-north segment)); O'Neill Regional Park (near Cañada Gobernadora); Chiquita Ridge; Radio Tower Road; and San Onofre State Beach, State Park-leased land (near Christianitos Creek foothills) that falls partially within MCB Camp Pendleton. These vernal pools are the last remaining vernal pools in Orange County known to support this species (58 FR 41384; August 3, 1993) and represent a unique type of vernal pool habitat that differs from the

traditional mima mound vernal pool complexes of coastal San Diego County, the coastal pools at MCB Camp Pendleton, and the inland pools of Riverside County (70 FR 19182).

Unit 2 is within the geographical area occupied by the species at the time of listing. The areas within Unit 2 are occupied and contain the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and the topography and soils that support ponding during winter and spring months (PCE 3); in almost all cases, slow-moving or still surface water and saturated soils are present at or near vernal pool habitat. Conservation of an array of vernal pools that contain the physical or biological features essential to the conservation of Riverside fairy shrimp in the foothill region of Orange County provides for necessary habitat function, natural genetic diversity and exchange, and species viability in the central portion of the species' range.

Subunit 2dA: Saddleback Meadows

Subunit 2dA is located in the community of Silverado in southern Orange County, California. This subunit is near the St. Michael's College Preparatory School, east of El Toro Road and southwest of Live Oak Canyon Road. Subunit 2dA consists of 252 ac (102 ha) of privately owned land. It contains areas identified in the 1998 Recovery Plan (Appendix F) as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp, as well as other proposed and listed vernal pool species. This subunit is essential to the conservation and recovery of Riverside fairy shrimp because it is currently occupied and includes one or more pools necessary to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. This vernal pool complex includes a series of natural and impounded cattle troughs that have been breached and degraded by past agricultural activities and urban development. Additionally, Subunit 2dA is an important link to the northern occupied locations, and represents a nearby source for recolonization of pools in the Orange County foothills.

Subunit 2dA contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 2dA at the time of listing. However, Subunit 2dA contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 2dA under section 3(5)(A)(ii) of the Act because we consider this subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 2dA meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species, development, or grazing that may occur in the vernal pool basins. These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 2dB: O'Neill Regional Park (Near Trabuco Canyon)

Subunit 2dB is located approximately 1.5 km (1 mi) southeast of Subunit 2dA in southern Orange County, California. This subunit is west of Live Oak Canyon Road and northeast of the O'Neill Regional Park, near Cañada Gobernadora (see Subunit 2e below). In the 2008 5-year review, this area was referred to as ''O'Neill Park/Clay Flats pond property'' (Service 2008, p. 7). Subunit 2dB consists of 15 ac (6 ha) of privately owned land. Subunit 2dB was not specifically identified in the 1998 Recovery Plan (Appendix F), but is classified as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''Orange County Foothills (undescribed)'' heading in Appendix F (Service 1998a, p. F1).

This subunit is essential for the conservation of Riverside fairy shrimp because it is currently occupied and includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Subunit 2dB contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3). A portion of this subunit lies at 1,413 ft (431 m), and is among the highest elevation occurrences of Riverside fairy shrimp.

We are lacking specific documentation of Riverside fairy shrimp occupancy in Subunit 2dB at the time of listing. However, Subunit 2dB contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 2dB under section 3(5)(A)(ii) of the Act because we consider the subunit essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 2dB meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and activities, such as unauthorized recreational use, OHV use, and fire management. These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 2e: O'Neill Regional Park (Near Cañada Gobernadora)

Subunit 2e is located near the city of Rancho Santa Margarita in southern Orange County, California, and is currently occupied. This subunit is east of Cañada Gobernadora and bounded to the west by State Highway 241. In the 2008 5-year review this area was referred to as ''east of Tijeras Creek complex'' (Service 2008, p. 7). Subunit 2e consists of 22 ac (9 ha) of private land. Subunit 2e was not specifically identified in the 1998 Recovery Plan (Appendix F), but was classified as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''Orange County Foothills (undescribed)'' heading in Appendix F (Service 1998a, p. F1).

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Areas within this subunit contain clay, clay loam, or sandy loam, and consist primarily of dry-land agriculture and sagebrush-buckwheat scrub habitat. Located in the water drainages of the foothills of the Santa Ana Mountains, this pool rests in a canyon bottomland at approximately 919 ft (280 m) of elevation.

Subunit 2e contains the physical or biological features essential to the conservation of Riverside fairy shrimp including clay soils and loamy soils underlain by a clay subsoil (PCE 3); areas with a natural, generally intact surface and subsurface soil structure (PCE 2); and the ephemeral habitat (PCE 1) that supports Riverside fairy shrimp, including slow-moving or still surface water and/or saturated soils. Subunit 2e also supports a stable, persistent occurrence of the species.

We are lacking specific documentation of Riverside fairy shrimp occupancy in Subunit 2e at the time of listing. However, Subunit 2e contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 2e under section 3(5)(A)(ii) of the Act because we consider the subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 2e meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, surrounding residential and commercial development, unauthorized recreational use, OHV use, and fire management). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 2h: San Onofre State Beach, State Park-Leased Lands

Subunit 2h is located along the border between Orange and San Diego Counties, southeast of Richard Steed Memorial Park and north of Christianitos Road. Nearly half of this subunit (105 ac (42 ha)) occurs on Department of Defense (DOD) land on MCB Camp Pendleton, and is exempt from critical habitat under section 4(a)(3)(B)(i) of the Act. The other half of Subunit 2h consists of 107 ac (43 ha) of privately owned land. The portion of Subunit 2h that falls within DOD land, the ''Cal State Parks Lease,'' as described in the 2007 Integrated Natural Resources Management Plan (INRMP) (U.S. Marine Corps 2007, p. 2–30), is part of a lease agreement made between the U.S. Marine Corps and California State Department of Parks on September 1, 1971, for a 50-year term. Portions of Subunit 2h exempt from this final critical habitat rule include military thoroughfares (roads), military training with advanced coordination, utility easements, fire suppression activities, and public recreation. The presence of Riverside fairy shrimp in Subunit 2h was discovered after the 1993 listing rule and 1998 Recovery Plan were written.

This subunit is essential for the conservation of Riverside fairy shrimp because it is currently occupied and includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). It represents an important ecological linkage for genetic exchange between the coastal mesa pools of San Diego and the Orange County Foothills occurrences. Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs.

Subunit 2h consists of two sag ponds (a pool that forms as a result of movement between two plates on an active fault line) at the eastern section of the unit and their associated upland watersheds on land within Orange County near the city of San Clemente. Subunit 2h contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 2h at the time of listing. However, Subunit 2h contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that

it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. As discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 2h under section 3(5)(A)(ii) of the Act because we consider the subunit essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 2h meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, military activities, unauthorized recreational use, agricultural runoff, OHV use, and fire management). These threats could disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations. The 105 ac (42 ha) of lands identified as critical habitat within the boundaries of MCB Camp Pendleton are exempt from critical habitat under section 4(a)(3)(B)(i) of the Act.

Unit 5: San Diego Southern Coastal Mesas

Unit 5 is located in Southern San Diego County and consists of seven subunits totaling 862 ac (349 ha). This unit contains 250 ac (101 ha) of State-owned land, 157 ac (64 ha) of locally owned land, and 455 ac (184 ha) of private land. This unit falls within the San Diego Southern Coastal Management Area, as identified in the 1998 Recovery Plan. Land we are designating as critical habitat includes vernal pool complexes within the jurisdiction of the Service, City of San Diego, County of San Diego, other DOD land, and private interests. This unit contains several mesa-top vernal pool complexes on western Otay Mesa (Bauder vernal pool complexes J2 N, J2 S, J2 W, J4, J5, J11 W, J11 E, J12, J16–18, J33) and eastern Otay Mesa (Bauder pool complexes J29–31, J33) as in Appendix D of City of San Diego (2004).

These vernal pool complexes are associated with coastal mesas from the Sweetwater River south to the U.S.-Mexico International Border, and represent the southernmost occurrences of Riverside fairy shrimp in the United States. This unit is also genetically diverse, including two haplotypes (a unique copy or form of a sequenced gene region) not found outside of the Otay Mesa area (Lahti *et al.* 2010, Table 5). Additionally, Otay Mesa pools are significantly differentiated from one another (Lahti *et al.* 2010, p. 19). This area is essential for the conservation of Riverside fairy shrimp for the following reasons: (1) These vernal pool complexes represent the few remaining examples of the much larger and mostly extirpated vernal pool complexes on the highly urbanized Otay Mesa (Bauder 1986a); (2) recent genetic work indicates that complexes within this unit (J26, J29–30) support Riverside fairy shrimp with the unique haplotype B; and (3) this is one of only three locations that supports haplotype C (Lahti *et al.* 2010). Maintaining this unique genetic structure may be crucial in the conservation of this species. Unit 5 is within the geographical area occupied by the species at the time of listing.

Subunit 5a: Sweetwater (J33)

Subunit 5a is located in the City of San Diego in southern San Diego County, California. This subunit is at Sweetwater High School (site J33), south of the intersection between Otay Mesa and Airway Roads. Subunit 5a consists of 2 ac (less than 1 ha) of locally owned land and less than 1 ac (< 1 ha) of private land. Subunit 5a contains areas identified in the 1998 Recovery Plan (Appendix F) as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp, as well as other proposed and listed vernal pool species.

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. This subunit is under the ownership of the Sweetwater Union High School District.

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 5a at the time of listing. However, Subunit 5a contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. As discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 5a under section 3(5)(A)(ii) of the Act because we consider the subunit essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 5a meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

Subunit 5a contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils (Olivenhain cobbly loam soil series) that support ponding during winter and spring months (PCE 3). 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 nonnative plant species, unauthorized recreational use and OHV use, and other human-related activities. These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 5c: East Otay Mesa

Subunit 5c is located in the eastern Otay Mesa region of southern San Diego County, California. This subunit is approximately 1.75 mi (2.75 km) southeast of Kuebler Ranch and just north of the U.S.-Mexico Border. Subunit 5c consists of 57 ac (23 ha) of privately owned land. These lands fall within the County of San Diego Subarea Plan under the San Diego MSCP. Subunit 5c was not specifically identified in the 1998 Recovery Plan (Appendix F), but is classified as

necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''J2, J5, J7, J11–21, J23–30 Otay Mesa'' heading in Appendix F (Service 1998a, p. F1). The pool in Subunit 5c is not included in the list above, but is within the geographical area of those listed pools. Areas within Subunit 5c were also identified as essential in the previous critical habitat rules for Riverside fairy shrimp (66 FR 29384, May 30, 2001; 70 FR 19154, April 12, 2005). Subunit 5c contains one vernal pool; this pool is occupied by Riverside fairy shrimp. It also contains a small stream as well as the downward slope and mima mound topography that make up the watershed associated with the occupied vernal pool.

This subunit is currently occupied; dry season surveys in 2011 by Busby Biological Services documented the presence of Riverside fairy shrimp cysts (Busby Biological Services 2011, entire). This subunit was first documented as occupied in 2000 (GIS ID 4). Though the stock pond in Subunit 5c was not surveyed by Lahti *et al.* (2010), other vernal pools surveyed in Otay Mesa were found to have unique genetic diversity in the range of the species, including two haplotypes not found elsewhere. Otay Mesa pools also show significant genetic differentiation from each other (Lahti *et al.* 2010, p. 19). Given the subunit's location as the very easternmost pool in Otay Mesa, we determine that Subunit 5c may also host unique genetic diversity.

This subunit is essential for the conservation of Riverside fairy shrimp because its occupied pool and surrounding watershed are essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. The vernal pool in this subunit has been impacted by OHV use, cattle grazing, development, and nonnative grasses. Subunit 5c contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3). This subunit also contains critical habitat for the endangered Quino checkerspot butterfly (*Euphydryas editha quino*) and is occupied by both the Quino checkerspot butterfly and San Diego fairy shrimp (72 FR 70648, December 12, 2007; 74 FR 28776, June 17, 2009).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 5c at the time of listing. However, Subunit 5c contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. As discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 5c under section 3(5)(A)(ii) of the Act because we consider the subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 5c meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, development, OHV use, water runoff, and grazing). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 5d: J29–31

Subunit 5d is located in the Otay Mesa region of southern San Diego County, California. This subunit is to the east and west of State Highway 125, south of the Otay Valley, and north of the U.S.-Mexico Border. Subunit 5d consists of 347 ac (140 ha), including less than 1 ac (< 1 ha) of federally owned land, 205 ac (83 ha) of State-owned land (Caltrans), and 142 ac (57 ha) of private land. One vernal pool complex within Subunit 5d (J31) was not specifically identified in the 1998 Recovery Plan (Appendix F). However, pool J31 within the same watershed as pool complexes J29 and J30, both of which were listed as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''J2, J5, J7, J11–21, J23–30 Otay Mesa'' heading in Appendix F (Service 1998a, p. F1). This subunit was confirmed occupied at the time of listing by protocol surveys, and is currently occupied. Subunit 5d is within the geographical area occupied by the species at the time of listing. Therefore, we are designating it under section 3(5)(A)(i) of the Act.

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Subunit 5d is predominantly in the City of San Diego in San Diego County, California, although portions of pools J29–31 are within the County of San Diego's jurisdiction. This subunit contains a large area of habitat that supports sizable occurrences of Riverside fairy shrimp, and provides potential connectivity between occurrences of Riverside fairy shrimp in Subunits 5e and 5c. This subunit contains several mesa-top vernal pool complexes on eastern Otay Mesa (Bauder vernal pool complexes J22, J29, J30, J31 N, J31 S as in Appendix D of City of San Diego (2004) and Service GIS files). Subunit 5d contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3).

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 nonnative plant species and anthropogenic activities (for example, OHV use, unauthorized recreational use, impacts from development (including water runoff), and fire management). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the

vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 5e: J2 N, J4, J5 (Robinhood Ridge)

Subunit 5e is located in the Otay Mesa region of southern San Diego County, California. This subunit is approximately 1 mi (1.5 km) east of Ocean View Hills Parkway, 0.6 mi (1 km) north of State Highway 905, and bounded by Vista Santo Domingo to the east. Subunit 5e consists of 44 ac (18 ha), including 32 ac (13 ha) of locally owned land and 12 ac (5 ha) of private land. Subunit 5e was not specifically identified in the 1998 Recovery Plan (Appendix F), but is classified as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''J2, J5, J7, J11–21, J23–30 Otay Mesa'' heading in Appendix F (Service 1998a, p. F1). This subunit is currently occupied.

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Subunit 5e contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and the topography and soils that support ponding during winter and spring months (PCE 3).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 5e at the time of listing. However, Subunit 5e contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 5e under section 3(5)(A)(ii) of the Act because we consider the subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 5e meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, OHV use, unauthorized recreational use, impacts from development, and fire management). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 5f: J2 W, J2 S (Hidden Trails, Cal Terraces, Otay Mesa Road)

Subunit 5f is located in the Otay Mesa region of southern San Diego County, California, and consists of three pool complexes. All complexes are located north of State Highway 905 and southwest of Subunit 5e, with one complex in the lot southwest of Ocean View Hills Parkway, one bounded to the west by Hidden Trails Road, and one bounded to the west by Corporate Center Drive. Subunit 5f consists of 22 ac (9 ha) of locally owned land and 11 ac (4 ha) of private land. Subunit 5f was not mentioned by name in the 1998 Recovery Plan (Appendix F), but portions of vernal pool complexes within the units (J2 W and J2 S) were listed as necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''J2, J5, J7, J11–21, J23–30 Otay Mesa'' heading in Appendix F (Service 1998a, p. F1). This subunit is currently occupied.

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Subunit 5f contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 5f at the time of listing. However, Subunit 5f contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 5f under section 3(5)(A)(ii) of the Act because we consider the subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 5f meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, OHV use; unauthorized recreational use; impacts from development, including water runoff; and fire management). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 5g: J14

Subunit 5g is located in the Otay Mesa region of southern San Diego County, California. This subunit is south of State Highway 905, southeast of Caliente Avenue, west of Heritage Road, and northwest of Spring Canyon. Subunit 5g consists of 45 ac (18 ha) of State-owned land (Caltrans), 18 ac (7 ha) of locally owned land, and 72 ac (29 ha) of private land. Subunit 5g was not mentioned by name in the 1998 Recovery Plan (Appendix F), but is included in the list of vernal pool complexes necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''J2, J5, J7, J11–21, J23–30 Otay Mesa'' heading in Appendix F (Service 1998a, p. F1). This subunit is currently occupied.

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Subunit 5g contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 5g at the time of listing. However, Subunit 5g contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 5g under section 3(5)(A)(ii) of the Act because we consider the subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 5g meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, OHV use; unauthorized recreational use; impacts from development, (including water runoff and fire management). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

Subunit 5h: J11 E, J11 W, J12, J16–18 (Goat Mesa)

Subunit 5h is located in the Otay Mesa region of southern San Diego County, California. This subunit is north and west of Subunit 5b, bounded by the U.S.-Mexico Border to the south, and bisected by Jeep Trail. Subunit 5h consists of 83 ac (34 ha) of locally owned land (City of San Diego) and 161 ac (65 ha) of privately owned land. Subunit 5h was not mentioned by name in the 1998 Recovery Plan (Appendix F), but is included in the list of vernal pool complexes necessary to stabilize and protect (conserve) existing populations of Riverside fairy shrimp within the ''J2, J5, J7, J11–21, J23–30 Otay Mesa'' heading in Appendix F (Service 1998a, p. F1). This subunit is currently occupied.

This subunit is essential for the conservation of Riverside fairy shrimp because it includes one or more pools essential to maintain habitat function, genetic diversity, and species viability (Service 1998a, p. 65). Further, it is essential because the basin contains the appropriate depth and ponding duration, soils, elevation, and water chemistry (pH, temperature, salinity, etc.) to fulfill Riverside fairy shrimp's life-history needs. Subunit 5h contains the physical or biological features essential to the conservation of Riverside fairy shrimp, including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3).

We lack specific documentation of Riverside fairy shrimp occupancy in Subunit 5h at the time of listing. However, Subunit 5h contains the physical or biological features necessary to the conservation of the species and these features support life-history characteristics of Riverside fairy shrimp (such as the presence of cyst banks that indicate long-term occupancy of a vernal pool). The presence of these traits makes it likely that the subunit was occupied at the time of listing, and that it meets the definition of critical habitat under section 3(5)(A)(i) of the Act because it is within the geographical area occupied by the species at the time of listing. However, as discussed in the *Criteria Used To Identify Critical Habitat* section above, we alternatively designate Subunit 5h under section 3(5)(A)(ii) of the Act because we consider the subunit to be essential for the conservation of Riverside fairy shrimp, regardless of occupancy data at the time of listing. Thus, for the purposes of this rulemaking, we determine that Subunit 5h meets the definition of critical habitat under section 3(5)(A)(i) or, alternatively, under section 3(5)(A)(ii) of the Act.

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 nonnative plant species and anthropogenic activities (for example, OHV use; unauthorized recreational use; impacts from development, including water runoff; and fire management). These threats could impact the water chemistry characteristics that support Riverside fairy shrimp (PCE 1) and disrupt the surrounding watershed that provides water to fill the pool in the winter and spring (PCE 2) as well as the vegetative coverage and soil substrates surrounding the pool (PCE 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to Riverside fairy shrimp habitat and potential management considerations.

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 that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service* et al., 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a 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 (CWA) (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) 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, or 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. Thus, the analysis of effects to critical habitat under Section 7(a)(2) of the Act is a separate and distinct analysis from an analysis of the effects to the species. While the jeopardy analysis focuses on an action's effects on the survival and recovery of a species, the adverse modification analysis investigates the action's effects to the designated habitat's contribution to conservation. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for a species. The difference in outcomes of the jeopardy and adverse modification analyses represents the regulatory benefit of critical habitat designation.

As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species. For Riverside fairy shrimp, this includes supporting viable vernal pools containing the species and the associated watersheds upon which the pools depend.

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 in consultation for Riverside fairy shrimp. These activities include, but are not limited to:

(1) Actions that result in ground disturbance. Such activities could include, but are not limited to, residential or commercial development, OHV activity, pipeline construction, new road construction, existing road maintenance (including road widening and grading), manure dumping, and grazing. These activities potentially impact the habitat and physical or biological features essential to Riverside fairy shrimp by damaging, disturbing, and altering soil composition through direct impacts, increased erosion, and increased nutrient content. Additionally, changes in soil composition may lead to changes in the vegetation composition, thereby changing the overall habitat type.

(2) Actions that would impact the ability of an ephemeral wetland to continue to provide habitat for Riverside fairy shrimp and other native species that require this specialized habitat type. Such activities could include, but are not limited to, water impoundment, stream channelization, water diversion, water withdrawal, and development activities. These activities could alter the physical or biological features essential to the conservation of Riverside fairy shrimp by eliminating ponding habitat; changing the duration and frequency of the ponding events on which this species relies; making the habitat too wet, thus allowing obligate wetland species to become established;

making the habitat too dry, thus allowing upland species to become established; causing large amounts of sediment or manure to be deposited in Riverside fairy shrimp habitat; or causing increased erosion and incising of waterways.

(3) Actions that result in alteration of the hydrological regimes typically associated with Riverside fairy shrimp habitat, including actions that would impact the soil and topography that cause water to pond during the winter and spring months. Such activities could include, but are not limited to, deep-ripping of soils, trenching, soil compaction, and development activities. These activities could alter the biological and physical features essential to the conservation of Riverside fairy shrimp by eliminating ponding habitat, impacting the impervious nature of the soil layer, or making the soil so impervious that water pools for an extended period that is detrimental to Riverside fairy shrimp (see ''Primary Constituent Elements for Riverside Fairy Shrimp'' section above). These activities could alter surface layers and the hydrological regime in a manner that promotes loss of soil components, ponding regimes, or hydrological connectivity to upland habitats that support the growth and reproduction of Riverside fairy shrimp.

(4) Road construction and maintenance (including widening and grading), right-of-way designation, regulation of agricultural activities, or any activity funded or carried out by a Federal agency that could result in excavation or mechanized clearing of Riverside fairy shrimp critical habitat. These activities could alter the habitat in such a way that cysts of Riverside fairy shrimp are crushed, Riverside fairy shrimp are removed, or ephemeral wetland habitat is permanently altered.

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 listed species. We analyzed INRMPs developed by military installations that cover lands we determined meet the definition of critical habitat for Riverside fairy shrimp to determine if they are exempt from designation under section 4(a)(3) of the Act. The following Department of Defense installations include lands that meet the definition of critical habitat for Riverside fairy shrimp and have completed, Service-approved INRMPs.

Approved INRMPs

MCB Camp Pendleton (Units 4 and Portion of 2h)

In the previous final critical habitat designation for Riverside fairy shrimp, we exempted MCB Camp Pendleton from the designation (70 FR 19154, April 12, 2005). MCB Camp Pendleton completed their INRMP in November 2001, and updated it in March 2007 (U.S. Marine Corps 2007). The INRMP includes the following conservation measures for the Riverside fairy shrimp: (1) Surveys and monitoring, studies, impact avoidance and minimization, and habitat restoration and enhancement; (2) species survey information stored in MCB Camp Pendleton's GIS database and recorded in a resource atlas that is published and updated on a semi-annual basis; (3) application of a 984-ft (300-m) radius to protect the microwatershed buffers around current and historical Riverside fairy shrimp locations; and (4) use of a resource atlas to plan operations and projects to avoid impacts to Riverside fairy shrimp and to trigger section 7 consultations if an action may affect the species. These measures are established, ongoing aspects of existing programs or Base directives (for example, Range and Training Regulations), or measures that are being implemented as a result of previous consultations.

To avoid and minimize adverse effects to Riverside fairy shrimp, MCB Camp Pendleton implements Base directives, such as: (1) Bivouac (temporary camps for military training purposes), command post, and field support activities should be no closer than 984 ft (300 m) to occupied Riverside fairy shrimp habitat year round; (2) vehicle and equipment operations should be limited to existing road and trail networks year round; and (3) environmental clearance is required prior to any soil excavation, filling, or grading. MCB Camp Pendleton has also demonstrated ongoing funding of their INRMP and management of endangered and threatened species. MCB Camp Pendleton continues to expend significant resources for management of federally listed species and habitat on their land, including management actions that provide a benefit for Riverside fairy shrimp. Moreover, in partnership with the Service, MCB Camp Pendleton provides funding for Service biologists to assist in implementing their Sikes Act program and buffer land acquisition initiative.

Based on MCB Camp Pendleton's past funding history for listed species and their Sikes Act program (including the management of Riverside fairy shrimp), we conclude there is a high degree of certainty that MCB Camp Pendleton will continue to implement the INRMP in coordination with CDFG and the Service in a manner that provides a benefit to Riverside fairy shrimp. We also find there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with MCB Camp Pendleton on a variety of endangered and threatened species issues, including the Riverside fairy shrimp. The management programs and Base directives to avoid and minimize impacts to the species are consistent with current and ongoing

section 7 consultations with MCB Camp Pendleton.

In MCB Camp Pendleton, lands that contain the features essential to the conservation of Riverside fairy shrimp are within the following areas: San Onofre State Beach, State Park-leased land (near the Christianitos Creek foothills portion of Subunit 2h); Oscar One; Oscar Two; Victor area south of San Onofre State Park (Uniform Training Area); Red Beach; and Tango (U.S. Marine Corps 2007, Section 4, pp. 51–76).

State Park-leased lands are treated under the Real Estate Agreements and Lease section in the INRMP. Base real estate agreements (for example, leases, easements, outleases, assignments) cover approximately 5,000 ac (2,020 ha) of the Base (not inclusive of leased acreage within cantonment areas). These agreements include easements for public utilities and transit corridors, leases to public educational and retail agencies, State Beach leases, and agricultural leases for row crop production and seed collection.

In the portion of Subunit 2h within MCB Camp Pendleton boundaries, permissible activities include military thoroughfares (use of roads), military training (with advanced coordination), fire suppression activities, and public recreational access. Lessees are required to manage the natural resources on the lands leased for their use consistent with the philosophies and supportive of the objectives of the MCB Camp Pendleton INRMP. Each lessee that manages and/or controls use of lands leased from MCB Camp Pendleton (for example, State Parks or agriculture leases) is required to generate and submit a natural resources management plan for their leased lands for approval by the Base within 1 year of establishment of their lease or renewal. Lessees are also required to identify any activity that may affect federally regulated resources (for example, listed species, wetlands, waters of the United States) and provide information and mitigation that may be required to support consultation with the applicable regulatory agency.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that all identified lands on MCB Camp Pendleton that meet the definition of critical habitat are subject to the MCB Camp Pendleton INRMP, and that conservation efforts identified in the INRMP will provide a benefit to Riverside fairy shrimp and to vernal pool habitat on MCB Camp Pendleton. Therefore, 1,929 ac (781 ha) of land containing physical or biological features essential to the conservation of the species are exempt from the final critical habitat designation in accordance with section 4(a)(3) of the Act.

MCAS Miramar (Within Unit 4)

In the previous final critical habitat designation for Riverside fairy shrimp, we exempted MCAS Miramar from the designation of critical habitat (70 FR 19154, April 12, 2005). MCAS Miramar completed an INRMP in May 2000, which was updated in October 2006 and again in August 2011 (Gene Stout and Associates *et al.* 2011, entire). The INRMP is being fully implemented at MCAS Miramar, and provides for the conservation, management, and protection of Riverside fairy shrimp. The INRMP classifies 95.6 percent of the vernal pool basins and watersheds on MCAS Miramar, including the two pools containing Riverside fairy shrimp, as a Level I Management Area (Gene Stout and Associates *et al.* 2011, Table 5.1). A Level I Management Area receives the highest conservation priority under the INRMP. Preventing damage to vernal pool resources is the highest conservation priority in management areas with the Level I designation (Gene Stout and Associates *et al.* 2011, p. 5–2). The conservation of vernal pool basins and watersheds in a Level I Management Area is achieved through educating Base personnel; taking proactive measures, including signs and fencing, to avoid accidental impacts; developing procedures to respond to and fix accidental impacts on vernal pools; controlling nonnative vegetation within vernal pools; and maintaining an updated inventory of vernal pool basins and associated vernal pool watersheds (Gene Stout and Associates *et al.* 2011, p. 7–3).

Since the completion of MCAS Miramar's INRMP, the Service has received reports on their vernal pool monitoring and restoration program, and correspondence detailing the installation's expenditures on the objectives outlined in its INRMP. MCAS Miramar continues to monitor and manage its vernal pool resources. Ongoing programs include a study of the effects of fire management on vernal pool resources, vernal pool mapping, and species and vernal pool surveys. Based on the value MCAS Miramar's INRMP assigns to vernal pool basins and watersheds, and the management actions undertaken to conserve them, we find that the INRMP provides a benefit for the Riverside fairy shrimp.

Land that contains the features essential to the conservation of Riverside fairy shrimp is within the following area at MCAS Miramar: AA1 east complex, near the junction of Interstate 15 and Pomerado Road.

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 MCAS Miramar INRMP, and that conservation efforts identified in the INRMP will provide a benefit to Riverside fairy shrimp occurring in habitats within or adjacent to MCAS Miramar. Therefore, 59 ac (24 ha) of land containing physical or biological features essential to the conservation of the species are exempt from the final critical habitat designation in accordance with section 4(a)(3) of the Act.

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 exercise his discretion to exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

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 ancillary benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to further national security interests; result in conservation; result in the continuation, strengthening, or encouragement of partnerships; or result in implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation. If we determine that the benefits of exclusion outweigh the benefits of inclusion and that exclusion will not result in extinction, we may, but are not required to, exercise Secretarial discretion to exclude the area from a designation of critical habitat.

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 (DEA) of the proposed critical habitat designation and related factors (Industrial Economics Inc. 2011, entire). The draft analysis, dated November 3, 2011, was made available for public review from March 1 through April 2, 2012 (77 FR 12543, March 1, 2012). Following the close of the comment period, a final analysis (dated August 30, 2012) of the potential economic effects of the designation was developed, taking into consideration the public comments and any new information (Industrial Economics Inc. 2012).

The intent of the final economic analysis (FEA) is to quantify the economic impacts of foreseeable conservation efforts for Riverside fairy shrimp; 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 (for example, 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. Decisionmakers can 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 the species' listing in 1993 (58 FR 41384, August 3, 1993). The analysis only considers the current critical habitat designation and estimates the costs as if the previous critical habitat designation did not exist (Industrial Economics Inc. 2012, p. 2–2). The analysis considers those costs that may occur in the 24 years following the current designation of critical habitat. This was determined to be the appropriate period for analysis because 24 years is the amount of time for which regional planning information is available (Industrial Economics Inc. 2012, p. 2–23). The FEA quantifies economic impacts of Riverside fairy shrimp conservation efforts due to critical habitat designation associated with the following categories of activity: (1) Agricultural, commercial, and residential development; (2) transportation; and (3) livestock grazing and other activities (including roadway construction and maintenance, livestock grazing, water management activities, OHV use, heavy foot traffic, vegetation removal, nonnative plants, pesticides, and fire suppression and management).

The majority of incremental costs (90 percent) related to revised critical habitat result from time delays to development activities. The remaining 10 percent of incremental costs result from the additional administrative costs of considering adverse modification to proposed projects, and from conducting environmental assessments in compliance with the California Environmental Quality Act (CEQA) (Industrial Economics Inc. 2012, pp. ES–5—ES–6). The total future incremental impacts are estimated to be $1.75 million to $2.87 million ($166,000 to $273,000 annualized) in present value terms, using a 7 percent discount rate over the next 24 years (2012 to 2035) in areas that we proposed as revised critical habitat (Industrial Economics Inc. 2012, pp. ES–1—ES–2, ES–5). The majority of the costs are expected to occur in developable areas in Unit 2 (Orange County) and Unit 5 (San Diego County). Smaller impacts are expected in Unit 1 (Ventura County) and Unit 3 (Riverside County), and no impacts are forecast in Unit 4 (San Diego County), as no developable area exists in Unit 4 (Industrial Economics Inc. 2012, p. 4–17). Only minor impacts to transportation and habitat management are anticipated from this final critical habitat designation, and no economic impacts to livestock grazing, OHV activities, vegetation removal, water management activities, nonnative plants, or fire management are forecast (Industrial Economics Inc. 2012, pp. 5–1, 5–4).

Our economic analysis did not identify any disproportionate costs likely to result from the designation, and we are not excluding any lands from this designation of critical habitat for Riverside fairy shrimp based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Carlsbad Fish and Wildlife Office (see **ADDRESSES**) or by downloading it 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) or other agencies where a national security impact might exist. In preparing this final rule, we have

exempted from the designation of critical habitat those DOD lands with completed INRMPs determined to provide a benefit to Riverside fairy shrimp. Areas identified as owned and managed by DOD on MCB Camp Pendleton and MCAS Miramar that are exempt from critical habitat designation under section 4(a)(3) of the Act are discussed in the Exemptions section above.

In our previous final revised critical habitat rule published April 12, 2005 (70 FR 19154) rule, we excluded from critical habitat lands adjacent to the U.S.-Mexico border under the jurisdiction of the U.S. Department of Homeland Security (DHS), U.S. Border Patrol, San Diego Sector. In that rule, we found that the portion of the lands owned by the DHS that are directly adjacent to the U.S.-Mexico border have previously been disturbed and developed by the ongoing construction of the Border Infrastructure System (BIS), and those lands within the constructed portion of the footprint of the BIS do not contain any of the primary constituent elements for the Riverside fairy shrimp. The U.S. Customs and Border Protection of the DHS is tasked with maintaining National Security interests along the nation's international borders. As such, lands on which DHS activities occur may qualify for exclusion under section 4(b)(2) of the Act. The BIS is considered integral to national security, and therefore, lands owned by DHS along the U.S.-Mexico border have been excluded from the designation under section 4(b)(2) of the Act for national security impacts (see Table 4 below).

TABLE 4—AREAS EXCLUDED FROM THE RIVERSIDE FAIRY SHRIMP FINAL REVISED CRITICAL HABITAT UNDER SECTION 4(b)(2) OF THE ACT FOR NATIONAL SECURITY REASONS

Land ownership	Acreage
Department of Homeland Security	
5b. Arnie's Point (J15)	29 ac (12 ha).
5h (portion). J11 E, J11 W, J12, J16–18 (Goat Mesa)	11 ac (4 ha).
Total	40 ac (16 ha).

On February 6, 2002, the Service completed a section 7 consultation with the U.S. Army Corps of Engineers (Corps) and the former Immigration and Naturalization Service on the effects of closing a gap in the Border Fence Project's secondary fence at Arnie's Point on three endangered species: Riverside fairy shrimp, San Diego fairy shrimp, and San Diego button-celery (*Eryngium aristulatum* var. *parishii;* Service 2002). We concluded in our biological opinion that the proposed action, which included the loss of a linear vernal pool occupied by both the Riverside fairy shrimp and San Diego fairy shrimp, was not likely to jeopardize the continued existence of the three endangered species. On January 9, 2003, the Service completed a section 7 consultation with the former Immigration and Naturalization Service of the effects on the endangered Riverside fairy shrimp and endangered San Diego fairy shrimp from the construction of a secondary border fence and other road and fencing improvements in San Diego County along the U.S.-Mexico border (Service 2003). We concluded in our biological opinion that the proposed action, which included the loss of three vernal pool basins, was not likely to jeopardize the continued existence of the Riverside fairy shrimp and San Diego fairy shrimp. To offset losses for both fairy shrimp species, the DHS conducted two restoration projects and identified for conservation some DHS-owned lands located north of the BIS (at Arnie's Point), including lands identified as critical habitat in the 2011 proposed revised critical habitat rule (76 FR 31686; June 1, 2011). Though the BIS has been completed, the U.S. Border Patrol conducts ongoing operations and maintenance activities in the area, including upkeep of fences, roads, surveillance, communication, and detection equipment. These areas include lands directly adjacent to the border, including Subunit 5b and a portion of Subunit 5h. In recognition of the continuing ongoing national security concerns along the U.S.-Mexico border, the Secretary is exercising his discretion to exclude Subunit 5b (a total of 29 ac (12 ha)) and a portion of Subunit 5h (11 ac (4 ha)) from the final revised critical habitat designation.

Benefits of Inclusion—DHS Lands

The designation of critical habitat can result in regulatory, educational, and ancillary benefits. As discussed under *Application of the ''Adverse Modification'' Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208 (8 U.S.C. 1101 *et seq.*)), was passed as part of the Omnibus Consolidated Appropriations Act of 1997, and addressed construction of the BIS. Among the provisions of section 102 was the authority granted to the Attorney General (AG) to waive the provisions of the Act and of the National Environmental Protection Act (NEPA) ''to ensure the expeditious construction of barriers and roads * * *'' (Public Law 104–208, 1996; sec. 102 (c)). Although DHS was within its authority to request the AG grant a waiver from complying with the Act, it did consult with the Service on impacts associated with the proposed border fence project, including the preparation of documents to fulfill its NEPA obligations (42 U.S.C. 4321 *et seq.*). The result of that consultation was the restoration of three vernal pools within Arnie's Point, as discussed above. In 2002, the Homeland Security Act (HSA) transferred the authority to take such actions as necessary to construct the BIS to the Secretary of the DHS. In 2005, the Secretary of the DHS, under the authority granted under the HSA and section 102 of the IIRIRA, as amended by the REAL ID Act of 2005, did, in fact, make a determination to waive all ''federal, state, or other laws, regulations or legal requirements of, deriving from, or related to the subject of, * * * The National Environmental Policy Act, the Endangered Species Act * * *.'' (70 FR 55623). In light of this determination (that became effective on September 22, 2005), there is no longer a requirement

for DHS to consult with the Service on actions that may impact federally listed species, including the Riverside fairy shrimp, if those actions are related to the construction or maintenance or operations of the BIS. Further, in 2008, the U.S. Congress granted to the Secretary of Homeland Security the ability to waive all legal requirements related to construction of the BIS. Subsequently, the Secretary of Homeland Security published a determination in the **Federal Register** (73 FR 18294; April 3, 2008) waiving laws that the Secretary determined to be necessary to ensure the completion of barriers and roads related to the BIS, including the Act and the CWA. Though much of the BIS has been completed, there are ongoing operations and maintenance activities in the area, including upkeep of fences, roads, surveillance, communication, and detection equipment. These activities occur in lands directly adjacent to the border, including Subunit 5b and a portion of Subunit 5h. Because of the waiver determination, DHS would not be required to consult under Section 7 of the Act on the effects of such U.S. Border Patrol activities should critical habitat for the Riverside fairy shrimp be designated on these lands. Because of the laws and authorities granted to DHS outlined above, neither section 7 of the Act nor provisions of the CWA apply in these areas; therefore, a critical habitat designation in these areas will have no regulatory impact. Further, because the lands at issue are owned by DHS, and Border Patrol activities are not subject to compliance with state laws such as CEQA, there are no ancillary benefits of designating critical habitat on these lands.

Another possible 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 Riverside fairy shrimp and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable. In the case of Riverside fairy shrimp, however, lands identified as essential to the conservation of the species were identified in the proposed critical habitat designation published in the **Federal Register** on June 1, 2011 (76 FR 31686), as well as the previous proposed revised critical habitat published on April 27, 2004 (69 FR 23024), and the previous final revised rule published on April 12, 2005 (70 FR 19154). Notices of these publications were announced in press releases and newspapers of general circulation, and information was posted on the Service's Web site. We also sent notifications to local, State, and Federal agencies. Therefore, any educational benefits of designating critical habitat on lands owned by DHS are negligible.

For the reasons stated above, we consider that no regulatory or ancillary benefits will result from critical habitat designation on lands owned by DHS. In addition, the Service previously thoroughly evaluated the impacts of the BIS on the Riverside fairy shrimp and its vernal pool habitat, and determined that the project will not jeopardize the continued existence of the species. As part of the BIS project, DHS has committed to restore, protect, and manage nearby Riverside fairy shrimp habitat as laid out in our biological opinions (Service 2002; Service 2003). We also conclude that the educational benefits of designating lands identified as critical habitat for Riverside fairy shrimp on lands owned by the DHS are negligible because the location of habitat for this species within San Diego County is already well known generally and to DHS. Therefore, these facts render negligible the benefits of inclusion of subunits 5b and 5h in the designation of critical habitat for Riverside fairy shrimp.

Benefits of Exclusion—DHS lands

Although designating critical habitat on DHS lands in Subunits 5b and 5h may clearly reflect our determination that these lands are essential to the conservation of the Riverside fairy shrimp, there is no regulatory requirement for the DHS or any other Federal agency directly involved with the construction and maintenance of the BIS to consult with us regarding impacts to the species. Designation of critical habitat on those lands under these circumstances would be received negatively by Federal agencies directly involved with the timely operation and maintenance of this critical national security project to safeguard our international borders and viewed negatively as well as by the public at large.

In past years, DHS has undertaken additional conservation measures in Subunit 5b. These measures include: Installation of a chain link fence along the inside edge of an existing perimeter road to prevent vehicles from driving into the restoration area; preparation of a restoration plan for the three pools; and restoration and enhancement of 1 ac (<1 ha) of native grassland in the restoration area. Excluding DHS-owned lands from critical habitat will further our partnership with DHS and could encourage future restoration actions for listed species and their habitats.

Benefits of Exclusion Outweigh Benefits of Inclusion—DHS Lands

We conclude that the minimal benefits of designating critical habitat on the DHS lands, including the vernal pool restoration area in Subunit 5b, are far outweighed by the substantial benefits to national security and our partnership with DHS. Therefore, the Secretary is exercising his discretion to exclude the DHS lands within Subunit 5b (29 ac (12 ha)) and a portion of Subunit 5h (11 ac (4 ha)) under section 4(b)(2) of the Act. No lands owned by the DHS are being designated as critical habitat.

Exclusion Will Not Result in Extinction of the Species—DHS Lands

The Service determined that exclusion of these lands will not result in extinction of the species. We have thoroughly analyzed the impacts associated with the BIS and conclude that Border Patrol activities associated with operation and maintenance of the BIS are not likely to jeopardize the continued existence of Riverside fairy shrimp. The DHS has also conserved and restored vernal pools at Arnie's Point since the construction of the border fence to support listed species such as Riverside fairy shrimp. Therefore, we conclude that the exclusion of lands in Subunits 5b and in a portion of 5h will not result in the extinction of the Riverside fairy shrimp.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts in addition to economic impacts and impacts on national security. We consider a number of factors, including whether landowners have developed any HCPs or other management plans for areas proposed as critical habitat, 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.

Based on species information and other information in our files, information provided by entities seeking exclusion, and public comments we received, we evaluated whether certain lands in the proposed critical habitat units 2, 4, and 5 that are covered by approved habitat conservation plans (HCPs) are appropriate for exclusion

from this final designation under section 4(b)(2) of the Act. Based on our review, we are excluding the following areas from critical habitat designation for Riverside fairy shrimp: Subunits 2c; 2i; portions of Subunits 2dA, 2dB, and 2e; 2f; 2g; all of Unit 3 (Subunits 3c, 3d, 3e, 3f, 3g, and 3h); Unit 4; and a portion of Subunit 5d. All of those areas were identified as under consideration for exclusion in the proposed rule published June 1, 2011 (76 FR 31686).

Table 5, below, provides approximate areas (ac (ha)) of lands that meet the definition of critical habitat, but that we are excluding under section 4(b)(2) of the Act from the final revised critical habitat rule.

TABLE 5—AREAS EXCLUDED FROM THE RIVERSIDE FAIRY SHRIMP FINAL REVISED CRITICAL HABITAT UNDER SECTION 4(b)(2) OF THE ACT

Subunit by Plan **	Acreage
Orange County Central-Coastal NCCP	
2c. (MCAS) El Toro	26 ac (11 ha).
2i. SCE Viejo Conservation Bank	63 ac (25 ha).
Subtotal for Orange County Central-Coastal Subregional NCCP/HCP	*89 ac (36 ha)*
Orange County Southern Subregion HCP	
2dA. Saddleback Meadow	4 ac (2 ha).
2dB. O'Neill Regional Park (near Trabuco Canyon)	75 ac (30 ha).
2e. O'Neill Regional Park (near Cañada Gobernadora)	47 ac (19 ha).
2f. Chiquita Ridge	56 ac (23 ha).
2g. Radio Tower Road	51 ac (21 ha).
Subtotal for Orange County Southern Subregion HCP	*233 ac (94 ha).*
Western Riverside County MSHCP	
3c. Australia Pool	19 ac (8 ha).
3d. Scott Road Pool	9 ac (4 ha).
3e. Schleuniger Pool	23 ac (9 ha).
3f. Skunk Hollow and Field Pool (Barry Jones Wetland Mitigation Bank)	163 ac (66 ha).
3g. Johnson Ranch Created Pool	54 ac (22 ha).
3h. Santa Rosa Plateau—Mesa de Colorado	597 ac (242 ha).
Subtotal for Western Riverside County MSHCP	*865 ac (350 ha).*
San Diego MHCP—Carlsbad HMP	
4c. Poinsettia Lane Commuter Train Station (JJ2)	9 ac (4 ha).
Subtotal Carlsbad HMP under the San Diego MHCP	*9 ac (4 ha).*
County of San Diego Subarea Plan under the MSCP	
5d. J29–31 (portion)	23 ac (9 ha).
Subtotal County of San Diego Subarea Plan under the MSCP	*23 ac (9 ha).*
Total	1,219 ac (493 ha).*

* Values in this table may not sum due to rounding.

** All lands that meet the definition of critical habitat and fall within the boundaries of an HCP are being excluded, with the exception of lands within the City of San Diego Subarea Plan. Because Riverside fairy shrimp is no longer a covered species under the City of San Diego's Subarea Plan under the MSCP (the City relinquished its permit on April 20, 2010), we are not excluding critical habitat areas falling within the boundaries of the City of San Diego Subarea Plan.

We are excluding these areas because we determine that they are appropriate for exclusion under the ''other relevant factor'' provisions of section 4(b)(2) of the Act.

Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships

As discussed above, 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.

We find that the Orange County Central-Coastal Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP), the Orange County Southern Subregion HCP, the Western Riverside County MSHCP, City of Carlsbad Habitat Management Plan (HMP) under the San Diego Multiple Habitat Conservation Program (MHCP), and County of San Diego Subarea Plan under the MSCP provide protection and management for lands that meet the definition of critical habitat for Riverside fairy shrimp based on the weighing of those factors, and the Secretary is exercising his discretion to

exclude non-Federal lands covered by these plans (see Table 5 above). Details of our analysis for each plan are described below.

We did not consider excluding non-Federal lands covered by the City of San Diego Subarea Plan under the MSCP. In a 2006 Federal district court ruling in *Center for Biological Diversity* v. *Bartel,* 470 F. Supp. 2d 1118 (S.D.Cal.), the court enjoined the incidental take permit issued to the City of San Diego based on the City's Subarea Plan, as it applied to Riverside fairy shrimp and six other vernal pool species. The court held that the City's Subarea Plan did not provide adequate protection for Riverside fairy shrimp. As a result, the City surrendered permit coverage for seven vernal pool species, including Riverside fairy shrimp, on April 20, 2010, and the Service cancelled the permit insofar as it applied to the seven species on May 14, 2010. Because the Riverside fairy shrimp is no longer a covered species under the City of San Diego Subarea Plan under the MSCP, we are not excluding critical habitat areas that fall within the boundary of the City of San Diego Subarea Plan. The City is currently preparing a new HCP to obtain incidental take coverage for the Riverside fairy shrimp and other vernal pool species. Despite the City's relinquishment of their permit, 54 percent of all currently identified vernal pool habitat, or 1,369 pools, within the boundaries of the City's subarea plan have been conserved by covenant of easement, conservation easement, or dedication in fee title to the City (City of San Diego 1997; Service 2006). The City continues to monitor and manage vernal pools in support of the MSCP.

Regulatory Benefits of Inclusion for Habitat Conservation Plans

As discussed under *Application of the ''Adverse Modification'' Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

However, for some species, including Riverside fairy shrimp, the outcome of adverse modification analysis under section 7(a)(2) will be similar to the jeopardy analysis because effects to habitat will often also result in effects to the species. Though jeopardy and adverse modification analyses must satisfy two different standards, any modifications to proposed actions resulting from a section 7 consultation to minimize or avoid impacts to Riverside fairy shrimp are likely to be habitat based, as the Riverside fairy shrimp is completely dependent on a properly functioning hydrological regime. Avoidance or adequate minimization of impacts to the wetland area and its associated watershed, which collectively create the hydrological regime necessary to support Riverside fairy shrimp, is essential not only to enable the critical habitat unit to carry out its conservation function such that adverse modification is avoided, but also to avoid a possible jeopardy determination with regard to the continued existence of the listed species. All subunits excluded within the Orange County Central-Coastal NCCP/HCP, the Orange County Southern Subregion HCP, the Western Riverside County MSHCP, City of Carlsbad HMP under the San Diego MHCP, and County of San Diego Subarea Plan under the MSCP are occupied. Thus, it is difficult to differentiate meaningfully between measures that would be implemented solely to minimize impacts to critical habitat from those required under the plans to minimize impacts to Riverside fairy shrimp. Therefore, in the case of Riverside fairy shrimp, we believe any additional regulatory benefits of critical habitat designation within areas covered by approved habitat conservation plans would be minimal because the regulatory benefits from designation are difficult to distinguish at this point in time from the benefits of listing.

Detailed discussion of the regulatory, educational, and ancillary benefits of critical habitat designation is discussed under the *Benefits of Inclusion* sections for each plan below.

Orange County Central-Coastal NCCP/HCP

The Orange County Central-Coastal Natural Community Conservation Planning/Habitat Conservation Plan (NCCP/HCP) was developed in cooperation with numerous local jurisdictions, State agencies, and participating landowners, including the cities of Anaheim, Costa Mesa, Irvine, Orange, and San Juan Capistrano; Southern California Edison; Transportation Corridor Agencies; The Irvine Company; California Department of Parks and Recreation; Metropolitan Water District of Southern California; and the County of Orange. Approved in 1996, the Orange County Central-Coastal NCCP/HCP provides for the establishment of approximately 38,738 ac (15,677 ha) of reserve land for 39 Federal or State-listed and unlisted sensitive species within the 208,713-ac (84,463-ha) plan area in central and coastal Orange County. The Orange County Central-Coastal NCCP/HCP is a multispecies conservation plan that minimizes and mitigates expected habitat loss and associated incidental take of covered species within the plan area. The ''Reserve System'' created pursuant to the NCCP/HCP is designed to function effectively as a multiple-habitat and multiple-species reserve that specifically includes vernal pool habitat and Riverside fairy shrimp (R.J. Meade Consulting, Inc. 1996, entire).

The Orange County Central-Coastal NCCP/HCP provides for monitoring and adaptive management of covered species and their habitats within this Reserve System (Consultation #1–6–FW–24, Service 1996, pp. 1–4). Conditionally covered species, including the Riverside fairy shrimp, receive protection not only through the establishment and management of the Reserve System, but also additional mitigation measures specified in the NCCP/HCP and implementing agreement (IA) (Service *et al.* 1996, p. 6). Under the NCCP/HCP, incidental take for Riverside fairy shrimp is limited to highly degraded or artificial vernal pools. Take of Riverside fairy shrimp in nondegraded, natural vernal pool habitat, such as habitat in Subunits 2c and 2i, is not authorized. If a planned activity will affect Riverside fairy shrimp in a highly degraded or artificial vernal pool, it ''must be consistent with a mitigation plan that:

- Addresses design modifications and other onsite measures that are consistent with the project's purposes, minimizes impacts, and provides appropriate protections for vernal pool habitat;
- Provides for compensatory vernal pool habitat restoration/creation at an appropriate location (which may include the reserve or other open space) and includes relocation of potential cyst-bearing soils; and
- Provides for monitoring and adaptive management of vernal pools consistent with Chapter 5 of this NCCP'' (R.J. Meade Consulting, Inc. 1996, p. 97).

Permittees implement the above conservation measures for Riverside fairy shrimp and other covered species over the 75-year permit term, as well as provide commitments in perpetuity regarding habitat protection for lands in the Reserve System and commitments outlined in the IA (R.J. Meade Consulting 1996, p. 12). Subunit 2i (SCE Viejo Conservation Bank; 63 ac (25 ha)) is part of the proposed SCE Viejo Conservation Bank and is targeted for conservation. Although Subunit 2c

((MCAS) El Toro; 26 ac (11 ha)) is not yet conserved, loss of vernal pool habitat in this area is not authorized under the Orange County Central-Coastal NCCP. To date, monitoring and management related to Riverside fairy shrimp have included reservewide vernal pool surveys conducted from 1997 through 2001, and ongoing control of invasive, nonnative vegetation in the upland environment; both Subunit 2c and 2i are within the reserve boundaries.

The Secretary is exercising his discretion to exclude a total of 89 ac (36 ha) of land that is owned by or under the jurisdiction of the permittees of the Orange County Central-Coastal NCCP/HCP (see Table 5 above).

Benefits of Inclusion—Orange County Central-Coastal NCCP/HCP

The designation of critical habitat can result in regulatory, educational, and ancillary benefits. As discussed under *Application of the ''Adverse Modification'' Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

However, for reasons stated in the *Regulatory Benefits of Inclusion for Habitat Conservation Plans* section above, we conclude any additional regulatory benefits of critical habitat designation would be minimal because the regulatory benefits from designation are difficult to distinguish at this point in time from the benefits of listing. In addition, because non-degraded Riverside fairy shrimp habitat within the Central-Coastal NCCP/HCP is required to be protected under the plan, the likelihood of a future section 7 consultation on these lands for other than conservation-related actions is remote. Thus, because we do not anticipate that the outcome of future section 7 consultations on Riverside fairy shrimp would change if critical habitat were designated, and because the likelihood of future Section 7 consultations is remote, we conclude that the regulatory benefits of designating lands identified as critical habitat within the Orange County Central Coastal NCCP/HCP (Subunits 2c and 2i) would be, at most, minor.

Another possible 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 Riverside fairy shrimp and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable. In the case of Riverside fairy shrimp, however, there have already been multiple occasions when the public has been educated about the species. The Orange County Central-Coastal NCCP/HCP has been in place since 1996. Implementation of the plan is reviewed yearly through publicly available annual reports that extensively detail progress of the plan and status of nature reserves within the plan area. These reports provide extensive opportunity to educate the public and landowners about the location of, and efforts to conserve, areas that meet the definition of critical habitat for Riverside fairy shrimp. As discussed above, the permit holders of the Orange County Central-Coastal NCCP/HCP are aware of the value of these lands to the conservation of Riverside fairy shrimp, and conservation measures are already in place to protect essential occurrences of the Riverside fairy shrimp and its habitat.

Lands identified as critical habitat that are covered by the Orange County Central-Coastal NCCP/HCP were also included in the proposed critical habitat designation for Riverside fairy shrimp published in the **Federal Register** on June 1, 2011 (76 FR 31686), as well as the previous proposed revised critical habitat published on April 27, 2004 (69 FR 23024), and the previous final revised rule published on April 12, 2005 (70 FR 19154). These publications were also announced in press releases and information was posted on the Service's web site. We also sent notifications to local, State, and Federal agencies.

We consider the educational benefits of critical habitat designation (such as providing information to Orange County and other stakeholders and to the public regarding areas important to the long-term conservation of this species) have already been realized through development and ongoing implementation of the Orange County Central-Coastal NCCP/HCP, by proposing these areas as critical habitat, and through the Service's public outreach efforts. The educational benefits of designating critical habitat within the Orange County Central Coastal NCCP/HCP would be negligible.

Finally, critical habitat designation can result in ancillary conservation benefits to Riverside fairy shrimp by triggering additional review and conservation through other Federal and State laws. The primary State law that might be affected by critical habitat designation is CEQA. However, vernal pool habitat occupied by Riverside fairy shrimp within the central-coastal subregion of Orange County has been identified in surveys conducted since the completion of the Orange County Central Coastal NCCP/HCP and is targeted for protection under the plan and not authorized for take. Thus, reviews of development proposals affecting occupied vernal pool habitat within the plan area under CEQA already take into account the importance of this habitat to Riverside fairy shrimp and the protections required for the species and its habitat under the plan. The Federal law most likely to afford protection to designated Riverside fairy shrimp habitat is the CWA. Projects requiring a permit under the CWA, such as a fill permit under section 404 of the CWA, located within critical habitat or likely to affect critical habitat, would trigger section 7 consultation under the Act. However, as discussed above, we conclude the potential regulatory benefits resulting from designation of critical habitat would be negligible because, with regard to Riverside fairy shrimp, the outcome of an adverse modification analysis under section 7(a)(2) of the Act would not differ materially from the outcome of a jeopardy analysis. Therefore, we conclude the ancillary benefits of designating lands identified as critical habitat for Riverside fairy shrimp within the Orange County Central Coastal NCCP/HCP as critical habitat would be negligible.

For the reasons stated above, we consider section 7 consultations for critical habitat designation conducted under the standards required by the 9th Circuit Court in the *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service* decision would provide little conservation benefit and would be largely redundant with those benefits attributable to endangered species listing as well as those already provided by the Orange County Central-Coastal NCCP/HCP. Therefore, the benefits of inclusion are reduced because the regulatory benefits of designating those acres as Riverside fairy shrimp critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Additionally, the benefits of inclusion are reduced because the educational and ancillary benefits of designating lands identified as critical habitat for Riverside fairy shrimp covered by the Orange County Central-Coastal NCCP/HCP would be

negligible because the location of habitat for this species within the central-coastal subregion of Orange County and the importance of conserving such habitat are well known and are already addressed through CEQA and through implementation of the Orange County Central-Coastal NCCP/HCP.

Benefits of Exclusion—Orange County Central-Coastal NCCP/HCP

The benefits of excluding from designated critical habitat the approximately 89 ac (36 ha) of land within the Orange County Central-Coastal NCCP/HCP are significant. The benefits of excluding lands identified as critical habitat for Riverside fairy shrimp covered by the plan include: (1) Continuance and strengthening of our effective working relationships with the Central-Coastal NCCP/HCP jurisdictions and stakeholders to promote the conservation of Riverside fairy shrimp and its habitat; (2) allowance for continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (3) encouragement of other regional jurisdictions with completed NCCP or HCP plans to amend their plans to cover and benefit Riverside fairy shrimp and vernal pool habitat; (4) encouragement for local jurisdictions to fully participate in the Orange County Central-Coastal NCCP/HCP; and (5) encouragement of additional HCP and other conservation plan development in the future on other private lands that include Riverside fairy shrimp and other federally listed species.

We have developed close partnerships with the County of Orange and all other participating entities through the development of the Orange County Central-Coastal NCCP/HCP. The protections and management provided under the plan for Riverside fairy shrimp and its habitat, including the physical or biological features essential to the conservation of this species, are consistent with statutory mandate under section 7 of the Act to avoid destruction or adverse modification of critical habitat. Furthermore, this plan goes beyond the statutory mandate by protecting areas that contain the physical or biological features essential to the conservation of the species.

By excluding the approximately 89 ac (36 ha) of land within the boundaries of the Orange County Central-Coastal NCCP/HCP from critical habitat designation, we are eliminating a redundant layer of regulatory review for projects covered by the Orange County Central-Coastal NCCP/HCP, maintaining our partnership with Orange County and other plan stakeholders, and encouraging new voluntary partnerships with other landowners and jurisdictions to protect Riverside fairy shrimp and other listed species. As discussed above, the prospect of potentially avoiding a future designation of critical habitat provides a meaningful incentive to plan proponents to extend protections to endangered and threatened species and their habitats under a habitat conservation plan. Achieving comprehensive landscape-level protection for listed species, particularly rare vernal pool species, such as Riverside fairy shrimp, through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our ongoing partnership with the County of Orange and plan stakeholders, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of Riverside fairy shrimp.

Some NCCP and HCP permittees have expressed the view that designation of lands covered by an NCCP/HCP devalues the conservation efforts of plan proponents and the partnerships fostered through the development and implementation of the plans and would discourage development of additional NCCP/HCPs and other conservation plans in the future (see the *Benefits of Exclusion—Orange County Southern Subregion HCP* and *Benefits of Exclusion—Western Riverside County MSHCP* sections below*).* Where an existing NCCP/HCP provides protection for a species and its habitat within the plan area, the benefits of preserving existing partnerships by excluding the covered lands from critical habitat are most significant. Under these circumstances, excluding lands owned by or under the jurisdiction of the permittees of an NCCP/HCP promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional NCCPs and HCPs for other species.

Large-scale HCPs, such as the Orange County Central-Coastal NCCP/HCP, take many years to develop, and foster an ecosystem-based approach to habitat conservation planning by addressing conservation issues through a coordinated approach. If, instead, local jurisdictions were to require landowners to individually obtain incidental take permits (ITPs) under section 10 of the Act, the conservation likely to result would be uncoordinated, patchy, and less likely to achieve listed species recovery, as conservation measures would be determined on a project-by-project basis instead of on a comprehensive, landscape-level scale. To avoid that outcome, we are committed to fostering partnerships with local jurisdictions to encourage the development and continued implementation of regional HCPs that afford proactive landscape-level conservation for multiple species. We conclude that the exclusion from critical habitat designation of lands identified as critical habitat within the Orange County Central-Coastal NCCP/HCP will result in significant partnership benefits that are likely to result in important protection for the Riverside fairy shrimp and its habitat and also other listed species and their habitats.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Orange County Central-Coastal NCCP/HCP

We reviewed and evaluated the exclusion of approximately 89 ac (36 ha) of land within the boundaries of the Orange County Central-Coastal NCCP/HCP from our revised designation of critical habitat, and we determined the benefits of excluding these lands outweigh the benefits of including them. The benefits of including these lands in the designation are reduced 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 Orange County Central-Coastal NCCP/HCP and under State and Federal law. In contrast to the reduced benefits of inclusion, the benefits of excluding lands covered by the Orange County Central-Coastal NCCP/HCP from critical habitat designation are significant. Exclusion of these lands will help preserve the partnerships we developed with local jurisdictions and project proponents through the development and ongoing implementation of the Orange County Central-Coastal NCCP/HCP, and aid in fostering future partnerships for the benefit of listed species. Our partnership with plan participants has already resulted in significant benefits to listed species and vernal pool habitat; based on this track record of success, we expect that this meaningful partnership will continue into the future.

The Orange County Central-Coastal NCCP/HCP will provide significant conservation and protection of the Riverside fairy shrimp and its habitat and help achieve recovery of this species through habitat enhancement and restoration, maintenance of functional connections to adjoining

habitat, and species monitoring efforts. Additional HCPs or other species-habitat plans potentially fostered by this exclusion would also help to recover this and other federally listed species. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion—Orange County Central-Coastal NCCP/HCP* section above, we determine the significant benefits of exclusion outweigh the minor benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Orange County Central-Coastal NCCP/HCP

We determine that the exclusion of 89 ac (36 ha) of land within the boundaries of the Orange County Central-Coastal NCCP/HCP from the designation of critical habitat for Riverside fairy shrimp will not result in extinction of the species. Proposed actions that affect waters of the United States as defined under the CWA, which in many cases include vernal pools occupied by Riverside fairy shrimp, will continue to be subject to consultation under section 7(a)(2) of the Act and to the duty to avoid jeopardy to the species. The protection provided by the Orange County Central-Coastal NCCP/HCP for the length of the permit also provides assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation.

Therefore, the Secretary is exercising his discretion to exclude 89 ac (36 ha) of land (the entirety of subunits 2c and 2i) within the boundaries of the Orange County Central-Coastal NCCP/HCP from this final critical habitat designation.

Orange County Southern Subregion HCP

The Orange County Southern Subregion HCP is a large-scale HCP that encompasses approximately 86,021 ac (34,811 ha) in southern Orange County. It is a multispecies conservation program that minimizes and mitigates expected habitat loss and associated incidental take of 32 covered species, including Riverside fairy shrimp, incidental to residential development and related actions in southern Orange County. The Orange County Southern Subregion HCP was developed and is being implemented by the County of Orange; Rancho Mission Viejo, LLC (RMV); and the Santa Margarita Water District. The Service issued incidental take permits based on the plan on January 10, 2007. The permit and plan cover a 75-year period.

The Orange County Southern Subregion HCP provides for the conservation of covered species, including Riverside fairy shrimp, through the establishment of an approximately 30,426-ac (12,313-ha) habitat reserve and 4,456 ac (1,803 ha) of supplemental open space areas (Service 2007, p. 19), which primarily consist of land owned by Rancho Mission Viejo and three pre-existing County parks (Service 2007, pp. 10, 19).

The Orange County Southern Subregion HCP is expected to provide benefits for the conservation of Riverside fairy shrimp through implementation of the following conservation measures:

- Conserving vernal pools within the habitat reserve,
- Minimizing impacts to vernal pools from development,
- Maintaining water quality and quantity,
- Controlling nonnative, invasive species,
- Managing livestock grazing, and
- Minimizing human access and disturbance.

Specifically, any development must be located at least 1,000 ft (305 m) away from vernal pools and be built at a lower elevation than the vernal pools to avoid hydrological alterations (Service 2007, p. 133). Water quality monitoring will be conducted throughout the life of the permit at occupied vernal pools near development (Service 2007, p. 133).

The conservation strategy for this HCP provides a comprehensive habitat-based approach to the protection of covered species and their habitats by focusing on the lands and aquatic resource areas containing the physical or biological features essential for the long-term conservation of the covered species (including Riverside fairy shrimp), and by providing for appropriate management for those lands (Service 2007, p. 64). All of the portions of Unit 2 that fall within the Orange County Southern Subregion HCP have been conserved or are targeted for conservation within the plan's open space area, known as its habitat reserve. Portions of Subunits 2dB and 2e are within O'Neill Regional Park, a park permanently conserved as open space that is part of the habitat reserve system (Dudek and Associates 2006, p. 10–6). The remaining portions of Subunits 2dB and 2e are outside the plan boundaries and have not been excluded from this final revised critical habitat rule. Chiquita Ridge (Subunit 2f) and Saddleback Meadow (Subunit 2dA) are also within the habitat reserve. Lands within these subunits are conserved with conservation easements, and permittees fund the management of these areas to benefit vernal pool species, including Riverside fairy shrimp (Service 2007, pp. 15–17). Management provided by the plan includes regular monitoring of vernal pools at Chiquita Ridge (Subunit 2f) (Service 2007, p. 134). Radio Tower Road (Subunit 2g) is required to be conserved within the habitat reserve in future years in accordance with the schedule set forth in the plan. In the interim, the Orange County Southern Subregion HCP mandates that all construction must take place at a minimum of 1,000 ft (305 m) from the Radio Tower Road vernal pools (Subunit 2g) (Service 2007, p. 135). Monitoring and management for Subunit 2g will occur once the property is added to the reserve (Service 2007, p. 134).

The Secretary is exercising his discretion to exclude a total of 233 ac (94 ha) of covered lands under the Orange County Southern Subregion HCP (see Table 5 above).

Benefits of Inclusion—Orange County Southern Subregion HCP

The designation of critical habitat can result in regulatory, educational, and ancillary benefits. As discussed under *Application of the ''Adverse Modification'' Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

However, for reasons stated in the *Regulatory Benefits of Inclusion for Habitat Conservation Plans* section above, we conclude that any additional regulatory benefits of critical habitat designation would be minimal because the regulatory benefits from designation are difficult to distinguish at this point in time from the benefits of listing. In addition, because essential Riverside fairy shrimp habitat within the Orange County Southern Subregion HCP is required to be protected under the plan, the likelihood of a future section 7 consultation on these lands for other than conservation related actions is remote. Thus, because we do not anticipate that the outcome of future section 7 consultations on Riverside fairy shrimp would change if critical habitat were designated and because the likelihood of future section 7 consultations is remote, we conclude that the regulatory benefits of designating lands that meet the

definition of critical habitat within the Orange County Southern Subregion HCP (Subunits 2f and 2g and portions of Subunits 2dA, 2dB, and 2e) would be, at most, minor.

As discussed under *Benefits of Inclusion—Orange County Central-Coastal NCCP/HCP,* another possible 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. In the case of Riverside fairy shrimp, however, there have already been multiple occasions when the public has been educated about the species. The planning process for the Orange County Southern Subregion HCP began in 1992, when the County of Orange formally enrolled its unincorporated area in the NCCP program, and then signed a planning agreement with CDFG and the Service in 1993. Planning efforts were delayed for a time, but scoping and planning meetings continued. The Orange County Southern Subregion HCP was finalized in 2006. As discussed above, the permit holders of the Orange County Southern Subregion HCP are aware of the value of these lands to the conservation of Riverside fairy shrimp, and conservation measures are already in place to protect essential occurrences of the Riverside fairy shrimp and its habitat.

Lands meeting the definition of critical habitat that are covered by the Orange County Southern Subregion HCP were also included in the proposed designation published in the **Federal Register** on June 1, 2011 (76 FR 31686), as well as the previous proposed revised critical habitat published on April 27, 2004 (69 FR 23024), and the previous final revised rule published on April 12, 2005 (70 FR 19154). These publications were announced in press releases and information was posted on the Service's Web site. We consider the educational benefits of critical habitat designation (such as providing information to the participating entities and to the public regarding areas important to the long-term conservation of this species) have already been realized through development and ongoing implementation of the Orange County Southern Subregion HCP, by proposing these areas as critical habitat, and through the Service's public outreach efforts. The educational benefits of designating critical habitat within the Orange County Southern Subregion HCP would be negligible.

Finally, critical habitat designation can result in ancillary conservation benefits to Riverside fairy shrimp by triggering additional review and conservation through other Federal and State laws. The primary State law that might be affected by critical habitat designation is CEQA. However, Riverside fairy shrimp lands that meet the definition of critical habitat within the Southern Subregion of Orange County have been identified and are either already protected or targeted for protection under the plan. Thus, review of development proposals affecting lands identified as critical habitat covered by the plan under CEQA by the entities participating in the Orange County Southern Subregion HCP already takes into account the importance of this habitat to the species and the protections required for the species and its habitat under the plan. The Federal law most likely to afford protection to designated Riverside fairy shrimp habitat is the CWA. Projects requiring a permit under the CWA, such as a fill permit under section 404 of the CWA, located within critical habitat or likely to affect critical habitat, would trigger section 7 consultation under the Act. However, as discussed above, we conclude the potential regulatory benefits resulting from designation of critical habitat would be negligible because, with regard to Riverside fairy shrimp, the outcome of an adverse modification analysis under section 7(a)(2) of the Act would not differ materially from the outcome of a jeopardy analysis. Therefore, we conclude that the ancillary benefits of designating lands identified as critical habitat for Riverside fairy shrimp within the Orange County Southern Subregion HCP as critical habitat would be negligible.

For the reasons stated above and under *Benefits of Inclusion—Orange County Central-Coastal NCCP/HCP,* we consider section 7 consultations for critical habitat designation conducted under the standards required by the 9th Circuit Court in the *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service* decision would provide little conservation benefit and would be largely redundant with those benefits attributable to listing as well as those already provided by the Orange County Southern Subregion HCP. Therefore, the benefits of inclusion are reduced because the regulatory benefits of designating those acres as Riverside fairy shrimp critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Additionally, the benefits of inclusion are reduced because the educational and ancillary benefits of designating critical habitat covered by the Orange County Southern Subregion HCP would be negligible because the location of lands identified as critical habitat for this species within the County of Orange and the importance of conserving such habitat are well known and are already addressed through CEQA and through implementation of the Orange County Southern Subregion HCP.

Benefits of Exclusion—Orange County Southern Subregion HCP

The benefits of excluding from designated critical habitat the approximately 233 ac (94 ha) of land within the Orange County Southern Subregion HCP are significant. The discussion of partnership benefits under *Benefits of Exclusion—Orange County Central-Coastal NCCP/HCP* applies equally to the Orange County Southern Subregion HCP. The benefits of excluding lands identified as critical habitat covered by the Orange County Southern Subregion HCP include continuing and strengthening our existing partnerships with the HCP permittees and stakeholders across the subregion to promote the conservation of the Riverside fairy shrimp and its habitat and encouraging new partnerships with other jurisdictions to amend existing and develop future HCPs that cover and provide conservation for the Riverside fairy shrimp and other listed species.

We have developed close partnerships with participating entities through the development of the Orange County Southern Subregion HCP. The protections and management provided for the Riverside fairy shrimp and its habitat, including the physical or biological features essential to the conservation of the species, are consistent with statutory mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat. Furthermore, this plan goes beyond the statutory mandate including active management and protection of areas that contain the physical or biological features essential to the conservation of the species. By excluding the approximately 233 ac (94 ha) of land within the boundaries of the Orange County Southern Subregion HCP from critical habitat designation, we are eliminating a redundant layer of regulatory review for projects covered by the Orange County Southern Subregion HCP, maintaining our partnership with Orange County and other plan permittees, and encouraging new voluntary partnerships with other

landowners and jurisdictions to protect the Riverside fairy shrimp and other listed species. As discussed above, the prospect of potentially avoiding a future designation of critical habitat provides a meaningful incentive to plan proponents to extend protections to endangered and threatened species and their habitats under a conservation plan. Achieving comprehensive landscape-level protection for listed species, particularly rare vernal pool species such as the Riverside fairy shrimp through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our ongoing partnerships with the participating entities, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of the Riverside fairy shrimp.

As noted above, some HCP permittees have expressed the view that critical habitat designation of lands covered by an HCP devalues the conservation efforts of plan proponents and the partnerships fostered through the development and implementation of the plan, and would discourage development of additional HCPs and other conservation plans in the future. Landowners in the Orange County Southern Subregion HCP have repeatedly expressed their belief that lands covered by the plan should be excluded from critical habitat (RMV 2012, pp. 1, 8). Where an existing HCP provides protection for a species and its essential habitat within the plan area, such as is the case with the Orange County Southern Subregion HCP, the benefits of preserving existing partnerships by excluding the covered lands from critical habitat are most significant. Under these circumstances, excluding lands owned by or under the jurisdiction of the permittees of an HCP promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional HCPs for other species.

Large-scale HCPs, such as the Orange County Southern Subregion HCP, take many years to develop, and foster an ecosystem-based approach to habitat conservation planning by comprehensively addressing conservation issues. If local jurisdictions were to require landowners to individually obtain ITPs under section 10 of the Act, the conservation likely to result would be uncoordinated, patchy, and less likely to achieve listed species recovery, as conservation measures would be determined on a project-by-project basis instead of on a comprehensive, landscape-level scale. To avoid that outcome, we are committed to fostering partnerships with local jurisdictions and large landowners to encourage the development and continued implementation of regional HCPs that afford proactive landscape-level conservation for multiple species. We conclude that the exclusion from critical habitat designation of lands that contain the physical and biological factors essential to the conservation of the species within the Orange County Southern Subregion HCP will result in significant partnership benefits that we believe will result in important protection for Riverside fairy shrimp and its habitat and other listed species and their habitats.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Orange County Southern Subregion HCP

We reviewed and evaluated the exclusion of approximately 233 ac (94 ha) of land within the boundaries of the Orange County Southern Subregion HCP from our revised designation of critical habitat, and we determined the benefits of excluding these lands outweigh the benefits of including them. The benefits of including these lands in the designation are reduced 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 Orange County Southern Subregion HCP and under State and Federal law. In contrast to the reduced benefits of inclusion, the benefits of excluding lands covered by the Orange County Southern Subregion HCP from critical habitat designation are significant. Exclusion of these lands will help preserve the partnerships we developed with local jurisdictions and project proponents through the development and ongoing implementation of the Orange County Southern Subregion HCP, and will aid in fostering future partnerships for the benefit of listed species. Our partnership with plan participants has already resulted in significant benefits to listed species and vernal pool habitat; based on this track record of success, we expect that this meaningful partnership will continue into the future.

The Orange County Southern Subregion HCP will provide significant conservation and management of the Riverside fairy shrimp and its habitat, and help achieve recovery of this species through habitat enhancement and restoration, functional connections to adjoining habitat, and species monitoring efforts. Additional HCPs or other species-habitat plans potentially fostered by this exclusion would also help to recover this and other federally listed species. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion—Orange County Southern Subregion HCP* section above, we determine the significant benefits of exclusion outweigh the minor benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Orange County Southern Subregion HCP

We determined that the exclusion of 233 ac (94 ha) of land within the boundaries of the Orange County Southern Subregion HCP from the designation of critical habitat for the Riverside fairy shrimp will not result in extinction of the species. Proposed actions that affect waters of the United States as defined under the CWA, including in many cases vernal pools occupied by Riverside fairy shrimp, will continue to be subject consultation under section 7(a)(2) of the Act and to the duty to avoid jeopardy to the species. The protection provided by the Orange County Southern Subregion HCP also provides assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation. Therefore, the Secretary is exercising his discretion to exclude 233 ac (94 ha) of land within the boundaries of the Orange County Southern Subregion HCP from this final critical habitat designation.

Western Riverside County Multiple Species Habitat Conservation Program

The Western Riverside County MSHCP is a regional, multijurisdictional HCP that encompasses approximately 1.26 million ac (510,000 ha) of land in western Riverside County. The Western Riverside County MSHCP addresses 146 listed and unlisted ''covered species,'' including the Riverside fairy shrimp. The Western Riverside County MSHCP is a multispecies conservation program designed to minimize and mitigate the expected loss of habitat and associated incidental take of covered species resulting from covered development activities such as indirect effects from flood control, road maintenance, housing construction, and construction of public facilities in the plan area. On June 22, 2004, the Service issued a single incidental take permit under section 10(a)(1)(B) of the Act to 22 permittees under the Western Riverside County MSHCP to be in effect for a period of 75 years (Service 2004a).

The Western Riverside County MSHCP, when fully implemented, will establish approximately 153,000 ac (61,917 ha) of new conservation lands (additional reserve lands (ARL)) to complement the approximate 347,000 ac (140,426 ha) of preexisting natural and open space areas (public/quasi-public (PQP) lands) in the plan area. PQP lands include those under ownership of public agencies, primarily the U.S. Forest Service (USFS) and Bureau of Land Management (BLM), as well as permittee-owned or controlled open-space areas managed by the State of California and Riverside County. Collectively, the ARL and PQP lands form the overall Western Riverside County MSHCP Conservation Area. The configuration of the 153,000 ac (61,916 ha) of ARL is not mapped or precisely delineated (hard-lined) in the Western Riverside County MSHCP. Instead, the configuration and composition of the ARL are described in text within the bounds of the approximately 310,000-ac (125,453-ha) criteria area. Additional reserve lands are being acquired and conserved as part of the ongoing implementation of the Western Riverside County MSHCP.

Skunk Hollow and Field Pool (Barry Jones Wetland Mitigation Bank, Subunit 3f), Lake Elsinore Back Basin (Australia Pool; Subunit 3c), and Murrieta (Schleuniger Pool, Subunit 3e) are conserved or will be conserved in the Western Riverside County MSHCP Conservation Area. The plan protects Riverside fairy shrimp within the plan area by ensuring the species is conserved within 90 percent of an occupied area (County of Riverside 2003, Table 9–2). All vernal pool habitat within the Western Riverside County MSHCP Conservation Area will be conserved. For vernal pool habitat outside the Conservation Area, vernal pool habitat is assessed on a project by project basis and an avoidance alternative implemented, if feasible. If an avoidance alternative is not feasible, a practicable alternative that minimizes direct and indirect effects to riparian/riverine areas, vernal pools/fairy shrimp habitat, and associated functions will be selected and unavoidable impacts will be mitigated. To ensure adequate replacement of lost functions and values, the permittee is required to make a determination of biologically equivalent or superior preservation, as described in the Plan (pp. 6–24 and 6–25), that evaluates the effects to habitats and effects on species (Dudek and Associates 2003, pp. 6–20, 6–21, 6–23). This analysis must demonstrate that a proposed action, including design features to minimize impacts and compensation measures (for example, restoration, enhancement), will provide equal or better conservation than avoidance of the riparian, riverine, vernal pools, or fairy shrimp habitats (Dudek and Associates 2003, pp. 6–23–6–25). All projects impacting vernal pool habitat must be reviewed by project permittees and the Service (Dudek and Associates 2003, p. 6–84).

Subunit 3g (Johnson Ranch Created Pool) is on existing conserved lands and is managed by CDFG (Service 2001, p. 2). Portions of Subunits 3e (Schleuniger Pool) and 3h (Santa Rosa Plateau—Mesa de Colorado) have been conserved. Subunits 3c (Australia Pool), 3d (Scott Road Pool), 3f (Skunk Hollow and Field Pool (Barry Jones Wetland Mitigation Bank)), and the remaining portions of Subunits 3e and 3h are on PQP lands.

Species-specific conservation objectives are included in the Western Riverside County MSHCP for the Riverside fairy shrimp. One objective is to conserve at least 11,942 ac (4,833 ha) of occupied or suitable habitat for the species. In addition, other areas within the criteria area identified as important for Riverside fairy shrimp will be conserved, including areas in Murrieta (Schleuniger Pool, Subunit 3e), Skunk Hollow (Subunit 3f), and Santa Rosa Plateau (Subunit 3h). This objective is intended to be met through implementation of the Protection of Species Associated with Riparian/Riverine Areas and Vernal Pools policy under the plan, which states that 90 percent of the area of occupied properties that provide long-term conservation value for Riverside fairy shrimp shall be conserved.

We anticipate that this species will persist in the remaining 90 percent of occupied habitat with long-term conservation value for the species, including all of the modeled habitat within both the existing public/quasi-public lands and the additional reserve lands. All critical habitat units within the boundaries of the Western Riverside MSHCP are conserved or on PQP lands. The MSHCP will further offset the proposed impacts to this species through management and monitoring actions within the reserve, including the enhancement of historic or vestigial vernal pools within Conservation Areas. This enhancement will help offset the impacts of activities covered by the plan by increasing the quality of the habitat that is conserved for this species and by allowing the expansion of populations within the reserve through the enhancement of historic or vestigial vernal pools that do not currently provide habitat for the species (Service 2004a, pp. 239–245).

The 1993 final listing rule for the Riverside fairy shrimp attributed the primary threat to this species to present or threatened destruction, modification, or curtailment of its habitat or to urban and agricultural development, OHV use, cattle trampling, human trampling, road development, and water management activities (58 FR 41387, August 3, 1993). The 1993 final listing rule also identified other natural and manmade factors, including introduction of nonnative plant species, competition with invading species, trash dumping, fire, and fire suppression activities (58 FR 41389, August 3, 1993) as primary threats to the Riverside fairy shrimp. The Western Riverside County MSHCP helps to address these threats through a regional planning effort, and contains species-specific objectives and criteria to provide for the conservation of the Riverside fairy shrimp and its habitat as the plan is implemented.

Benefits of Inclusion—Western Riverside County MSHCP

The designation of critical habitat can result in regulatory, educational, and ancillary benefits. As discussed under *Application of the ''Adverse Modification'' Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

However, for reasons stated in the *Regulatory Benefits of Inclusion for Habitat Conservation Plans* section above, we conclude any additional regulatory benefits of critical habitat designation would be minimal because the regulatory benefits from designation are difficult to distinguish at this point in time from the benefits of listing because all areas are considered occupied. In addition, because essential Riverside fairy shrimp habitat within the Western Riverside County MSHCP is required to be protected under the plan, the likelihood of a future section 7 consultation on these lands for other than conservation-related actions is remote. Thus, because we do not anticipate that the outcome of future section 7 consultations on Riverside fairy shrimp would change if critical habitat was designated and because the likelihood of future section 7 consultations is remote, we conclude that the regulatory benefits of

designating habitat that contains the physical or biological features essential to the conservation of the species and within the Western Riverside County MSHCP (all acreages within Unit 3) would be, at most, minor.

As discussed under *Benefits of Inclusion—Orange County Central-Coastal NCCP/HCP,* another possible 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. In the case of Riverside fairy shrimp, however, there have already been multiple occasions when the public has been educated about the species. The Western Riverside County MSHCP was developed over a 5-year period, and has been in place for almost a decade. Implementation of the plan is formally reviewed yearly through publicly available annual reports, again providing extensive opportunity to educate the public and landowners about the location of, and efforts to conserve, areas identified as critical habitat for the Riverside fairy shrimp. The permit holders of the Western Riverside County MSHCP are aware of the value of these lands to the conservation of the Riverside fairy shrimp, and conservation measures are already in place to protect the Riverside fairy shrimp and its habitat within the Conservation Area. Areas identified as critical habitat for the Riverside fairy shrimp that are covered by the Western Riverside County MSHCP were also included in the proposed designation published in the **Federal Register** on June 1, 2011 (76 FR 31686), as well as the previous proposed revised critical habitat published on April 27, 2004 (69 FR 23024), and the previous final revised rule published on April 12, 2005 (70 FR 19154). These publications were announced in a press release and information was posted on the Service's Web site.

We consider the educational benefits of critical habitat designation for Riverside fairy shrimp (such as providing information to the County of Riverside, other stakeholders, and the public regarding areas important to the long-term conservation of this species) have already been realized through the development and ongoing implementation of the Western Riverside County MSHCP, by proposing these areas as critical habitat, and through the Service's public outreach efforts. For these reasons, we conclude that the educational benefits of designating critical habitat within the Western Riverside County MSHCP would be negligible.

Finally, critical habitat designation can result in ancillary conservation benefits to Riverside fairy shrimp by triggering additional review and conservation through other Federal and State laws. The primary State law that might be affected by critical habitat designation is CEQA. However, lands identified as critical habitat within Western Riverside County have been identified in the Western Riverside County MSHCP and are either already protected or targeted for protection under the plan. Thus, review of any future development proposals affecting lands identified as critical habitat within the plan area under CEQA already take into account the importance of this habitat to the species and the protections required for the species and its habitat under the plan. The Federal law most likely to afford protection to designated Riverside fairy shrimp habitat is the CWA. Projects requiring a permit under the CWA, such as a fill permit under section 404 of the CWA, located within critical habitat or likely to affect critical habitat, would trigger section 7 consultation under the Act. However, as discussed above, we conclude the potential regulatory benefits resulting from designation of critical habitat would be negligible because, with regard to the Riverside fairy shrimp, the outcome of an adverse modification analysis under section 7(a)(2) of the Act would not differ materially from the outcome of a jeopardy analysis. Therefore, we conclude the ancillary benefits of designating lands identified as critical habitat for the Riverside fairy shrimp within the Western Riverside County MSHCP as critical habitat would be negligible.

For the reasons stated above, we consider section 7 consultations for critical habitat designation conducted under the standards required by the 9th Circuit Court in the *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service* decision would provide little conservation benefit and would be largely redundant with those benefits attributable to listing as well as those already provided by the Western Riverside County MSHCP. Therefore, the benefits of inclusion are reduced because the regulatory benefits of designating those acres as Riverside fairy shrimp critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Additionally, the benefits of inclusion are reduced because the educational and ancillary benefits of designating lands identified as critical habitat for the Riverside fairy shrimp covered by the Western Riverside County MSHCP would be negligible because the location of lands identified as critical habitat for Riverside fairy shrimp for this species within Western Riverside County and the importance of conserving such habitat are well known and are already addressed through CEQA and through implementation of Western Riverside County MSHCP.

Benefits of Exclusion—Western Riverside County MSHCP

The benefits of excluding from designated critical habitat the approximately 865 ac (350 ha) of land within the Western Riverside County MSHCP are significant. The benefits of excluding lands identified as critical habitat covered by these plans include: (1) Continuance and strengthening of our effective working relationships with all MSHCP jurisdictions and stakeholders to promote the conservation of the Riverside fairy shrimp and its habitat; (2) allowance for continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (3) encouragement of other jurisdictions with completed HCP/NCCP plans to amend their plans to cover and benefit the Riverside fairy shrimp and vernal pool habitat; and (4) encouragement of additional HCP and other conservation plan development in the future on other private lands that include Riverside fairy shrimp and other federally listed species.

We have developed close partnerships with the County of Riverside and several other stakeholders through the development of the Western Riverside County MSHCP. The protection and management provided for the Riverside fairy shrimp and its habitat, including the physical or biological features essential to the conservation of the species, are consistent with statutory mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat. Furthermore, this plan goes beyond the statutory mandate by actively protecting habitat areas that contain the physical or biological features essential to the conservation of the species. By excluding the approximately 865 ac (350 ha) of land within the boundaries of the Western Riverside County MSHCP from critical habitat designation, we are eliminating a redundant layer of regulatory review for projects covered by the Western Riverside County MSHCP, maintaining our partnership with Riverside County and other participating jurisdictions,

and encouraging new voluntary partnerships with other landowners and jurisdictions to protect the Riverside fairy shrimp and other listed species. As discussed above, the prospect of potentially avoiding a future designation of critical habitat provides a meaningful incentive to plan proponents to extend protections to endangered and threatened species and their habitats under a habitat conservation plan. Achieving comprehensive landscape-level protection for listed species, particularly rare vernal pool species such as the Riverside fairy shrimp through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our ongoing partnerships with the County of Riverside and the regional Western Riverside County MSHCP participants, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of the Riverside fairy shrimp.

As noted earlier, some HCP permittees have expressed the view that critical habitat designation of lands covered by an HCP devalues the conservation efforts of plan proponents and the partnerships fostered through the development and implementation of the plans, and would discourage development of additional HCPs and other conservation plans in the future. Permittees of the Western Riverside County MSHCP have repeatedly stated that exclusion of lands covered by the plan would prove beneficial to our partnership (WRCRCA 2012, p. 5). In a comment letter on the proposed critical habitat, a representative from the Western Riverside Regional Conservation Authority stated that lands covered by the Western Riverside County MSHCP should be excluded from critical habitat. We consider that where an existing HCP provides protection for a species and its habitat within the plan area, the benefits of preserving existing partnerships by excluding the covered lands from critical habitat are most significant. Under these circumstances, excluding lands owned by or under the jurisdiction of the permittees of an HCP promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional HCPs for other species.

Large-scale HCPs, such as the Western Riverside County MSHCP, take many years to develop, and foster a strategic ecosystem-based approach to habitat conservation planning by addressing conservation issues through a coordinated approach. If, instead, local jurisdictions were to require landowners to individually obtain ITPs under section 10 of the Act, the conservation likely to result would be uncoordinated, patchy, and less likely to achieve listed species recovery as conservation measures would be determined on a project-by-project basis instead of on a comprehensive, landscape-level scale. To avoid that outcome, we are committed to fostering partnerships with local jurisdictions to encourage the development of regional HCPs that afford proactive landscape-level conservation for multiple species. We conclude that the exclusion from critical habitat designation of lands meeting the definition of critical habitat within the Western Riverside County MSHCP will result in significant partnership benefits that we believe will result in important protection for and conservation of the Riverside fairy shrimp and other listed species and their habitats.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Western Riverside County MSHCP

We reviewed and evaluated the exclusion of approximately 865 ac (350 ha) of land within the boundaries of the Western Riverside County MSHCP from our revised designation of critical habitat, and we determined the benefits of excluding these lands outweigh the benefits of including them. The benefits of including these lands in the designation are reduced 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 Western Riverside County MSHCP and under State and Federal law. In contrast to the reduced benefits of inclusion, the benefits of excluding lands covered by the Western Riverside County MSHCP from critical habitat designation are significant. Exclusion of these lands will help preserve the partnerships we developed with local jurisdictions and project proponents through the development and ongoing implementation of the Western Riverside County MSHCP, and aid in fostering future partnerships for the benefit of listed species. Our partnership with plan participants has already resulted in significant benefits to listed species and vernal pool habitat; based on this track record of success, we expect that this meaningful partnership will continue into the future.

The Western Riverside County MSHCP will provide significant conservation and management of the Riverside fairy shrimp and its habitat and help achieve recovery of this species through habitat enhancement and restoration, functional connections to adjoining habitat, and species monitoring efforts. Additional HCPs or other species-habitat plans potentially fostered by this exclusion would also help to recover this and other federally listed species. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion—Western Riverside County MSHCP* section above, we determine the significant benefits of exclusion outweigh the minor benefits of inclusion.

Exclusion Will Not Result in Extinction of the Species—Western Riverside County MSHCP

We determine that the exclusion of 865 ac (350 ha) of land within the boundaries of the Western Riverside County MSHCP from the designation of critical habitat for the Riverside fairy shrimp will not result in extinction of the species. Proposed actions that affect waters of the United States as defined under the CWA, which in many cases include vernal pools occupied by Riverside fairy shrimp, will continue to be subject to consultation under section 7(a)(2) of the Act and to the duty to avoid jeopardy to the species. The protection provided by the Western Riverside County MSHCP also provides assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation.

Therefore, the Secretary is exercising his discretion to exclude 865 ac (350 ha) of land (all of Unit 3) within the boundaries of the Western Riverside County MSHCP from this final critical habitat designation.

Carlsbad HMP Under the San Diego MHCP

The San Diego Multiple Habitat Conservation Program (MHCP) is a comprehensive, multijurisdictional planning program designed to create, manage, and monitor an ecosystem preserve in northwestern San Diego County while providing for economic and urban development by streamlining the permitting process. The MHCP is also a subregional plan under the State of California's NCCP program, which was developed in cooperation with CDFG. The MHCP preserve system (focused planning area (FPA)) is intended to protect viable populations 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.

The MHCP includes an approximately 112,000-ac (45,324-ha) study area within the cities of Carlsbad, Encinitas, Escondido, San Marcos, Oceanside, Vista, and Solana Beach (MHCP 2003, entire). These cities will implement their respective portions of the MHCP through subarea plans. Only the City of Carlsbad has an approved subarea plan at this time, which is called the Carlsbad Habitat Management Plan (Carlsbad HMP). The section 10(a)(1)(B) incidental take permit and IA for the Carlsbad HMP were issued on November 12, 2004 (Service 2004b). Conservation requirements within the Carlsbad HMP for Riverside fairy shrimp include conserving 100 percent of the known Riverside fairy shrimp habitat and implementing the MHCP's narrow endemic and no net loss of wetlands (including vernal pools) policies for any additional vernal pools discovered in the MHCP planning area. These policies require all vernal pools and their watersheds within the MHCP study area to be 100 percent conserved, regardless of occupancy by Riverside fairy shrimp and regardless of location inside or outside of the FPA, unless doing so would remove all economic uses of a property. In the event that no feasible project alternative avoids all impacts on a particular property, the impacts must be minimized and mitigated to achieve no net loss of biological functions and values (Service 2004c, p. 330). Unit 4c covers the Poinsettia Lane Commuter Train Station vernal pool complex within the Carlsbad HMP, and consists of 9 ac (4 ha): 3 ac (1 ha) of private property and 6 ac (3 ha) local land owned by the North County Transit District.

The Poinsettia Lane Commuter Train Station vernal pool complex supports the only known occurrence of the Riverside fairy shrimp within the boundaries of the Carlsbad HMP. Coverage of the Riverside fairy shrimp under the Carlsbad HMP is conditioned on permanent protection, management, and monitoring of the Poinsettia Lane Commuter Train Station vernal pool complex as outlined in the biological opinion for the Carlsbad HMP (Service 2004c, pp. 327–33). We continue to work with the City of Carlsbad to conserve this area.

Benefits of Inclusion—Carlsbad HMP Under the San Diego MHCP

The designation of critical habitat can result in regulatory, educational, and ancillary benefits. As discussed under *Application of the ''Adverse Modification'' Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

However, as discussed above and for reasons stated in the *Regulatory Benefits of Inclusion for Habitat Conservation Plans* section above, we conclude any additional regulatory benefits of critical habitat designation would be minimal because the regulatory benefits from designation are difficult to distinguish at this point in time from the benefits of listing. In addition, because lands identified as critical habitat for the Riverside fairy shrimp habitat within the Carlsbad HMP are required to be protected under the plan, the likelihood of a future section 7 consultation on these lands for other than conservation related actions is remote. Thus, because we do not anticipate that the outcome of future section 7 consultations on Riverside fairy shrimp would change if critical habitat were designated and because the likelihood of future section 7 consultations is remote, we conclude that the regulatory benefits of designating lands identified as critical habitat for Riverside fairy shrimp within the Carlsbad HMP (Subunit 4c) would be, at most, minor.

Another possible 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 Riverside fairy shrimp and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable. In the case of Riverside fairy shrimp, however, there have already been multiple occasions when the public has been educated about the species. The framework of the regional San Diego MHCP was developed over a 6-year period and both the San Diego MHCP and the Carlsbad HMP have been in place for almost a decade. Implementation of the subarea plan is 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, lands identified as critical habitat for the Riverside fairy shrimp. As discussed above, the permit holders of the Carlsbad HMP are aware of the value of these lands to the conservation of Riverside fairy shrimp. Lands identified as critical habitat for Riverside fairy shrimp that are covered by the Carlsbad HMP were included in the proposed designation published in the **Federal Register** on June 1, 2011 (76 FR 31686), as well as the previous proposed revised critical habitat published on April 27, 2004 (69 FR 23024), and the previous final revised rule published on April 12, 2005 (70 FR 19154). These publications were announced in press releases and information was posted on the Service's Web site.

We consider the educational benefits of critical habitat designation (such as providing information to the City of Carlsbad and other stakeholders and to the public regarding areas important to the long-term conservation of this species) have already been realized through development and ongoing implementation of the Carlsbad HMP, by proposing these areas as critical habitat, and through the Service's public outreach efforts. For these reasons, we conclude that the educational benefits of designating critical habitat within the Carlsbad HMP would be negligible.

Finally, critical habitat designation can also result in ancillary conservation benefits to Riverside fairy shrimp by triggering additional review and conservation through other Federal and State laws. The primary State law that might be affected by critical habitat designation is CEQA. However, lands identified as critical habitat within the City of Carlsbad have been identified in the HMP and are either already protected or targeted for protection under the plan. Thus, review of development proposals affecting habitat that contains the physical or biological features essential to the conservation of the species under CEQA by the City of Carlsbad already takes into account the importance of this habitat to the species and the protections required for the species and its habitat under the plan. The Federal law most likely to afford protection to designated Riverside fairy shrimp habitat is the CWA. Projects requiring a permit under the CWA, such as a fill permit under section 404 of the CWA, located within critical habitat or likely to affect critical habitat, would trigger section 7 consultation under the Act. However, as discussed above, we conclude the potential regulatory benefits resulting from designation of critical habitat would be negligible because, with regard to Riverside fairy shrimp, the outcome of an adverse modification analysis under section 7(a)(2) of the Act would not differ materially from the outcome of a

jeopardy analysis. Therefore, we conclude that the ancillary benefits of designating lands identified as critical habitat for Riverside fairy shrimp within the Carlsbad HMP as critical habitat would be negligible.

For the reasons stated above, we consider section 7 consultations for critical habitat designation conducted under the standards required by the 9th Circuit Court in the *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service* decision would provide little conservation benefit and would be largely redundant with those benefits attributable to listing as well as those already provided by the Carlsbad HMP. Therefore, the benefits of inclusion are reduced because the regulatory benefits of designating those acres as Riverside fairy shrimp critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Additionally, the benefits of inclusion are reduced because the educational and ancillary benefits of designating lands identified as critical habitat for Riverside fairy shrimp covered by the Carlsbad HMP would be negligible because the location of such habitat for this species within the City of Carlsbad and the importance of conserving such habitat are well known and are already addressed through CEQA and through implementation of the Carlsbad HMP.

Benefits of Exclusion—Carlsbad HMP Under the San Diego MHCP

The benefits of excluding from designated critical habitat the approximately 9 ac (4 ha) of land within the Carlsbad HMP are significant. The benefits of excluding lands identified as critical habitat covered by this plan include: (1) Continuance and strengthening of our effective working relationships with the City of Carlsbad and other plan stakeholders to promote the conservation of the Riverside fairy shrimp and its habitat; (2) allowance for continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (3) encouragement of other jurisdictions to complete subarea plans under the MHCP (including the cities of Oceanside, San Marcos, and Escondido) that cover or are adjacent to Riverside fairy shrimp or other vernal pool habitat; and (4) encouragement of additional NCCP/HCP and other conservation plan development in the future on private lands within the region that includes Riverside fairy shrimp and other federally listed species.

We have developed close partnerships with the City of Carlsbad and several other stakeholders through the development of the Carlsbad HMP. The protections and management provided for Riverside fairy shrimp and its habitat under the plan are consistent with statutory mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat. By excluding the approximately 9 ac (4 ha) of land within the boundaries of the Carlsbad HMP from critical habitat designation, we are eliminating a redundant layer of regulatory review for projects covered by the Carlsbad HMP, maintaining our partnership with the City of Carlsbad, and encouraging new voluntary partnerships with other landowners and jurisdictions to protect the Riverside fairy shrimp and other listed species. As discussed above, the prospect of potentially avoiding a future designation of critical habitat provides a meaningful incentive to plan proponents to extend protections to endangered and threatened species and their habitats under a habitat conservation plan. Achieving comprehensive landscape-level protection for listed species, particularly rare vernal pool species such as the Riverside fairy shrimp through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our ongoing partnerships with the City of Carlsbad and other regional MHCP participants, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of Riverside fairy shrimp.

As noted in the *Benefits of Exclusion—Orange County Southern Subregion HCP* and *Benefits of Exclusion—Western Riverside County MSHCP* sections above, some HCP permittees have expressed the view that critical habitat designation of lands covered by an HCP devalues the conservation efforts of plan proponents and the partnerships fostered through the development and implementation of the plans, and would discourage development of additional HCPs and other conservation plans in the future. Where an existing HCP provides protection for a species and its essential habitat within the plan area, the benefits of preserving existing partnerships by excluding the covered lands from critical habitat are most significant. Under these circumstances, excluding lands owned by or under the jurisdiction of the permittees of an HCP promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional HCPs for other species.

Large-scale HCPs, such as the regional MHCP and subarea plans in development under its framework, take many years to develop and foster an ecosystem-based approach to habitat conservation planning by addressing conservation issues through a coordinated approach. If, instead, local jurisdictions were to require landowners to individually obtain ITPs under section 10 of the Act, the conservation likely to result would be uncoordinated, patchy, and less likely to achieve listed species recovery as conservation measures would be determined on a project-by-project basis instead of on a comprehensive, landscape-level scale. To avoid that outcome, we are committed to fostering partnerships with local jurisdictions to encourage the development of regional HCPs that afford proactive landscape-level conservation for multiple species. We find that the exclusion from critical habitat designation of lands identified as critical habitat for the Riverside fairy shrimp within the Carlsbad HMP will result in significant partnership benefits that we believe will result in greater protection for the Riverside fairy shrimp and its habitat and other listed species and their habitats.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Carlsbad HMP Under the San Diego MHCP

We reviewed and evaluated the exclusion of approximately 9 ac (4 ha) of land within the boundaries of the Carlsbad HMP from our revised designation of critical habitat, and we determined the benefits of excluding these lands outweigh the benefits of including them. The benefits of including these lands in the designation are reduced 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. In contrast to the reduced benefits of inclusion, the benefits of excluding lands covered by the Carlsbad HMP from critical habitat designation are significant. Exclusion of these lands will help preserve the partnerships we developed with local jurisdictions and project proponents through the development and ongoing implementation of the Carlsbad HMP, and aid in fostering future partnerships for the benefit of listed species. Our partnership with the City of Carlsbad

has already resulted in significant benefits to listed species and vernal pool habitat; based on this track record of success, we expect that this meaningful partnership will continue into the future.

The Carlsbad HMP will provide significant conservation and management of the Riverside fairy shrimp and its habitat and help achieve recovery of this species through habitat enhancement and restoration, functional connections to adjoining habitat, and species monitoring efforts. Additional HCPs or other species-habitat plans potentially fostered by this exclusion would also help to recover this and other federally listed species. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion—Carlsbad HMP under the San Diego MHCP* section above, we determine the significant benefits of exclusion outweigh the minor benefits of inclusion.

Exclusion Will Not Result in Extinction of the Species—Carlsbad HMP Under the San Diego MHCP

We determine that the exclusion of 9 ac (4 ha) of land within the boundaries of the Carlsbad HMP from the designation of critical habitat for Riverside fairy shrimp will not result in extinction of the species. Proposed actions that affect waters of the United States as defined under the CWA, which in many cases include vernal pools occupied by Riverside fairy shrimp, will continue to be subject consultation under section 7(a)(2) of the Act and to the duty to avoid jeopardy to the species. The protection provided by the Carlsbad HMP also provides assurances that this species will not go extinct as a result of excluding lands from critical habitat within the plan area.

Therefore, the Secretary is exercising his discretion to exclude 9 ac (4 ha) of land (Subunit 4c) within the boundaries of the Carlsbad HMP from this final critical habitat designation.

County of San Diego Subarea Plan Under the San Diego MSCP

The Riverside fairy shrimp is covered under the County of San Diego Subarea Plan. The Multiple Species Conservation Program (MSCP) is a comprehensive habitat conservation planning program that encompasses 582,243 ac (235,626 ha) within 12 jurisdictions in southwestern San Diego County. The MSCP is a subregional plan that identifies the conservation needs of 85 federally listed and sensitive species, including the Riverside fairy shrimp, and serves as the basis for development of subarea plans by each jurisdiction in support of section 10(a)(1)(B) permits. The subregional MSCP identifies where mitigation activities should be focused, such that upon full implementation of the subarea plans, approximately 171,920 ac (69,574 ha) of the 582,243-ac (235,626-ha) MSCP plan area will be preserved and managed for covered species. The MSCP also provides for a regional biological monitoring program, with the Riverside fairy shrimp identified as a first-priority species for field monitoring.

Consistent with the MSCP, the conservation of Riverside fairy shrimp is addressed in the County of San Diego Subarea Plan. The County of San Diego Subarea Plan identifies areas that are hard-lined for conservation and areas where mitigation activities should be focused to assemble its preserve (pre-approved mitigation area). Implementation of the County of San Diego Subarea Plan will result in a minimum 98,379-ac (39,813-ha) preserve area.

A portion of Subunit 5d (23 ac (9 ha)) is within the County of San Diego Subarea Plan. Within the covered area, 6 ac (2 ha) are within a hard-lined preserve area. These hard-lined preserve lands were designated in conjunction with the Otay Ranch Specific Plan, and are to be conveyed to a land manager (for example, County or Federal government) in phases such that 1.18 ac (0.48 ha) are conserved for every 1 ac (0.40 ha) developed. A natural resource management plan has been developed that addresses the preservation, enhancement, and management of sensitive natural resources on the 22,899-ac (9,267-ha) Otay Ranch hard-lined preserve area (County of San Diego 1997, pp. 3–15). The remaining 17 ac (7 ha) are outside the hard-lined preserve. This portion of the unit receives protections set out in the County of San Diego Subarea Plan, including the requirement that any impacts to the Riverside fairy shrimp and vernal pools be avoided to the maximum extent practicable; where complete avoidance is infeasible, projects would be designed to avoid any significant reduction to species viability (Service 1998b, pp. 33, 43, 66). Any unavoidable impacts will be minimized and mitigated to achieve no net loss of function or value (Service 1998b, p. 66).

The Secretary is exercising his discretion to exclude the portion of Subunit 5d (23 ac (9 ha)) of land within the boundaries of the County of San Diego Subarea Plan from this final critical habitat designation.

Benefits of Inclusion—County of San Diego Subarea Plan Under the San Diego MSCP

The designation of critical habitat can result in regulatory, educational, and ancillary benefits. As discussed under *Application of the "Adverse Modification" Standard,* the regulatory benefit of including an area in a critical habitat designation is the added conservation that may result from the separate duty imposed on Federal agencies under section 7(a)(2) of the Act to ensure that actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat.

However, for reasons stated in the *Regulatory Benefits of Inclusion for Habitat Conservation Plans* section above, we conclude any additional regulatory benefits of critical habitat designation would be minimal because the regulatory benefits from designation are difficult to distinguish at this point in time from the benefits of listing. Thus, because we do not anticipate that the outcome of future section 7 consultations on the Riverside fairy shrimp would change if critical habitat were designated, we conclude that the regulatory benefits of designating lands identified as critical habitat for the Riverside fairy shrimp within the portion of Subunit 5d within the County of San Diego Subarea Plan would be, at most, minor.

Another possible 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 Riverside fairy shrimp and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable. In the case of the Riverside fairy shrimp, however, there have already been multiple occasions when the public has been educated about the species. The framework of the regional San Diego MSCP was developed over a 7-year period, while the County of San Diego Subarea Plan has been in place for over a decade. Implementation of the subarea plans is 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, essential Riverside fairy shrimp habitat. As discussed above, the permit holders of the County of San

Diego Subarea Plan are aware of the value of these lands to the conservation of the Riverside fairy shrimp, and measures are already in place to protect Riverside fairy shrimp and its habitat.

Lands identified as critical habitat for the Riverside fairy shrimp that are covered by the County of San Diego Subarea Plan were also included in the proposed designation published in the **Federal Register** on June 1, 2011 (76 FR 31686), as well as the previous proposed revised critical habitat published on April 27, 2004 (69 FR 23024), and the previous final revised rule published on April 12, 2005 (70 FR 19154). These publications were announced in press releases and information was posted on the Service's web site. We consider the educational benefits of critical habitat designation (such as providing information to the County and other stakeholders and to the public regarding areas important to the long-term conservation of this species) have already been realized through the development and ongoing implementation of the County of San Diego Subarea Plan, by proposing these areas as critical habitat, and through the Service's public outreach efforts. The educational benefits of designating critical habitat within the County of San Diego Subarea Plan would be negligible.

Finally, critical habitat designation can also result in ancillary conservation benefits to the Riverside fairy shrimp by triggering additional review and conservation through other Federal and State laws. The primary State law that might be affected by critical habitat designation is CEQA. However, lands identified as critical habitat within the County of San Diego in Subunit 5d are required to be protected under the Subarea Plan. Thus, review of development proposals affecting lands identified as critical habitat for the Riverside fairy shrimp in Subunit 5d under CEQA by the County of San Diego already takes into account the importance of this habitat to the species and the protections required for the species and its habitat under the Subarea plan. The Federal law most likely to afford protection to designated Riverside fairy shrimp habitat is the CWA. Projects requiring a permit under the CWA, such as a fill permit under section 404 of the CWA, located within critical habitat or likely to affect critical habitat, would trigger section 7 consultation under the Act. However, as discussed above, we conclude the potential regulatory benefits resulting from designation of critical habitat would be negligible because, with regard to the Riverside fairy shrimp, the outcome of an adverse modification analysis under section 7(a)(2) of the Act would not differ materially from the outcome of a jeopardy analysis. Therefore, we conclude the ancillary benefits of designating habitat containing the physical or biological features essential to the conservation of the Riverside fairy shrimp within that portion of Subunit 5d covered by the County of San Diego Subarea Plan as critical habitat would be negligible.

For the reasons stated above, we consider section 7 consultations for critical habitat designation conducted under the standards required by the 9th Circuit Court in the *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service* decision would provide little conservation benefit and would be largely redundant with those benefits attributable to listing as well as those already provided by the County of San Diego Subarea Plan. Therefore, the benefits of inclusion are reduced because the regulatory benefits of designating those acres as Riverside fairy shrimp critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Additionally, the benefits of inclusion are reduced because the educational and ancillary benefits of designating lands identified as critical habitat for Riverside fairy shrimp covered by the County of San Diego Subarea Plan would be negligible because the location of lands identified as critical habitat for Riverside fairy shrimp for this species within the County of San Diego and the importance of conserving such habitat are well known and are already addressed through CEQA and through implementation of the County of San Diego Subarea Plan.

Benefits of Exclusion—County of San Diego Subarea Plan Under the San Diego MSCP

The benefits of excluding from designated critical habitat the approximately 23 ac (9 ha) of land within the County of San Diego Subarea Plan are significant. The benefits of excluding critical habitat covered by these plans include: (1) Continuance and strengthening of our effective working relationships with the County of San Diego and all MSCP jurisdictions and stakeholders to promote the conservation of the Riverside fairy shrimp and its habitat; (2) allowance for continued meaningful collaboration and cooperation in working toward recovering the Riverside fairy shrimp, including conservation benefits that might not otherwise occur; (3) encouragement of other jurisdictions with completed subarea plans under the MSCP to amend their plans to cover and benefit Riverside fairy shrimp and vernal pool habitat (such as the City of Poway Subarea Plan under the MSCP); (4) encouragement of other jurisdictions to complete subarea plans under the MSCP (including the City of Santee) to cover and benefit Riverside fairy shrimp and vernal pool habitat; (5) encouragement for the City of San Diego to complete its draft vernal pool management plan; and (6) encouragement of additional HCP and other conservation plan development in the future on other private lands that include Riverside fairy shrimp and other federally listed species.

We have developed close partnerships with the County of San Diego, and several other stakeholders, and the protections and management provided for the Riverside fairy shrimp and its habitat are consistent with statutory mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat. Furthermore, this plan goes beyond the statutory mandate by requiring active management of the portion of Subunit 5d covered by the County of San Diego Subarea Plan and within the hardline reserves (6 ac (2 ha)). By excluding the approximately 23 ac (9 ha) of land covered by the County of San Diego Subarea Plan from critical habitat designation, we are eliminating a redundant layer of regulatory review for the approved Otay Ranch Specific Plan under the County of San Diego Subarea Plan and encouraging new voluntary partnerships with other landowners and jurisdictions to protect the Riverside fairy shrimp and other listed species. As discussed above, the prospect of potentially avoiding a future designation of critical habitat provides a meaningful incentive to plan proponents to extend protections to endangered and threatened species and their habitats under a habitat conservation plan. Achieving comprehensive landscape-level protection for listed species, particularly rare vernal pool species such as Riverside fairy shrimp through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our ongoing partnerships with the county of San Diego and the regional MSCP participants, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of Riverside fairy shrimp.

As noted in the *Benefits of Exclusion—Orange County Southern Subregion HCP* and *Benefits of Exclusion—Western Riverside County*

MSHCP sections above, some HCP permittees have expressed the view that critical habitat designation of lands covered by an HCP devalues the conservation efforts of plan proponents and the partnerships fostered through the development and implementation of the plans, and would discourage development of additional HCPs and other conservation plans in the future. Where an existing HCP provides protection for a species and its essential habitat within the plan area, the benefits of preserving existing partnerships by excluding the covered lands from critical habitat are most significant. Under these circumstances, excluding lands owned by or under the jurisdiction of the permittees of an HCP promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional HCPs for other species.

Large-scale HCPs, such as the regional MSCP and County of San Diego Subarea Plan issued under its framework, take many years to develop, and foster a strategic, ecosystem-based approach to habitat conservation planning by addressing conservation issues through a coordinated approach. If, instead, local jurisdictions were to require landowners to individually obtain ITPs under section 10 of the Act, the conservation likely to result would be uncoordinated, patchy, and less likely to achieve listed species recovery as conservation measures would be determined on a project-by-project basis instead of on a comprehensive, landscape-level scale. To avoid that outcome, we are committed to fostering partnerships with local jurisdictions to encourage the development of regional HCPs that afford proactive landscape-level conservation for multiple species. We conclude that the exclusion from critical habitat designation of lands identified as critical habitat for the Riverside fairy shrimp in Subunit 5d within the County of San Diego Subarea Plan will result in significant partnership benefits that we conclude will result in greater protection for the Riverside fairy shrimp and its habitat and also other listed species and their habitats.

Benefits of Exclusion Outweigh the Benefits of Inclusion—County of San Diego Subarea Plan Under the San Diego MSCP

We reviewed and evaluated the exclusion of approximately 23 ac (9 ha) of land within the boundaries of the County of San Diego Subarea Plan from our revised designation of critical habitat, and we determined the benefits of excluding these lands outweigh the benefits of including them. The benefits of including these lands in the designation are reduced 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 County of San Diego Subarea Plan and under State and Federal law. In contrast to the reduced benefits of inclusion, the benefits of excluding lands covered by the County of San Diego Subarea Plan from critical habitat designation are significant. Exclusion of these lands will help preserve the partnerships we developed with local jurisdictions and project proponents through the development and ongoing implementation of the MSCP and the County of San Diego Subarea Plan, and aid in fostering future partnerships for the benefit of listed species. Our partnership with the County of San Diego has already resulted in significant benefits to listed species and vernal pool habitat; based on this track record of success, we expect that this meaningful partnership will continue into the future.

Designation of lands covered by the County of San Diego Subarea Plan may discourage other partners from seeking, amending, or completing subarea plans under the MSCP framework or from pursuing other HCPs that cover the Riverside fairy shrimp and other listed vernal pool species. Designation of critical habitat does not require that management or recovery actions take place on the lands included in the designation. The County of San Diego Subarea Plan will provide significant protection of the Riverside fairy shrimp and its habitat, and help achieve recovery of this species through habitat enhancement and restoration, functional connections to adjoining habitat, and species monitoring efforts. Additional HCPs or other species-habitat plans potentially fostered by this exclusion would also help to recover this and other federally listed species. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion—County of San Diego Subarea Plan under the San Diego MSCP* section above, we determine the significant benefits of exclusion outweigh the minor benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—County of San Diego Subarea Plan Under the San Diego MSCP

We determine that the exclusion of 23 ac (9 ha) of land in Subunit 5d within the boundaries of the County of San Diego Subarea Plan from the designation of critical habitat for the Riverside fairy shrimp will not result in extinction of the species. Proposed actions that affect waters of the United States as defined under the CWA, which in many cases include vernal pools occupied by Riverside fairy shrimp, will continue to be subject consultation under section 7(a)(2) of the Act and to the duty to avoid jeopardy to the species. The protection provided by the County of San Diego Subarea Plan also provides assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation.

Therefore, the Secretary is exercising his discretion to exclude 23 ac (9 ha) of land within the boundaries of the County of San Diego Subarea Plan from this final critical habitat designation.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of revised critical habitat for Riverside fairy shrimp during two comment periods. The first comment period associated with the publication of the proposed rule (76 FR 31686) opened on June 1, 2011, and closed on August 1, 2011. We also requested comments on the proposed critical habitat designation and associated DEA during a comment period that opened March 1, 2012, and closed on April 2, 2012 (77 FR 12543). We published a notice of the proposed rulemaking in local newspapers on June 6, 2011. We did not receive any requests for a public hearing. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and DEA during these comment periods.

During the first comment period, we received five comment letters directly addressing the proposed critical habitat designation. During the second comment period, we received one comment letter addressing the proposed critical habitat designation or the DEA. All substantive information provided during the comment periods has either been incorporated directly into this final determination or is addressed below. Comments we received were grouped into two general issues specifically relating to the proposed critical habitat

designation for Riverside fairy shrimp, and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from four species experts in invertebrate biology, freshwater crustaceans and fairy shrimp. These reviewers are also experts in vernal pool habitat in southern California, and conservation biology principles. We received responses from all four of the peer reviewers.

We reviewed all peer reviewer comments for substantive issues and new information regarding critical habitat for Riverside fairy shrimp. In general, the peer reviewers welcomed the expanded critical habitat and the conservation of more pools, but disagreed with the exclusion of lands within HCPs and the exemption of military lands. The peer reviewers provided additional information on Riverside fairy shrimp ecology and vernal pool ecology, including information on climate change. The reviewers also provided clarification and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comments on Riverside Fairy Shrimp Biology

(1) *Comment:* One peer reviewer agreed that maintaining natural levels of connectivity, which provide for gene flow, is important for the persistence of Riverside fairy shrimp, but noted that both unnaturally low and unnaturally high levels of connectivity are undesirable. The reviewer noted that unnaturally high levels of connectivity could result from recreational activities, such as bikers or OHVs, thus transferring Riverside fairy shrimp between distant pools and disrupting locally adapted populations.

Our Response: We agree with the peer reviewer that both too little and too much connectivity, and thus gene flow, are undesirable. We acknowledge that humans can impact Riverside fairy shrimp genetic diversity through undesirable increases in gene flow, and that these artificial increases in gene flow can impact locally adapted genetic conditions and decrease the fitness of vernal pool populations.

(2) *Comment:* Two peer reviewers appreciated the inclusion of a discussion about the importance of functional hydrology to the Riverside fairy shrimp and its habitat within the critical habitat unit descriptions and the PCEs. One reviewer noted that due to this complexity, management that addresses individual pools is not as likely to be as successful as management at the watershed level.

Our Response: We appreciate the peer reviewers' critical review and agree that management at the watershed level is the most likely to be successful in the conservation and recovery of the Riverside fairy shrimp. We have considered functional hydrology in previous documents addressing Riverside fairy shrimp conservation. The 1998 Recovery Plan addressing vernal pool species, including Riverside fairy shrimp, takes into account the importance of functional hydrology to Riverside fairy shrimp and designates entire pool complexes rather than individual vernal pools (Service 1998a, pp. 38–39). This final revised critical habitat rule includes functional hydrology in PCE 2, which requires ''intermixed wetland and upland habitats that function as the local watershed, including topographic features characterized by mounds, swales, and low-lying depressions within a matrix of upland habitat that result in intermittently flowing surface and subsurface water in swales, drainages, and pools described in PCE 1.''

(3) *Comment:* One peer reviewer noted that, though our description of critical habitat states that units include vernal pool networks and watersheds, the maps within the proposed rule do not show those features. The peer reviewer recommended including those features in the maps so that their inclusion could be verified.

Our Response: The printing standards of the **Federal Register** are not compatible with topographical maps or other detailed features that would show vernal pool networks and watersheds. However, the GIS files we used to delineate critical habitat are available by request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). The shapefiles can be laid over other layers (aerial photography, roads) for users to view the vernal pool networks and watersheds.

(4) Three peer reviewers had comments on genetic aspects of Riverside fairy shrimp ecology. The reviewers noted that genetic variation in Riverside fairy shrimp is lower than for other *Streptocephalus* species, and that untested pools may host unique genetic diversity. The reviewers concluded that maintaining genetic variation is important for the viability of the species, and that no genetic diversity is expendable.

Our Response: We appreciate the peer reviewers' critical review, and agree that genetic diversity is crucial to the continued viability of the Riverside fairy shrimp. As described in our *Criteria Used To Identify Critical Habitat* section, genetic diversity was one of the main criteria used in creating critical habitat units. Our final critical habitat designation provides for the preservation of existing Riverside fairy shrimp genetic diversity across the range of the species and makes use of the best scientific and commercial data available.

(5) *Comment:* One peer reviewer stated that the proposed rule overstated the longevity and durability of Riverside fairy shrimp cysts. The reviewer noted that cysts, particularly those that are salvaged from vernal pools and placed in storage, can be crushed or destroyed by disease.

Our Response: We appreciate the peer reviewer's critical review. We did not intend for our text to imply that cysts were indestructible, and we agree with the peer reviewer that cysts can be vulnerable to factors such as crushing, disease, or aging.

(6) *Comment:* One peer reviewer stated that the definition of haplotype given in the proposed rule is confusing, and that haplotype is better defined as ''a unique copy or form of a sequenced gene region.''

Our Response: We appreciate the peer reviewer's critical review. We agree that this is a clearer definition, and have made use of it in this final rule.

(7) *Comment:* Two commenters stated that many of the pools currently occupied were also occupied at the time of listing, and that the increase of known occupied pools was due to the increase of survey efforts rather than newly colonized pools.

Our Response: We agree with the peer reviewers' assessment, and in the proposed revised rule published on June 1, 2011 (76 FR 31686), we proposed all but one subunit under section 3(5)(A)(i) of the Act. All of these subunits are within the known geographical area occupied by the species at the time of listing. However, because we lack definitive evidence of their occupancy at the time of listing, which under *Otay Mesa* could disqualify the areas from designation under section 3(5)(A)(i) of the Act, we alternatively identify these areas as meeting the definition of critical habitat under section 3(5)(A)(ii) of the Act. We identify them as such to make clear that we consider these

specific areas to be essential for the conservation of Riverside fairy shrimp, notwithstanding the absence of surveys confirming the presence of Riverside fairy shrimp at the time of listing. As described in the *Criteria Used to Identify Critical Habitat* section above, a designation limited to areas known to be occupied at the time of listing would be inadequate to conserve the species. See the *Criteria Used To Identify Critical Habitat* section above for more information on our designation of critical habitat units, and see Table 3 for details of the units designated as final critical habitat or excluded under section 4(b)(2) of the Act.

(8) *Comment:* One peer reviewer offered detailed feedback on scientific aspects of our *Species Description, Habitat, Life History,* and *New Information Specific to Riverside Fairy Shrimp* sections of the proposed rule. The suggested changes included aspects of vernal pool characteristics that support Riverside fairy shrimp, cyst bank dynamics, and vernal pool ecology specific to southern California.

Our Response: We appreciate the peer reviewer's thorough review of our proposed revised critical habitat rule, and agree with all the suggested changes. However, as this final revised critical habitat rule does not include these sections, the suggested changes are not specifically reflected in this final revised critical habitat rule. We will, however, make use of the updated information in future actions related to the Riverside fairy shrimp.

(9) *Comment:* One peer reviewer stated that our description of red-color cercopods as useful to distinguish between other fairy shrimp in the genus *Streptocephalus* was misleading. The peer reviewer noted that, ''While a red tail is a character not seen in other genera in the area, it is not a useful character in distinguishing among species within the genus *Streptocephalus.*''

Our Response: The reference by Eng *et al.* that we quoted in the proposed rule (77 FR 31686) specifically states, ''both living male and female *S. woottoni* have the red color of the cercopods covering the ninth and 30–40 percent of the eighth abdominal segments. No red extends onto the abdominal segments in living *S. seali* of either sex'' (Eng *et al.* 1990, pp. 358–359). We had intended for our statement in the proposed rule to specifically refer to genera in the area, in which, as the peer reviewer notes, this is a useful distinguishing characteristic. However, we agree with the peer reviewer that the characteristic is not useful with other non-local *Streptocephalus* species, and we will be more specific when using this reference in the future.

(10) *Comment:* One reviewer suggested that the Service should conduct a long-term viability analysis of the Riverside fairy shrimp that incorporates GIS modeling, field studies, and species requirements.

Our Response: We thank the peer reviewer for the suggestion and will consider it in our next 5-year review and future recovery planning efforts for the Riverside fairy shrimp.

(11) *Comment:* One peer reviewer requested that we consider the ecosystem supporting Riverside fairy shrimp in our future actions regarding the species. The reviewer noted that the Riverside fairy shrimp is part of a complex food web, not all of which is considered in actions that address Riverside fairy shrimp conservation.

Our Response: We concur with the peer reviewer that it is crucial to consider the entire vernal pool ecosystem in conserving Riverside fairy shrimp. However, we did not explicitly focus on an ecosystem approach in this final revised critical habitat rule. A critical habitat designation is a regulatory action that identifies specific areas within the geographical area occupied by the species at the time of listing on which are found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, and areas outside the geographical area occupied at the time of listing that are determined to be essential for the conservation of the species. In the 1998 Vernal Pool Recovery Plan, we took an ecosystem-centered approach to the conservation of Riverside fairy shrimp. A recovery plan (and the associated recovery goals and objectives) is a guidance document developed in cooperation with partners, which provides a roadmap with detailed site-specific management actions to help conserve listed species and their ecosystems. We will continue to consider the entire vernal pool ecosystem in developing future recovery actions for the Riverside fairy shrimp and recommendations in future 5-year reviews.

(12) *Comment:* One peer reviewer noted that we had incorrectly cited a reference by Parsick (2002). The reviewer noted that Parsick analyzed the gut contents of San Diego fairy shrimp, not Riverside fairy shrimp.

Our Response: We appreciate the peer reviewer's critical review. We have reworded the sentence containing that reference to make clear that Parsick did not analyze the gut contents of Riverside fairy shrimp.

Comments on Critical Habitat, Exclusions, and Exemptions

(13) *Comment:* All four reviewers stressed the importance of maximizing critical habitat. The commenters reasoned that all suitable and potentially suitable habitat would be needed as critical habitat to fully recover the species. The commenters also reasoned that classifying all suitable areas as critical habitat would counter threats based on: (1) Limited habitat requirements; (2) low genetic variability; (3) previous population declines; and (4) stochastic or chance catastrophic events.

Our Response: We appreciate the peer reviewers' concern for the recovery of the Riverside fairy shrimp. Based on the best available scientific information, we have identified all habitat areas that we are able to determine meet the definition of critical habitat at this time. We have excluded certain areas covered by the Orange County Central-Coastal NCCP/HCP, the Orange County Southern Subregion HCP, the Western Riverside County MSHCP, City of Carlsbad HMP under the San Diego MHCP, County of San Diego Subarea Plan under the MSCP, and lands owned by DHS, where we have determined that the benefits of exclusion outweighs the benefits of inclusion within the critical habitat designation (see the Exclusions section above). In the case of each of the HCP exclusions, we concluded that the plan provides protection for the Riverside fairy shrimp and its habitat that contains the physical or biological features essential to the conservation of the species. In the case of the DHS exclusion, we excluded lands based on national security concerns. As required by section 4(a)(3)(B)(i) of the Act, we have also exempted certain military lands from critical habitat that are covered by approved INRMPs that provide a benefit to Riverside fairy shrimp (see the *Application of Section 4(a)(3) of the Act* section above). Nevertheless, our final critical habitat designation still includes a wide variety of vernal pool habitat. With the inclusion of diverse vernal pool habitat types across the range of the species, our critical habitat designation addresses the threats outlined by the reviewers. The designation addresses these threats through inclusion of a variety of vernal pool habitat types, which assists the species in buffering against catastrophic events, and through inclusion of lesser known occupied areas to target preservation for declining populations

and areas with unique genetic variability.

We recognize that the designation of critical habitat may not include all of the habitat that may eventually be determined to be necessary for the recovery of the Riverside fairy shrimp. Critical habitat designations do not signal that habitat outside the designation is unimportant or may not contribute to recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act, if actions occurring in these areas may affect the Riverside fairy shrimp. These protections and conservation tools will continue to contribute to recovery of this species.

(14) *Comment:* Two peer reviewers recommended designating both a wide variety of types of vernal pool habitats and upland habitat surrounding vernal pools. The reviewers suggested that preserving a diverse range of habitats could help to buffer the Riverside fairy shrimp against the possible unknown future changes due to climate change. One reviewer added that maintaining vernal pools with connectivity in natural watersheds could help Riverside fairy shrimp survive better than if they were in isolated pools. One reviewer also noted that preserving upland habitat as critical habitat could alter the water chemistry and ponding depth in pools that currently possess the features that support the Riverside fairy shrimp.

Our Response: We fully agree with the peer reviewers that it is essential to preserve a diverse array of vernal pool habitat. As we stated in our *Criteria Used To Identify Critical Habitat* section above, by protecting a variety of habitats throughout the species' current and historical range, we increase the probability that the species can adjust in the future to various limiting factors that may affect the population. Preserving this wide array of habitat types will also help to buffer against the uncertain and complex future effects of climate change. We also concur that preserving upland habitat is necessary to preserve the functional hydrology that supports Riverside fairy shrimp. This idea is reflected in PCE 2 for Riverside fairy shrimp critical habitat, which requires a mixture of ephemeral and wetland habitats as necessary to support the Riverside fairy shrimp. We conclude that PCE 2 and our criteria used to identify critical habitat have resulted in the designation of a diverse array of vernal pool habitat (see unit descriptions in the Final Critical Habitat Designation section above for further description of the types of vernal pool habitat that are designated as critical habitat).

We also agree that it is important to preserve upland habitat and watersheds associated with vernal pool complexes, and that the loss of those features could detrimentally alter water chemistry and ponding depth. In PCE 2, we require ''intermixed wetland and upland habitats that function as the local watershed, including topographic features characterized by mounds, swales, and low-lying depressions within a matrix of upland habitat that result in intermittently flowing surface and subsurface water in swales, drainages, and pools described in PCE 1.'' We conclude that, with the PCEs, we have preserved upland habitat and watersheds associated with vernal pools that support the physical or biological features necessary for the conservation of the Riverside fairy shrimp.

(15) *Comment:* Three peer reviewers expressed strong concern about exemption of military lands from the final critical habitat designation. One of the three peer reviewers listed several specific concerns with base activities affecting Riverside fairy shrimp: (1) OHVs frequently impact vernal pools, pulverize cysts, and allow invasion of nonnative species; (2) large numbers of pools are slated to be developed for reasons not having to do with national security; (3) military staff are not taking the requirement for management seriously; and (4) there are too many populations on military property to warrant exemption from critical habitat. The peer reviewer concluded that, with the amount of area excluded, continued military activities could potentially jeopardize the continued existence of the Riverside fairy shrimp.

Our Response: We appreciate the peer reviewers' concerns about the ongoing conservation of the Riverside fairy shrimp. In our analysis of the INRMPs provided by MCB Camp Pendleton and MCAS Miramar, we found that these plans provide considerable conservation benefits to the Riverside fairy shrimp and its habitat. These conservation measures are typically not addressed through a critical habitat designation, which is a statutory prohibition on destruction or adverse modification of critical habitat.

Section 4(a)(3)(B)(i) of the Act describes exemptions from critical habitat that apply to DOD land. The Secretary has determined that the INRMPs for MCB Camp Pendleton and MCAS Miramar provide a benefit to the Riverside fairy shrimp, and that the lands they cover are therefore exempt from critical habitat designation. More detail on our rationale is presented in the *Application of Section 4(a)(3) of the Act* section above.

We respectfully disagree with the peer reviewer that staff at MCB Camp Pendleton do not take their requirement for management seriously. MCB Camp Pendleton consults with the Service for all impacts to vernal pool habitat, including unplanned impacts sustained during training activities. In the case of any unplanned impacts, MCB Camp Pendleton consults with us retroactively on those impacts and works to minimize future impacts to vernal pool habitat. In regard to the commenter's assertion that pools are planned for development for reasons other than national security, the Service continues to review all project proposals through the section 7 process, and will ensure that all development carried out does not jeopardize the continued existence of the Riverside fairy shrimp.

We also disagree that exempting these areas from critical habitat will jeopardize the continued existence of the Riverside fairy shrimp. Sections 4(a)(3)(B)(ii) and (iii) of the Act note that agencies granted an exemption must still consult under section 7(a)(2) of the Act, and that the DOD must comply with section 9, ''including the prohibition preventing extinction and taking of endangered species and threatened species.'' Thus, although military bases can be exempt from critical habitat, the Act has mechanisms in place to prevent extinction. Therefore, we find that exempting military lands at MCB Camp Pendleton and MCAS Miramar under section 4(a)(3)(B)(i) of the Act is justified.

(16) *Comment:* Two peer reviewers expressed the belief that lands covered by HCPs should not be excluded from critical habitat because HCPs do not offer the same levels of protection as critical habitat.

Our Response: Critical habitat designation and HCPs offer distinct benefits to species. The primary benefit of a critical habitat designation derives from the requirement under section 7(a)(2) of the Act that Federal agencies consult with the Service to insure that any action authorized, funded, or carried out by such agencies does not destroy or adversely modify critical habitat. Thus, critical habitat designation precludes Federal action if it will destroy or adversely modify critical habitat, but designation does not require any affirmative action on a Federal agency's part to protect, enhance, or manage critical habitat. On the other hand, HCPs typically offer

landscape-level conservation, monitoring, and management of covered species' habitat. The Orange County Central-Coastal NCCP/HCP, Orange County Southern Subregion HCP, Western Riverside County MSHCP, Carlsbad HMP under the San Diego MHCP, and County of San Diego Subarea Plan under the MSCP all provide ongoing protection for the Riverside fairy shrimp and its habitat that will benefit the long-term conservation of the species, as well as providing strong partnerships to promote future conservation of the Riverside fairy shrimp and vernal pool habitat.

Based on the benefits to the Riverside fairy shrimp and its habitat that are provided by these habitat conservation plans, we chose to conduct exclusion analyses to compare the benefits of excluding areas covered by these existing conservation plans with the benefits of including those areas within this final revised critical habitat designation. We note that a decision to exclude an area is not based on the difference between the protection provided by critical habitat designation and an HCP, but takes into account the redundancy of protections provided by an HCP with those provided by critical habitat designation. Conservation benefits provided by an existing HCP are not considered a benefit of exclusion because they would remain in place regardless of critical habitat designation; however, the conservation provided under an HCP does minimize the benefits of inclusion to the extent that the protection that would result from critical habitat designation is redundant with the protection already provided under an HCP. In the case of the identified HCPs, we concluded that the protection for habitat containing physical or biological features essential to the conservation of the Riverside fairy shrimp that is likely to result from designation of lands covered by the HCPs is almost entirely redundant with the protection for such habitat provided by the HCPs, thus minimizing the conservation benefit of designation.

In the case of the HCPs discussed above, we also weighed other benefits of designation against the potential negative effects of designating areas covered by the HCPs on future partnerships and the development of new HCPs. We concluded that designating critical habitat within these HCPs could have a detrimental effect on our conservation partnerships (see the *Benefits of Exclusion* sections above). Weighing the significant conservation benefits of excluding lands identified as critical habitat for the Riverside fairy shrimp that are covered by the Orange County Central-Coastal NCCP/HCP, Orange County Southern Subregion HCP, Western Riverside County MSHCP, Carlsbad HMP under the San Diego MHCP, and County of San Diego Subarea Plan under the MSCP against the minimal and largely redundant benefits of designating such habitat, we determined that the benefits of exclusion outweigh the benefits of inclusion. The Secretary is therefore exercising his discretion to exclude lands identified as critical habitat for the Riverside fairy shrimp that are covered by these HCPs (see Table 5).

(17) *Comment:* One peer reviewer disagreed with the exclusions we were considering as described in the proposed revised critical habitat rule. The reviewer stated that all conservation plans (HCPs) should be critically analyzed before deciding to exclude lands within their boundaries. The commenter cited as an example the new vernal pool plan being developed by the City of San Diego due to the original plan being struck down by the courts.

Our Response: Our decision to exclude areas from critical habitat does not take place in the proposed rule, but in the final rule. Section 4(b)(2) of the Act authorizes the Secretary to designate critical habitat after taking into consideration the economic impacts, national security impacts, and any other relevant impacts of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of designating a particular area as critical habitat, unless the failure to designate will result in the extinction of the species. Before we made the decision to exclude any area from critical habitat, we carefully weighed the benefits of exclusion of an area from critical habitat versus the benefits of inclusion of an area in critical habitat. As described in comment (16), we concluded that the benefits of exclusion outweigh the benefits of inclusion for the Orange County Central-Coastal NCCP/HCP, Orange County Southern Subregion HCP, Western Riverside County MSHCP, Carlsbad HMP under the San Diego MHCP, and County of San Diego Subarea Plan under the MSCP. We conclude that the exclusions made in this final rule are legally supported under section 4(b)(2) of the Act and scientifically justified. Our detailed rationale for our decision is provided in the *Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships* section above.

Comments From Federal Agencies

(18) *Comment:* A representative from the U.S. Marine Corps noted that we had incorrectly identified the pool on MCAS Miramar that supports the Riverside fairy shrimp as the ''AA 1–7, 9–13 East Miramar (Pool 10) (AA1 East),'' and that the pool is more appropriately identified as ''East Miramar (AA1 South+ Group)(Pool 4786; previously Pool 12).''

Our Response: We appreciate the commenter's feedback, and we have made the appropriate changes throughout this rule.

(19) *Comment:* A commenter emphasized that the basin supporting the Riverside fairy shrimp on MCAS Miramar is not a naturally occurring vernal pool, but one ''created by construction of an earthen dam across a small ephemeral streambed, and associated excavations, many decades in the past,'' and that naturally occurring vernal pools on MCAS Miramar do not hold water long enough to support the Riverside fairy shrimp.

Our Response: We acknowledge that the vernal pool on MCAS Miramar that supports the Riverside fairy shrimp was created by construction activities many decades ago. However, we still believe that the pool contains the physical or biological features essential to the conservation of Riverside fairy shrimp. While we believe that this area contains the physical or biological features essential to the conservation of the species, we have also determined that it is exempt from critical habitat under section 4(a)(3)(B)(i) of the Act because the INRMP at MCAS Miramar provides conservation benefits to the species.

(20) *Comment:* The commenter agreed with the Service's exemptions of lands under the management of MCAS Miramar and MCB Camp Pendleton, and reiterated that the INRMPs at both stations provide for conservation and management of Riverside fairy shrimp habitat.

Our Response: We concur that the INRMPs at MCB Camp Pendleton and MCAS Miramar continue to provide conservation benefits to the species and its habitat. Details of our rationale to exempt MCB Camp Pendleton and MCAS Miramar from critical habitat are given in the Exemptions section above. We look forward to working with the Marine Corps to further conservation and management of the Riverside fairy shrimp and other listed and sensitive species.

(21) *Comment:* The commenter concurred with the Service's assessment that the San Mateo and Wire Mountain areas on MCB Camp Pendleton no

longer meet the definition of critical habitat. The commenter asserted that staff at the Base will continue to work with the Service on Riverside fairy shrimp conservation.

Our Response: We appreciate the Marine Corps' continued efforts to conserve the Riverside fairy shrimp and its habitat.

(22) *Comment:* The DHS has requested exclusion for national security reasons of lands owned by DHS on which activities related to the operation and maintenance of the Border Infrastructure System are carried out. These lands are composed of all of Subunit 5(b) ((29 ac) (12 ha)) and a portion of Subunit 5h ((11 ac) (4 ha)). The Department states that the lands should be excluded because: (1) The same areas were excluded in the previous 2005 critical habitat rule; (2) though the situation at the border has changed since the 2005 rule, there are still ongoing activities that relate to national security interests; and (3) all areas are either already disturbed, do not contain the PCEs, or have been set aside for conservation.

Our Response: We appreciate the commenter's information regarding ongoing national security issues. As described in our response to comment (17), section 4(b)(2) of the Act authorizes the Secretary to designate critical habitat after taking into consideration the economic impacts, national security impacts, and any other relevant impacts of specifying any particular area as critical habitat. Before we make the decision to exclude any area from critical habitat, we carefully weigh the benefits of exclusion of an area from critical habitat versus the benefits of inclusion of the area in critical habitat. As described in our ''Exclusions Based on National Security Impacts'' section above, we have determined that the benefits of excluding the DHS owned lands outweigh the benefits of inclusion, and that such exclusion will not result in extinction of the species. Based on that discussion, the Secretary is exercising his discretion to exclude all lands owned by DHS. We believe that this exclusion is consistent with the analysis in our 2005 final revised critical habitat rule (70 FR 19154; April 12, 2005).

We respectfully disagree with the commenter that the DHS lands identified as essential do not contain the PCEs. In an earlier proposed revised critical habitat rule published on April 27, 2004 (69 FR 23024), we did identify some lands as critical habitat that we subsequently removed in the final revised rule (70 FR 19154; April 12, 2005) due to lack of PCEs from construction of the BIS. The removed areas were not included in our 2011 proposed critical habitat designation, because they do not contain the PCEs. As described under *Criteria Used to Identify Critical Habitat* section above, we carefully assessed all areas occupied by Riverside fairy shrimp, and only proposed those areas as critical habitat that contain the PCEs. We do acknowledge that all lands in Subunit 5b (29 ac (12 ha)) have been set aside for conservation, and took that factor into consideration in our exclusion analysis.

(23) *Comment:* The commenter requested that we more clearly define the role of DHS. The commenter suggested adding the language, ''U.S. Customs and Border Protection is tasked with maintaining National Security interests along the nation's international borders. As such, CBP activities may qualify for exclusions under section 4(b)(2) of the act.''

Our Response: We acknowledge the important role of U.S. Customs and Border Protection in protecting our nation's international borders, including operation and maintenance of the BIS in the *Exclusions Based on National Security Impact* section above.

(24) *Comment:* The commenter requested an explanation of how road maintenance could impact the Riverside fairy shrimp. The commenter stated that we had not provided further information on how road maintenance could impact Riverside fairy shrimp critical habitat, and stated that if there was no such information, we should replace the term ''maintenance'' with ''widening or construction of roadways.''

Our Response: Ongoing road maintenance may impact Riverside fairy shrimp habitat. These activities could potentially adversely affect the habitat and physical or biological features essential to the Riverside fairy shrimp by damaging, disturbing, and altering soil composition through direct impacts, increased erosion, and increased nutrient content (PCEs 1d, 3). Additionally, road maintenance may lead to runoff that could alter the water quality and natural hydrology of vernal pools through changes in pool characteristics (Rodgers 2000, pp. 247–248), including interfering with ponding depths and duration necessary to support the Riverside fairy shrimp. Therefore, we consider road maintenance as an activity that may adversely affect or modify critical habitat. In order to make our definition of road maintenance more clear, we have added clarification of road maintenance activities that could adversely affect critical habitat to include road construction, widening, and grading in the *Application of the ''Adverse Modification'' Standard* section above.

(25) *Comment:* The commenter requested that we provide a clearer definition for OHV, and asked if it was synonymous with off-road vehicle. The commenter also stated that the use of the term ''roads'' seemed to apply to paved highways in some cases and unpaved roads in others. The commenter requested we clarify these terms, particularly as off-road impacts could have a significant effect on DHS border patrol operations, and requested that the term ''roads'' should include all roads, and not just paved roads.

Our Response: We intended the term ''off-highway vehicle'' to refer to any and all vehicles capable of travelling on dirt roads or across the countryside; this may include trucks or non-motorized vehicles not able to use highways. We have changed all instances off ''off-road vehicle'' to OHV in order to avoid confusion.

In reference to the commenter's question about roads, the term ''roads'' refers to all roads, including both paved roads and unpaved dirt roads.

Comments from Local Agencies

(26) *Comment:* One commenter stated that lands covered by the Orange County Southern Subregion HCP should be excluded from critical habitat because: (1) The plan is complete and provides a conservation benefit to the species; (2) the plan provides assurances that the conservation strategies and actions will be implemented and effective; (3) the Service has stated its intention to exclude habitat within this plan area from any revision to an existing critical habitat designation as long as the Conservation Strategy is being properly implemented; and (4) designation of critical habitat within Subarea 1 will not provide educational benefits or improve CEQA review of local projects.

Our Response: The Secretary may exercise his discretion to exclude an area from critical habitat designation under section 4(b)(2) of the Act if he concludes that the benefits of excluding the area outweigh the benefits of its designation. Areas are not excluded based solely on the existence of management plans or other conservation measures; however, we acknowledge that the existence of a plan may reduce the benefits of inclusion of an area from critical habitat designation to the extent that the protections provided under the plan are redundant with conservation benefits of the critical habitat

designation. Thus, in some cases, the benefits of exclusion in the form of sustaining and encouraging partnerships that result in on-the-ground conservation of listed species may outweigh the incremental benefits of inclusion. We have weighed the benefits of exclusion against the benefits of inclusion for lands covered by the Orange County Southern Subregion HCP, and the Secretary is exercising his discretion to exclude all lands within the boundaries of the Orange County Southern Subregion HCP from this final critical habitat designation.

In regard to the commenter's point about educational benefits and impacts of critical habitat on CEQA analysis, we agree that negligible educational benefits would be realized by the designation of critical habitat. We also agree that review of development proposals affecting lands identified as critical habitat for the Riverside fairy shrimp under CEQA by Orange County already takes into account the importance of this habitat to the species and the protections required for the species and its habitat under the Subarea plan. Details of our rationale are given in our discussion of the Orange County Southern Subregion HCP under *Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships* above.

(27) *Comment:* One commenter believed that all lands covered by the Western Riverside County MSHCP should be excluded from critical habitat. The commenter stated that: (1) The Service has previously found the Western Riverside County MSHCP sufficient for the conservation and recovery of the Riverside fairy shrimp; (2) the Western Riverside County MSHCP contains a plan to conserve and manage the Riverside fairy shrimp that is currently being implemented; and (3) excluding lands covered by the Western Riverside County MSHCP from critical habitat fosters important conservation partnerships with local agencies.

Our Response: As we stated in comment 26 above, the Secretary can exercise his discretion to exclude an area from critical habitat under section 4(b)(2) of the Act if we conclude that the benefits of exclusion of the area outweigh the benefits of its inclusion. In this case, the Secretary's decision to exclude is consistent with previous critical habitat rules; however, the decision to exclude is not based on previous rulemakings, but on the exclusion analysis within this final revised critical habitat rule.

In regard to the commenter's point about the existing conservation and management plan, we reiterate that areas are not excluded based solely on the existence of management plans or other conservation measures; however, we acknowledge that the existence of a plan may reduce the benefits of inclusion of an area from critical habitat to the extent that the protections provided under the plan are redundant with conservation benefits of the critical habitat designation. Thus, in some cases the benefits of exclusion in the form of sustaining and encouraging partnerships that result in on-the-ground conservation of listed species may outweigh the incremental benefits of inclusion. In this case, we agree with the commenter that excluding areas covered by the Western Riverside County MSHCP will foster our partnership. We have weighed the benefits of exclusion against the benefits of inclusions for lands covered by the Western Riverside County MSHCP, and based on the discussion of the Western Riverside County MSHCP under *Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships,* the Secretary is exercising his discretion to exclude all lands within the boundaries of the Western Riverside County MSHCP from this final critical habitat designation.

(28) *Comment:* One commenter believed that lands from the Western Riverside County MSHCP should be excluded because the exclusion would be consistent with the Service's previous exclusions of land within the Western Riverside County MSHCP, including in the 2005 final revised critical habitat designation for Riverside fairy shrimp. The commenter stated that a different determination in this rule would violate the Act and regulations at 50 CFR 424.12(g) because conditions have not changed since the 2005 revised designation. Furthermore, the commenter stated that a designation of critical habitat is required only to the ''maximum extent prudent and determinable'' (based on regulations at 50 CFR 424.12(a)(1)), but would not be prudent when such designation is not beneficial to the species.

Our Response: Section 4(b)(2) of the Act requires us to make critical habitat determinations on the basis of the best available scientific data at the time the designation is made. Therefore, critical habitat determinations are made based on individual species biology and an individual weighing analysis, not on decisions made in previous critical habitat rules. Additionally, we do not agree that designating critical habitat would violate regulations at 50 CFR 424.12(g). The regulations state that ''Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.'' As described in our *Criteria Used to Identify Critical Habitat* section above, in determining which areas meet the definition of critical habitat, we considered information including new survey reports; CDFG's CNDDB records; published peer-reviewed articles; unpublished papers and reports; and GIS data (such as species occurrences, soil data, land use, topography, and ownership maps), some of which has been published since the 2005 revised critical habitat designation. We also disagree with the commenter's assertion that designation of critical habitat for the Riverside fairy shrimp would not be beneficial.

However, as described in our discussion of the Western Riverside MSHCP under *Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships* and in the response to comment 27 above, we have determined that the benefits of excluding lands covered by the Western Riverside County MSHCP outweigh the benefits of including such lands. Therefore, we are excluding all lands within the boundaries of the Western Riverside County MSHCP from this final critical habitat designation.

Public Comments

(29) *Comment:* One commenter stated that Subunit 5c should not be designated as critical habitat because the Service lacks surveys proving occupancy of the subunit at the time of listing. The commenter concluded that the Service had not used the best available scientific information in making this decision.

Our Response: As required by section 4(b)(1)(A) of the Act, we used the best scientific and commercial data available to define areas that contain the physical or biological features necessary for the conservation of the Riverside fairy shrimp. As with many species, listing often results in greater efforts to conduct surveys, which may reveal a greater number of occurrences than were initially known. We determine that many additional occurrences, including Subunit 5c, were occupied at the time of listing but had not been identified due to lack of survey effort. We find occurrences documented since the 1993 listing do not represent an expansion of the species' distribution and range into previously unoccupied areas, but rather a better understanding of the historical distribution and range of the species (Service 2008, p. 9).

Because occurrences documented since listing are within relative proximity to existing, occupied, vernal pool habitat or within similar landscape types (for example, coastal terraces and mesas, inland valleys, inland mesas, and cismontane depressions) supporting ephemeral wetlands with occurrences that were known at the time of listing, it is reasonable to conclude, based on several life-history traits, that the Riverside fairy shrimp was present at the time of listing in these unsurveyed habitats. This subunit is known to be currently occupied; dry season surveys in 2011 by Busby Biological Services documented the presence of Riverside fairy shrimp cysts (Busby Biological Services 2011, Attachment 3). This subunit was first documented as occupied in 2000 (GIS ID 4). Subunit 5c contained the physical or biological features essential to the conservation of the species and the features known to support life-history characteristics of the Riverside fairy shrimp at the time of listing. Therefore, for the aforementioned reasons, although not ''documented'' to have been occupied at listing, we conclude this subunit was occupied at the time of listing, and that this rationale makes use of the best scientific and commercial information available.

Regardless, as stated in our March 1, 2012, publication (77 FR 12543), and in this final revised critical habitat rule, we are alternatively designating Subunit 5c under section 3(5)(A)(ii) of the Act because we consider this unit essential for the conservation of the Riverside fairy shrimp regardless of its occupancy status at listing, and conclude that a designation limited to areas known to be occupied at the time of listing would be inadequate to ensure the conservation of the species. We conclude that this approach also makes use of the best scientific and commercial information available.

(30) *Comment:* The commenter further stated that Subunit 5c does not contain the physical or biological features essential to the conservation of the Riverside fairy shrimp, and that it therefore does not meet the definition of critical habitat. The commenter stated that the pool is heavily disturbed by OHVs and cattle grazing, and that only a few surveys since the time of listing have detected the presence of Riverside fairy shrimp. The commenter added that in most years, the vernal pool does not hold water long enough to allow Riverside fairy shrimp to mature. The commenter stated that the infrequent presence of Riverside fairy shrimp may be due to transfer by human and animal traffic.

Our Response: As discussed in comment 29, the lack of surveys confirming Riverside fairy shrimp in a given year does not mean that a pool is not occupied. Cysts of Riverside fairy shrimp can persist—and be present—in the soil bank for many years before hatching. When mature, cysts can survive environmental conditions such as temperature extremes, the digestive tracts of animals, and years of desiccation, and still hatch under the appropriate environmental conditions (Pennak 1989, pp. 352–353; Fryer 1996, pp. 1–14; Eriksen and Belk 1999, p. 22). Indeed, as only small percentages of Riverside fairy shrimp cysts hatch in any given year, if the pool dries before the species is able to mature and reproduce, there are still many more cysts left in the soil that may hatch the next time the pool fills (Simovich and Hathaway 1997, p. 42). Even if the pool does not fill every year, the pool will still support Riverside fairy shrimp, and such infrequent fillings are a natural feature of the species' habitat (see PCE 1c) (Eriksen and Belk 1999, p. 105; Ripley *et al.* 2004, pp. 221–223). Cysts of other vernal pool fairy shrimp have been known to persist for up to 8 years in vernal pool soils, although anecdotal evidence states that cysts can persist even longer (Belk 1998, Table 1). Therefore, the presence of cysts in scattered years is typical of the life-history characteristics of the Riverside fairy shrimp.

We agree with the commenter that Riverside fairy shrimp are sometimes transferred by frequent vehicle use (Navy 2001, 2002, entire). However, Subunit 5c contains the physical or biological features essential to the conservation of the species including ephemeral wetland habitat (PCE 1), intermixed wetland and upland habitats that act as the local watershed (PCE 2), and topography and soils that support ponding during winter and spring months (PCE 3). As discussed in the *Criteria Used to Identify Critical Habitat* section above, the presence of these features, which currently support Riverside fairy shrimp in Subunit 5c, in combination with the life-history characteristics of Riverside fairy shrimp, render it likely that this subunit was occupied at the time of listing. Dry season surveys in 2011 confirmed the presence of Riverside fairy shrimp cysts in Subunit 5c (Busby Biological Surveys 2011). Subunit 5c is occupied irrespective of whether the cysts naturally occur in this area or if they arrived through OHV activity. Notwithstanding our conclusion that Subunit 5c meets the definition of critical habitat under section 3(5)(A)(i), we are alternatively designating this subunit under section 3(5)(A)(ii) because the area is essential for the conservation of the Riverside fairy shrimp regardless of its occupancy status at listing. See discussion in *Unit 5: San Diego Southern Coastal Mesas* and, specifically, the discussion in ''Subunit 5c: East Otay Mesa'' under Final Designation of Critical Habitat. We conclude that a designation limited to areas documented to be occupied at the time of listing would be inadequate to ensure the conservation of the species.

(31) *Comment:* One commenter questioned the amount of habitat designated for the Riverside fairy shrimp in Subunit 5c. The commenter stated that the pond is the only basin that could support the Riverside fairy shrimp in Subunit 5c, and it is not connected to any other vernal pool complexes in the area. The commenter also questioned how an artificial pond could be considered essential habitat and stated that it does not meet the definition of critical habitat.

Our Response: In drawing critical habitat units, we relied on the best available scientific information to define areas that contain the physical or biological features essential to the conservation of the Riverside fairy shrimp. We relied on survey reports, information from the CNDDB, and GIS mapping data, including topographical maps and aerial photographs.

We agree that not all portions of Subunit 5c are made up of vernal pool basins. Vernal pool basins are not the only PCE identified for the Riverside fairy shrimp. As described in our *Criteria Used to Identify Critical Habitat* section above, and in our response to Comments 2 and 14 above, Riverside fairy shrimp require intermixed wetland and upland habitats that function as the local watershed, including topographic features characterized by mounds, swales, and low-lying depressions. In the case of Subunit 5c, the subunit boundary captures a small stream as well as the downward slope and mima mound topography that make up the watershed associated with the occupied vernal pool (PCE 2). Subunit 5c contains the physical or biological features essential to conserve the Riverside fairy shrimp (see ''Subunit 5c: East Otay Mesa'' for more information), and this subunit is itself essential to the conservation of the species.

In regard to the commenter's assertion that a created pond could not provide the physical or biological features essential to the conservation of the species, as discussed in the Primary Constituent Elements for Riverside Fairy

Shrimp section above, multiple scientists have documented that both natural and created ponds can function as habitat for the Riverside fairy shrimp when they contain the appropriate physical or biological features (including soil characteristics and ponding duration) (Moran 1977, p. 155; Hathaway and Simovich 1996, p. 670; Service 1998a, p. 22). Subunit 5c contains characteristics, including the presence of mima mound topography and soils that support long-term ponding during winter and spring months and intermixed wetland and upland habitats that act as the local watershed, that are representative of Riverside fairy shrimp vernal pool habitat. The presence of these characteristics, which are shown on topographic maps created prior to the time of listing, further suggest that these elements which support the Riverside fairy shrimp have long been in place, even as the occurrence is now affected by human disturbance and OHV use. Additionally, the subunit is currently occupied by Riverside fairy shrimp. Habitat loss continues to be the greatest direct threat to Riverside fairy shrimp, coupled with the estimated loss of 90 to 97 percent of vernal pool habitat in southern California (Mattoni and Longcore 1997, pp. 71–73, 86–88; Bauder and McMillan 1998, p. 66; Keeler-Wolf *et al.* 1998, p. 10; Service 1998a, p. 45). As we indicated in the 1998 Recovery Plan, a key conservation goal for the Riverside fairy shrimp is protection of most of the remaining Riverside fairy shrimp occurrences (Service 1998a, p. 62). Given the historic and continued loss of habitat, and based on the best available scientific information available to us at this time, we have determined this subunit to be essential for the long-term conservation and recovery of the species (see ''Subunit 5c: East Otay Mesa'' section for more information).

(32) *Comment:* The commenter stated that the proposed development of a recycling center and landfill on Subunit 5c would provide benefits to the public in the form of jobs and San Diego County's need for increased landfill space. The commenter concluded that the subunit should be excluded for economic reasons, especially as the commenter believes that the Riverside fairy shrimp will not become extinct if the subunit is excluded.

Our Response: 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 that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. 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 factors to use and how much weight to give to any factor.

The commenter suggested that Subunit 5c should be excluded for economic reasons. Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. We prepared a draft economic analysis (DEA) of the proposed critical habitat designation and related factors (Industrial Economics Inc. 2011, entire). The draft analysis, dated November 3, 2011, was made available for public review and comment for 30 days (77 FR 12543, March 1, 2012). Following the close of the comment period, a final analysis (dated August 30, 2012) of the potential economic effects of the designation was developed, taking into consideration the public comments we received and any new information (Industrial Economics Inc. 2012). Our economic analysis did not identify any disproportionate costs likely to result from the designation. Because this area is currently known to be occupied by Riverside fairy shrimp (see ''Subunit 5c: East Otay Mesa'' above and response to comment 29), consultation under section 7 of the Act would be required if the proposed landfill would affect waters of the United States under the CWA. Alternatively, if the project had no Federal nexus and would result in take of Riverside fairy shrimp, an incidental take permit under section 10 of the Act would be required. In either case, the costs associated with avoiding adverse modification of critical habitat are likely to mirror those necessary to avoid jeopardy to the species. Therefore, critical habitat designation is not likely to result in incremental costs other than minor administrative costs associated with consideration of critical habitat in the section 7 consultation. Additionally, the lands that make up Subunit 5c area are already identified as critical habitat for the Quino checkerspot butterfly; therefore, an adverse modification analysis would be required for the project, assuming the existence of a Federal nexus, regardless of this final revised critical habitat designation. Our economic analysis did not identify any disproportionate costs likely to result from the designation. Specifically, because we conclude that the designation of critical habitat would not meaningfully influence whether a landfill can be constructed in Subunit 5c as there are existing constraints on development of these lands due to the presence of Riverside fairy shrimp and the designation of Subunit 5c lands as Quino checkerspot critical habitat, we also conclude that the public benefits asserted by the commenter—the need for a new landfill and the jobs that would result from a landfill project—are not traceable to and would not be avoided by an exclusion of Subunit 5c from the designation. Therefore, the Secretary has declined to exercise his discretion to exclude any areas, including Subunit 5c, from this designation of critical habitat for Riverside fairy shrimp based on economic impacts or public benefits (for more information see ''Exclusions Based on Economic Impacts'' section above). See also Response to Comment 37.

Comments on Legal and Policy Issues Relating to Critical Habitat

(33) *Comment:* One commenter stated that the Service had failed to comply with the Regulatory Flexibility Act, as amended (RFA), because it did not draft an initial regulatory flexibility analysis (IRFA) at the time the proposed revised critical habitat rule was published. The commenter believes that the Service had no justifiable reason to delay the IRFA, and that postponing the analysis could harm small businesses that may be affected by the proposed rule. The commenter also stated that 30 days was an insufficient amount of time for small businesses to review the DEA and provide comments, and that the dual rulemaking provided an unnecessary burden on small entities that might wish to comment on both the proposed rule and the DEA.

Our Response: The Service complied with the RFA when designating critical habitat. The RFA requires the head of an agency to certify, at the time of the proposal, that a rulemaking will not have a significant impact on a substantial number of small business entities. If the agency cannot certify, then the RFA recommends conducting an IRFA. It is the Service's general practice to issue a proposed critical habitat rule followed by a subsequent **Federal Register** Notice (FRN) that announces the availability of the DEA. The DEA provides the substantive economic information to evaluate compliance with the RFA and other statutes and Executive Orders. In our subsequent FRN announcing the availability of the DEA, the Service provides the necessary certification

statement or, if it is unable to make such a certification, conducts an IRFA. In both circumstances, the public is provided a second opportunity to review and comment on the proposed rule and to review and comment on the accompanying DEA or IRFA. We do not agree that a 30 day public comment period, which is the typical duration for public comment periods under the Administrative Procedure Act, is insufficient to afford members of the public with a meaningful opportunity to submit comments on the DEA or imposes an unreasonable burden on small businesses. Because the second FRN announcing the availability of the DEA is part of the proposed rulemaking, the Service's practice complies with the RFA. Further, in conversations with the Office of Management and Budget (OMB) and the Small Business Administration's (SBA) Office of Advocacy, and following their recommendations, the Service identifies in our initial proposal, to the maximum extent practicable, which small business sectors may be affected by the rulemaking. This assists SBA and small business sectors to understand whether the proposed rulemaking may impact a particular sector and allows for more focused public review and comment.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly affected by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect 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 regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of all available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EO regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. Further details are provided in the *Regulatory Flexibility Act (5 U.S.C. 601 et seq.*) and *Regulatory Planning and Review—Executive Orders 12866 and 13563* sections below.

(34) *Comment:* One commenter believed that previous court decisions in the Tenth Circuit Court require the Service to conduct a National Environmental Policy Act (NEPA) analysis prior to critical habitat designation.

Our Response: As we stated in the proposed rule, it is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the 9th Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). This action is outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit.

Comments Relating to the Draft Economic Analysis (DEA)

(35) *Comment:* One commenter stated that the DEA employs a flawed methodology because it employs the so-called baseline methodology, which, as the Tenth Circuit Court has noted, grossly underestimates the cost of designation. The commenter stated that the Service has flip-flopped on its method of conducting a DEA, and that the change seems arbitrary.

Our Response: As explained in chapter 2 of the DEA, the estimation of incremental impacts is consistent with direction provided by 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); and *Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service,* 616 F.3d 983 (9th Cir. 2010). Those decisions found that estimation of incremental impacts stemming solely from the designation is proper.

We respectfully disagree with the commenter that our change in policy was arbitrary. As described in the DEA, we developed our current methodology in response to conflicting court decisions. In the DEA, we address the divergent court opinions by analyzing both the baseline protections accorded to the Riverside fairy shrimp absent critical habitat designation and by monetizing incremental impacts attributable to critical habitat designation. We determine that this methodology addresses the divergent opinion of the courts and provides a thorough review for policymakers that enables them to consider the true costs of critical habitat designation, by comparing the costs that would occur solely as a result of designation to those costs that would occur in the absence of designation.

(36) *Comment:* Another commenter stated that the DEA does not explain the source of its estimate of administrative costs, and expresses concern that not all entities affected by administrative costs are included in the analysis.

Our Response: The consultation cost model was originally based on data gathered from three Service field offices (including a review of consultation records and interviews with field office staff), telephone interviews with Federal action agency staff (for example, BLM, USFS, U.S. Army Corps of Engineers), and telephone interviews with private consultants who perform work in support of permittees. In the case of Service and Federal agency contacts, efforts focused on determining the typical level of effort required to complete several different types of consultations (hours or days of time), as well as the typical Government Service (GS) level of the staff member performing this work. In the case of private consultants, we interviewed representatives of firms in California and New England to determine the typical cost charged to clients for these efforts (for example, biological survey, preparation of materials to support a biological assessment). The model is periodically updated with new information, received in the course of data collection efforts, which support economic analyses and public comments on more recent critical habitat rules. In addition, the GS rates are updated annually.

(37) *Comment:* One commenter stated that Subunit 5c should be excluded

because of its critical function as San Diego County's future recycling center and landfill. The commenter believes that the benefits to society of development plans at that site outweigh the benefits of including Subunit 5c as critical habitat.

Our Response: The Secretary is required to take into consideration ''any other relevant impact'' in addition to economic or national security impacts, in designating critical habitat under section 4(b)(2) of the Act. The commenter suggests that a ''relevant impact'' of designating Subunit 5c that should be considered by the Secretary is the effect designation would have on the potential future development of the area as a recycling center and landfill. As described in the comment letter, the project was approved by a county-wide initiative. The County Department of Environmental Health put out a Notice of Preparation of a Draft Environmental Impact Report (EIR) in September of 2011 (County of San Diego DEH 2011, pp. 1–4); the draft EIR is still under preparation.

Under section 4(b)(2) of the Act and its implementing regulations at 50 CFR 424.19, the Secretary is required to identify significant activities that are likely to be affected by a critical habitat designation and consider the probable economic and other impacts of the designation on those activities. The significant activities subject to this consideration are those that are carried out, authorized, or funded by a Federal agency, because the consequences of critical habitat designation result from the obligation of Federal agencies to consult under section 7 of the Act and to ensure that their activities are not likely to jeopardize any listed species or destroy or adversely modify designated critical habitat. Thus, whether designation of critical habitat could affect the siting of a new recycling center and landfill in Subunit 5c depends, in the first instance, on whether Federal authorization is required to build such a landfill. For purposes of addressing this comment, we assume that a Federal nexus that would trigger section 7 consultation under the Act would exist. The most likely Federal nexuses triggering section 7 consultation would be the need for a Section 404 permit under the CWA if the project would affect jurisdictional waters of the United States or the need for an incidental take permit under section 10 of the Act because the proposed project would result in take of the Riverside fairy shrimp.

Assuming that a Federal nexus exists, we next must determine if the designation of critical habitat would result in impacts to the future recycling center and landfill. If the designation would not itself result in impacts to the project beyond those already likely to occur as a result of the listing of the Riverside fairy shrimp, then the project is not an ''other relevant impact'' of designation under section 4(b)(2) of the Act.

The pool in Subunit 5c is known to be occupied by Riverside fairy shrimp and, as a result, in the event of a future consultation on the project under section 7 of the Act, the Service would be required to evaluate the effects of the East Otay Mesa Recycling Collection Center and Landfill Project on Riverside fairy shrimp occupying the pool, regardless of the designation of critical habitat. As discussed under the *Physical or biological features* section above, intact vernal pool hydrology (including the seasonal filling and drying down of pools) is the essential feature that governs the life cycle of the Riverside fairy shrimp, and intact vernal pool hydrology made up of the vernal pool basin and its upslope watershed (adjacent vegetation and upland habitat) must be available and functional (Hanes and Stromberg 1998, p. 38). Adjacent upland habitat supplies essential hydrological inputs to sustain vernal pool ecosystems. Protection of the upland habitat between vernal pools within the watershed is essential to maintain the space needs of the Riverside fairy shrimp and to buffer the vernal pools from edge effects. Conserving surrounding uplands ensures maintenance of proper hydrology to create pools of adequate depth also supports the temporal needs of the Riverside fairy shrimp, as deep pools provide for inundation periods of adequate length to support the entire life-history function and reproductive cycles necessary for the Riverside fairy shrimp.

We consider it likely that any measures identified as necessary to avoid adverse modification of Riverside fairy shrimp critical habitat in Subunit 5c would also be required to avoid jeopardy to the species. We also note that the project area contains designated critical habitat for the Quino checkerspot butterfly. Assuming the existence of a Federal nexus for the project, an adverse modification analysis for Quino checkerspot butterfly critical habitat also would be required (regardless of whether or not Subunit 5c is designated as Riverside fairy shrimp critical habitat). For these reasons, we conclude that designation of critical habitat in Subunit 5c is not likely to affect whether a recycling center and landfill can be developed or to impose restrictions on such development beyond those that would result from listing of the species. This conclusion is consistent with the results of our FEA, which did not identify any incremental economic impacts of designation beyond the minor added administrative costs of including an evaluation of critical habitat in future section 7 consultations involving Subunit 5c (Industrial Economics Inc. 2012, p. 4–17).

We have taken into account the potential economic impacts (see response to comment 32) and any other relevant impact of designating Subunit 5c as critical habitat. We conclude that designation of critical habitat will not result in significant economic impacts or other relevant impacts under section 4(b)(2) of the Act. Subunit 5c contains the physical or biological features necessary for the conservation of the Riverside fairy shrimp and is essential for the conservation of the Riverside fairy shrimp, and the Secretary has declined to consider this area for exclusion under 4(b)(2) of the Act.

(38) *Comment:* One commenter stated that the DEA uses a flawed Monte Carlo analysis. Explanation is needed: (1) For the use of 100,000 iterations; (2) for the use of a bell curve in the histogram in Exhibit 4–7 of forecast present value incremental impacts to development (where bell curves are generally used for natural phenomena); (3) regarding how specific probabilities for the four scenarios were chosen; (4) for why the Distribution of Impacts to Development Activities in the technical appendix has a narrower range than the collection of distributions for the sum of each unit and the sum for each subunit does not match the total value for each unit; and (5) regarding which scenarios are used for each subunit so grounds for exclusion are clearer.

Our Response: The number of iterations selected ensured a representative set of potential outcomes while being computationally manageable. This clarification has been added as a footnote in the development chapter.

In regard to the commenter's second point, Monte Carlo analyses generate a range of outcomes by randomly sampling from statistical distributions of uncertain input parameters, and then running the model using those chosen inputs. The process is repeated (in this case 100,000 times) until a representative set of outputs has been generated. The bell-shaped statistical distribution of the outputs in this analysis was therefore generated from repeatedly sampling the input distributions and running the model; it

was not pre-specified. This clarification has been added as a footnote in the development chapter of the FEA.

With regard to the commenter's question about how scenarios were chosen, as described on page 4–14 of the DEA, absent information on the likelihood of any particular outcome in developable areas not covered by HCPs, the analysis assumes that an equal probability exists that a property will be located in one of the four geographic situations described in the development chapter: (a) Entirely in upland areas, (b) proximate to a nonjurisdictional pool, (c) proximate to a jurisdictional pool that is occupied, or (d) proximate to a jurisdictional pool that is unoccupied.

The commenter is correct that the sum of development cost ranges for each subunit does not match the range from the distribution of all costs. As described on page 4–18 and in Exhibit 4–8 of the DEA, this occurs because the distribution of total costs across the proposed revised critical habitat area has a narrower range than the aggregation of the distributions for each subunit. In other words, it is not realistic to assume that every property will experience the most costly option for each variable included in the model (the sum of the upper bounds of the distributions). Likewise, it is unlikely that none of the affected properties will experience any impacts (the sum of the lower bounds of the distributions).

Finally, the DEA delineates proposed critical habitat areas into three categories in the development chapter: (a) Not developable, (b) developable but in HCP areas that the Service is considering for exclusion, and (c) other developable areas. As described above, the four geographic situations are applied with equal probability to lands in the third category (other developable areas). The areas of each subunit in this category are identified in Exhibits 4–9 through 4–23.

(39) *Comment:* One commenter stated that the DEA makes unexplained (and incorrect) assumptions in its development analysis: (1) The analysis assumes that all undeveloped parcels that are privately owned will be developed (Exhibit 4–24), which means future impacts on development will be disparately felt by those private landowners who do have plans to develop their land, such as Subunit 5c; (2) the analysis assumes a mean development project size of 13.5 housing units identified in the consultation history; and (3) the DEA does not explain why 60 percent was used as the only alternative to 41 percent of the 2,984 acres already subject to conservation plans.

Our Response: As described on page 4–4 of the DEA, the analysis does not assume that all undeveloped parcels that are privately owned will be developed, but instead relies on Regional Growth Forecast datasets from the Southern California Association of Governments (SCAG) and the San Diego Association of Governments (SANDAG) for information on future development in proposed revised critical habitat. These forecasts provide the total number of projected housing units at the Census tract level, which were applied at the proposed critical habitat unit level using the relationship between developable acres in the units and census tracts.

With regard to the commenter's assertion about mean development project size, as noted by the commenter and described on page 4–5, the estimated number of housing units per project is based on the consultation history. As described in Exhibit 4–24, it is uncertain whether this estimate is too high or too low, and how the number will vary across projects in the future. The commenter does not provide additional information to refine this estimate.

In section 2.4.4, the DEA describes why 60 percent and 41 percent are used as the two alternative areas subject to conservation plans. If the City of San Diego Subarea Plan was approved and implemented, an additional 19 percent of proposed critical habitat would be subject to an HCP and considered for exclusion. This additional 19 percent over the 41 percent subject to existing HCPs would lead to 60 percent of proposed critical habitat potentially subject to HCPs in the future.

(40) *Comment:* One commenter stated that the DEA should delete the willingness-to-pay study because the benefits cannot be directly compared to the costs and because it asks how much people would spend in order to protect the species from going extinct, not how much they did pay.

Our Response: For completeness, the benefits chapter of the DEA describes the results of any relevant studies that have evaluated the benefits of Riverside fairy shrimp preservation, and then describes whether or not the results of those studies can be compared to the costs estimated in the DEA. The willingness-to-pay study described by the commenter elicits the importance of preserving the Riverside fairy shrimp to local populations within the region of the proposed critical habitat using a well-accepted valuation technique. Because of its relevance, this study is summarized in the DEA. As suggested by the commenter and mentioned in chapter 6 of the DEA, the benefits presented in this study cannot be directly compared to the incremental costs quantified in chapters 4 and 5 and, as a result, the DEA does not make this comparison.

(41) *Comment:* One commenter believed that designating critical habitat in Subunit 5c would cause undue burden on the owners, who wish to develop the subunit as a landfill. The commenter stated that any delay to this multimillion dollar project could result in substantial costs and delay, and undue burden on the landowners.

Our Response: We respectfully disagree with the commenter that the designation of critical habitat would result in significant time and financial burden. The Service expects that, for the Riverside fairy shrimp, the outcome of an adverse modification analysis on lands identified as critical habitat would be similar to that of a jeopardy analysis for lands currently occupied by the Riverside fairy shrimp, including Subunit 5c. Again, because the subunit is occupied by the Riverside fairy shrimp, a jeopardy analysis would likely occur regardless of critical habitat designation. Our rationale is presented in Appendix D of the DEA (Industrial Economics Inc. 2011, pp. D–1–D–6). See also our responses to Comments 32 and 37. In the DEA analysis we note that, with regard to vernal pool species such as Riverside fairy shrimp, the outcomes of jeopardy and adverse modification analyses (in terms of potential restrictions on development) may often be similar. In general, a properly functioning hydrological regime is critical to sustain listed vernal pool species and their immediate vernal pool habitat (local watershed). Avoidance or adequate minimization of impacts to the wetland area and its associated watershed, which collectively create the hydrological regime necessary to support the Riverside fairy shrimp, are essential not only to enable the critical habitat unit to carry out its conservation function such that adverse modification is avoided, but also to avoid a jeopardy determination with regard to the continued existence (survival) of the listed species. Because the Riverside fairy shrimp is completely dependent on a properly functioning vernal pool system for its survival, at this time we are not able to differentiate meaningfully between the conservation measures needed to avoid adverse modification of critical habitat and those needed to avoid jeopardy to the species. Impacts to both wetland features where Riverside fairy shrimp actually occurs and to the associated local watershed necessary to maintain

those wetland features should generally be avoided to prevent jeopardy to the Riverside fairy shrimp or to prevent adverse modification to Riverside fairy shrimp critical habitat. Service biologists regularly work with project proponents to avoid impacts to vernal pool and ephemeral wetland habitat whenever possible; this process includes conservation measures designed to avoid or minimize impacts to both the pools and the associated local watershed area. Therefore, we do not expect that an adverse modification analysis would result in significant additional delay or cost to the landowner.

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 Executive Order 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. Executive Order 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 critical habitat designation for Riverside fairy shrimp will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the SBA, 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 on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the 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, such as: (1) Agricultural, commercial, and residential development; (2) transportation; and (3) livestock grazing and other human activities. 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 Riverside fairy shrimp. 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 FEA 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 Riverside fairy shrimp and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in chapters 4, 5, and Appendix A of the FEA, and evaluates the potential for economic impacts related to activity categories, including development, transportation, and other human activities, such as habitat management, livestock grazing, and water management, as well as impacts to the energy industry (Industrial Economics Inc. 2012, pp. 4–1–6–6, A–1–A–7).

As described in chapters 4 and 5 of the FEA, estimated incremental impacts consist primarily of administrative costs and time delays associated with section 7 consultation and CEQA review. The Service and the Federal action agency are the only entities with direct compliance costs associated with this critical habitat designation, although small entities may participate in section 7 consultation as a third party. It is, therefore, possible that the small entities may spend additional time considering critical habitat during section 7 consultation for the Riverside fairy shrimp. The FEA indicates that the incremental impacts potentially incurred by small entities are limited to the development sector.

In order to understand the potential impacts on small entities attributable to development activities, the FEA

conservatively assumed that all of the private owners of developable lands affected by the revised critical habitat designation are developers. We estimated that a total of 34.2 development projects may be affected by the revised critical habitat designation, or 1.42 projects per year. Costs per project range from $5,000 where incremental costs are limited to the additional cost of considering adverse modification during a section 7 consultation to $1.07 million where additional effort to comply with CEQA may be required, and time delays occur in areas with the highest land values. Because in most cases we are unable to identify the specific entities affected, the impact relative to those entities' annual revenues or profits is unknown. Assuming that the entities are small land subdividers with annual revenues less than $7 million, the high-end impacts represent approximately 15.2 percent of annual revenues. Of the total number of entities engaged in land subdivision and residential, commercial, industrial, and institutional construction, 97 percent are small entities. Provided the assumptions that development activity occurs at a constant pace throughout the timeframe of the analysis and each project is undertaken by a separate entity, we estimated that approximately two to three developers may be affected by the proposed revised critical habitat designation each year. Conservatively assuming that costs are borne by current landowners, and all landowners are land subdividers or construction firms, less than 3 percent or 1 percent, respectively, of all small entities in these sectors would be affected when the final revised critical habitat rule becomes effective (Industrial Economics Inc. 2012, p. A–5).

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect 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 regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EO regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In doing so, we focus on the specific areas being designated as critical habitat and compare the number of small business entities potentially affected in that area with other small business entities in the region, instead of comparing the entities in the area of designation with entities nationally, which is more commonly done. This analysis results in an estimation of a higher number of small businesses potentially affected. In this rulemaking, we calculate that less than 3 percent or 1 percent (assuming that all landowners are land subdividers or construction firms), respectively, of all small entities in the area would be affected when this final rule becomes effective. If we were to calculate that value based on the proportion nationally, then our estimate would be significantly lower than 1 percent. Following our evaluation of potential effects to small business entities from this rulemaking, we conclude that the number of potentially affected small businesses is not substantial.

The FEA also concludes that none of the government entities with which the Service might consult on the Riverside fairy shrimp for transportation or habitat management activities meets the definitions of small as defined by the SBA (Industrial Economics Inc. 2012, p. A–6); therefore, impacts to small government entities due to transportation and habitat management activities are not anticipated. A review of the consultation history for the Riverside fairy shrimp suggests future section 7 consultations on livestock grazing (for example, ranching operations) and water management are unlikely, and as a result are not anticipated to be affected by this rule (Industrial Economics Inc. 2012, pp. A–6–A–7).

In summary, we have considered whether this revised designation will result in a significant economic impact on a substantial number of small entities and the energy industry. Information for this analysis was gathered from the SBA, stakeholders, and from Service files. We determined that less than 3 percent of land subdividers or 1 percent of construction firms engaged in development activity within the area proposed for designation would be affected when the final rule becomes effective (Industrial Economics Inc. 2012, p. A–5). Given that this final rule excludes 1,259 ac (510 ha), the costs of the critical habitat designation will likely be even lower. Therefore, we are certifying that the designation of critical habitat for Riverside fairy shrimp will not have a significant economic impact on a substantial number of small entities, and an RFA 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 is relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with Riverside fairy shrimp 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 expect this rule to significantly or uniquely affect small governments. Small governments would be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions would not adversely affect critical habitat. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Riverside fairy shrimp 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 takings implications assessment concludes that this designation of revised critical habitat for Riverside fairy shrimp 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 critical habitat designation with appropriate State resource agencies in California. We received no comments from State agencies. The designation of critical habitat in areas currently occupied by the Riverside fairy shrimp imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments 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 set forth in sections 3(a) and 3(b)(2) of the Order. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested parties to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the 9th 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), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands occupied by the Riverside fairy shrimp at the time of listing that contain the features essential to conservation of the species, and no tribal lands unoccupied by the Riverside fairy shrimp that are essential for the conservation of the species. Therefore, we are not designating critical habitat for Riverside fairy shrimp on tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rulemaking are the staff members of the Carlsbad Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

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. In § 17.95, amend paragraph (h) by revising the entry for ''Riverside Fairy Shrimp (*Streptocephalus woottoni*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(h) *Crustaceans.*

* * * * *

Riverside Fairy Shrimp (*Streptocephalus woottoni*)

(1) Unit descriptions are depicted for Ventura, Orange, and San Diego Counties, California, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Riverside fairy shrimp consist of three components:

(i) Ephemeral wetland habitat consisting of vernal pools and ephemeral habitat that have wet and dry periods appropriate for the incubation, maturation, and reproduction of the Riverside fairy shrimp in all but the driest of years, such that the pools:

(A) Are inundated (pond) approximately 2 to 8 months during winter and spring, typically filled by rain, surface, and subsurface flow;

(B) Generally dry down in the late spring to summer months;

(C) May not pond every year; and

(D) Provide the suitable water chemistry characteristics to support the Riverside fairy shrimp. These characteristics include physiochemical factors such as alkalinity, pH, temperature, dissolved solutes, dissolved oxygen, which can vary depending on the amount of recent precipitation, evaporation, or oxygen saturation; time of day; season; and type and depth of soil and subsurface layers. Vernal pool habitat typically exhibits a range of conditions but remains within the physiological tolerance of the species. The general ranges of conditions include, but are not limited to:

(*1*) Dilute, freshwater pools with low levels of total dissolved solids (low ion levels (sodium ion concentrations generally below 70 millimoles per liter));

(*2*) Low alkalinity levels (lower than 80 to 1,000 milligrams per liter (mg/l)); and

(*3*) A range of pH levels from slightly acidic to neutral (typically in range of 6.4–7.1).

(ii) Intermixed wetland and upland habitats that function as the local watershed, including topographic features characterized by mounds, swales, and low-lying depressions within a matrix of upland habitat that result in intermittently flowing surface and subsurface water in swales, drainages, and pools described in paragraph (h)(2)(i) of this entry. Associated watersheds provide water to fill the vernal or ephemeral pools in the winter and spring months. Associated watersheds vary in size and therefore cannot be generalized, and they are affected by factors including surface and underground hydrology, the topography of the area surrounding the pool or pools, the vegetative coverage, and the soil substrates in the area. The size of associated watersheds likely varies from a few acres to greater than 100 ac (40 ha).

(iii) Soils that support ponding during winter and spring which are found in areas characterized in paragraphs (h)(2)(i) and (h)(2)(ii), respectively, of this entry, that have a clay component or other property that creates an impermeable surface or subsurface layer. Soil series with a clay component or an impermeable surface or subsurface layer typically slow percolation, increase water run-off (at least initially), and contribute to the filling and persistence of ponding of ephemeral wetland habitat where the Riverside fairy shrimp occurs. Soils and soil series known to support vernal pool habitat include, but are not limited to:

(A) The Azule, Calleguas, Cropley, and Linne soils series in Ventura County;

(B) The Alo, Balcom, Bosanko, Calleguas, Cieneba, and Myford soils series in Orange County;

(C) The Cajalco, Claypit, Murrieta, Porterville, Ramona, Traver, and Willows soils series in Riverside County; and

(D) The Diablo, Huerhuero, Linne, Placentia, Olivenhain, Redding, Salinas, and Stockpen soils series in San Diego County.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on January 3, 2013.

(4) *Critical habitat map units.* Data layers defining map units were created using a base of U.S. Geological Survey 7.5′ quadrangle maps. Unit descriptions were then mapped using Universal Transverse Mercator (UTM) zone 11, North American Datum (NAD) 1983 coordinates. The maps in this entry, as modified by any accompanying

regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public on *http://regulations.gov* at Docket No. FWS–R8–ES–2011–0013, on our Internet site (*http://www.fws.gov/carlsbad/*), and at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011.

(5) **NOTE:** Index map follows:

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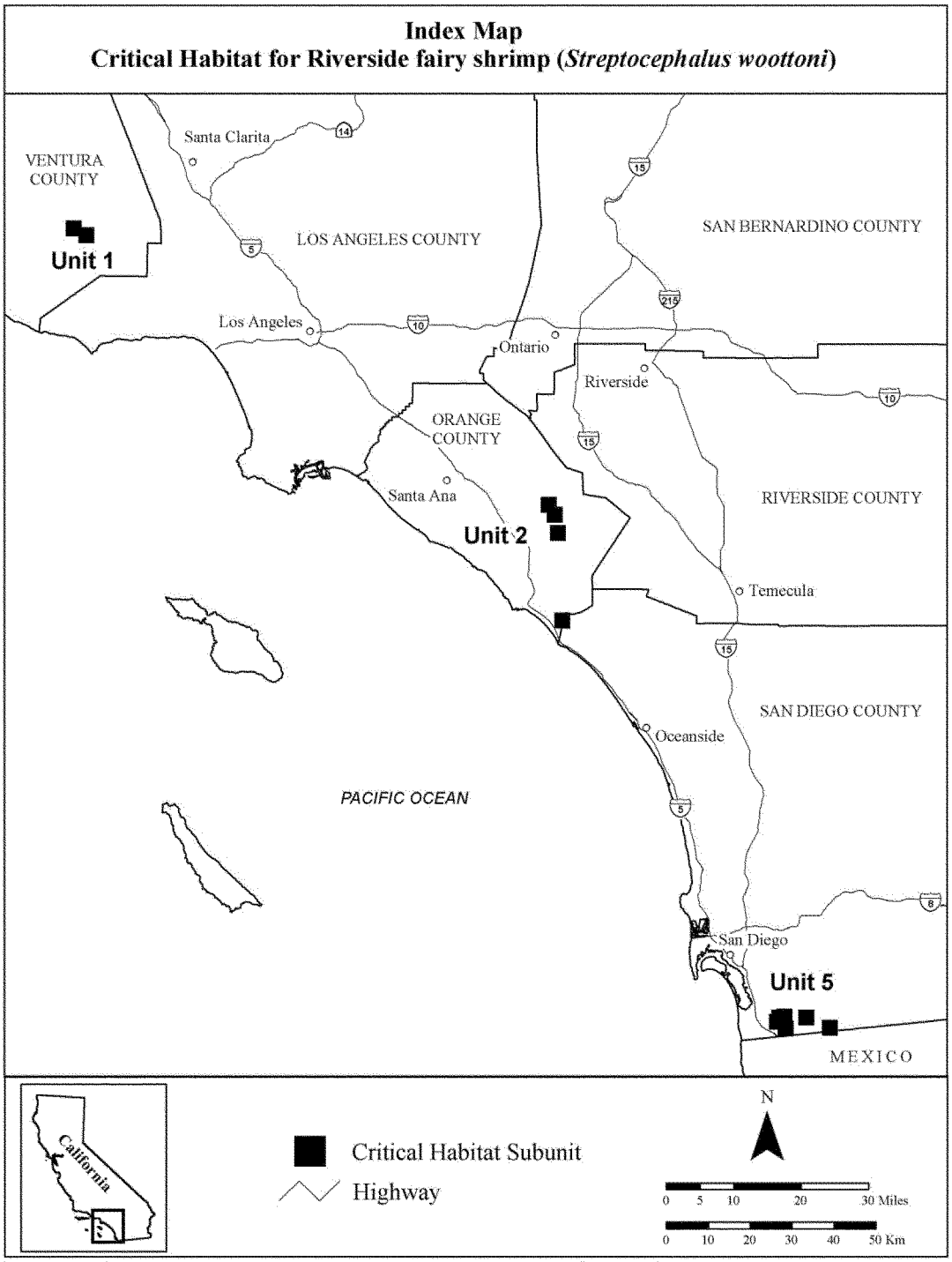
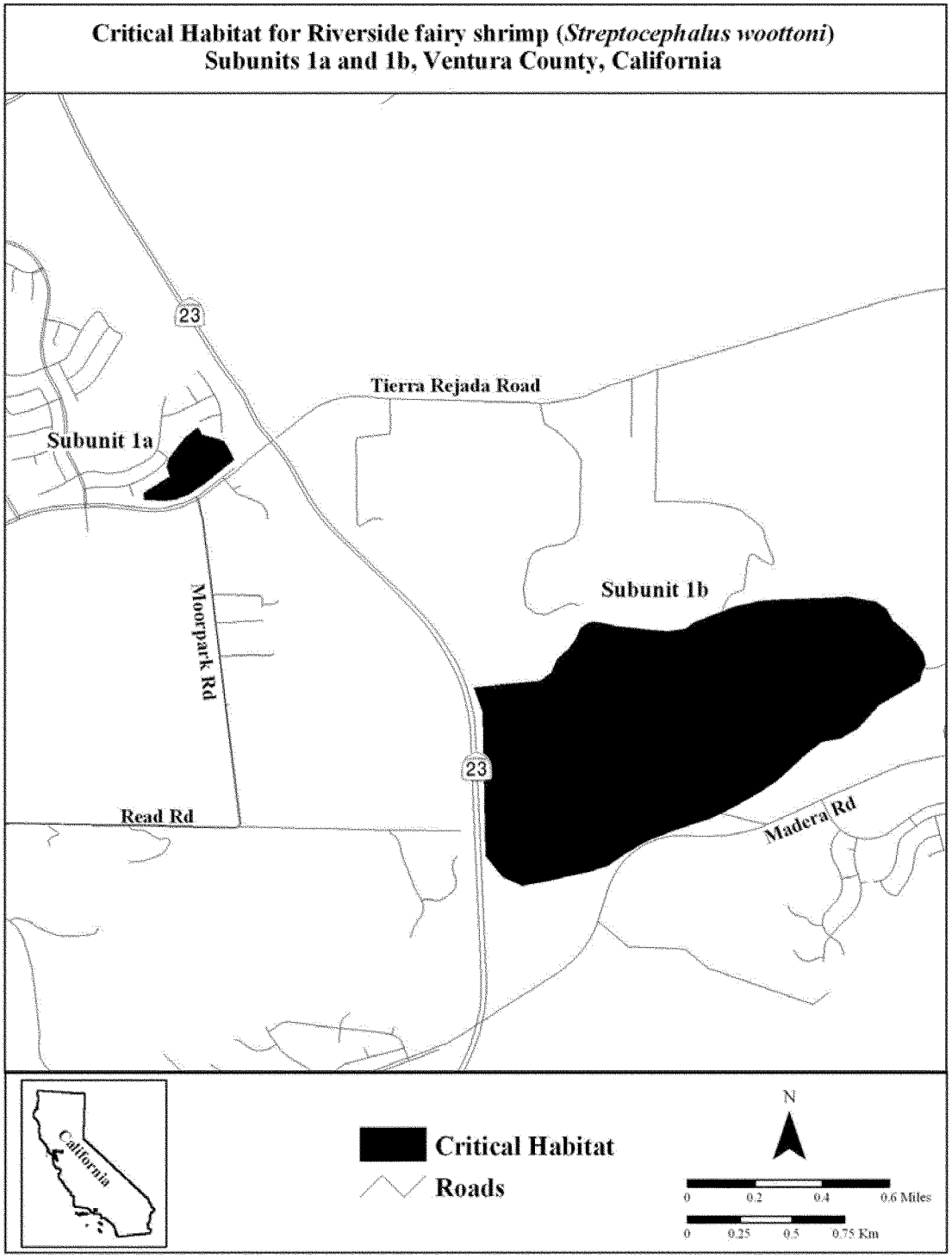
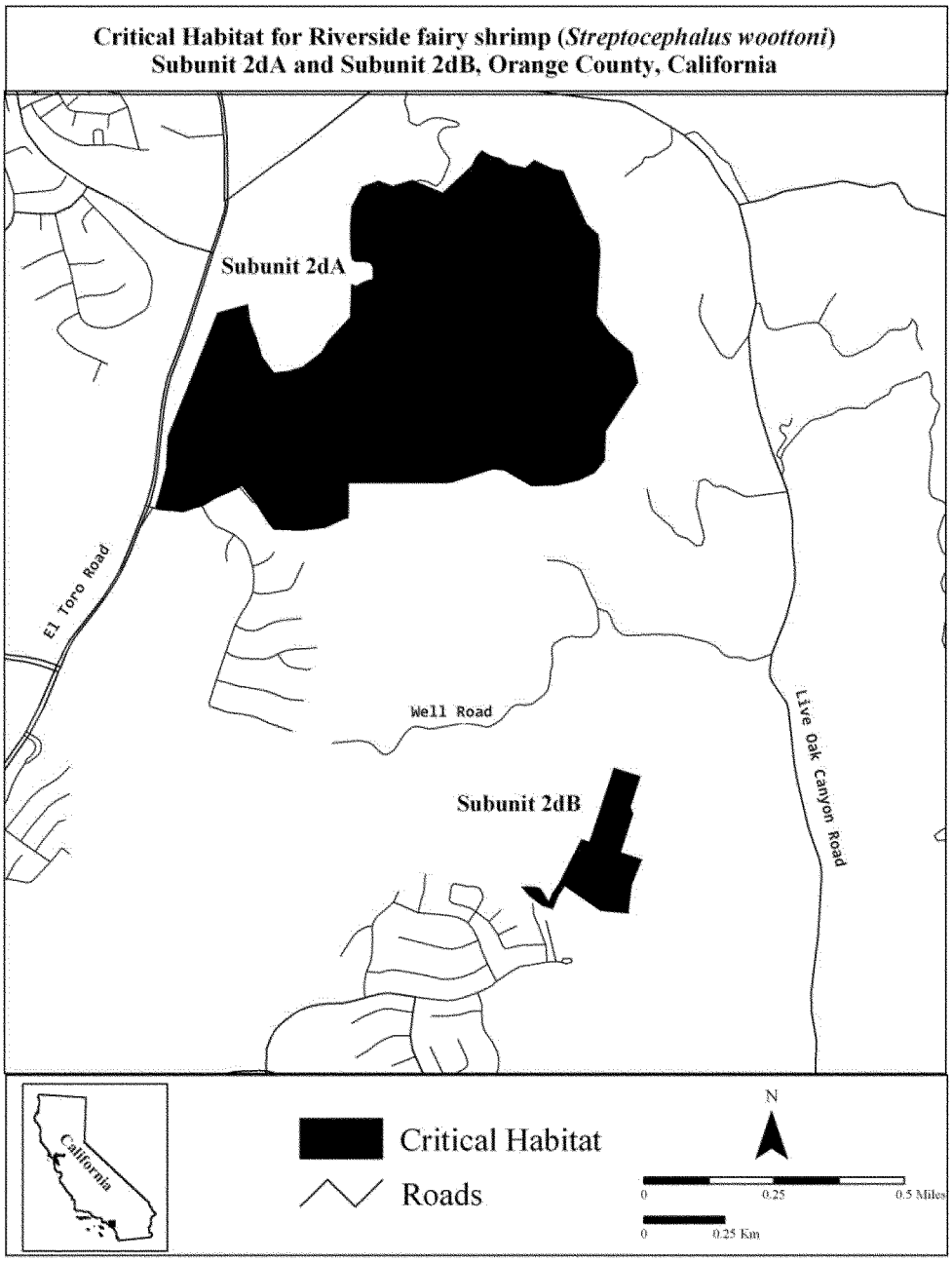


(6) Unit 1: Ventura County, California. Map of Subunit 1a, Tierra Rejada Preserve, and Subunit 1b, South of Tierra Rejada Valley, follows:

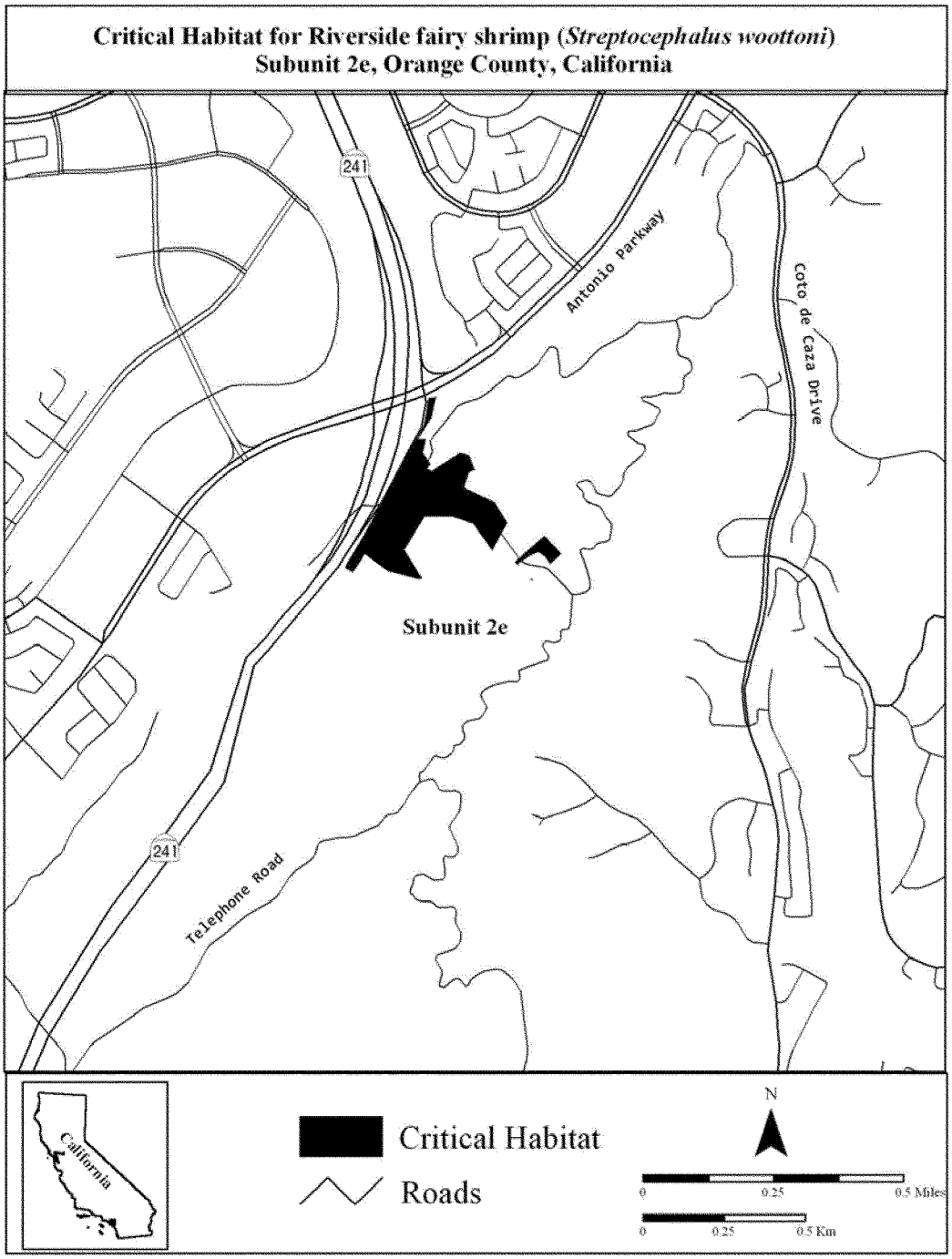


(7) Unit 2: Los Angeles Basin-Orange County Foothills, Orange County, California.

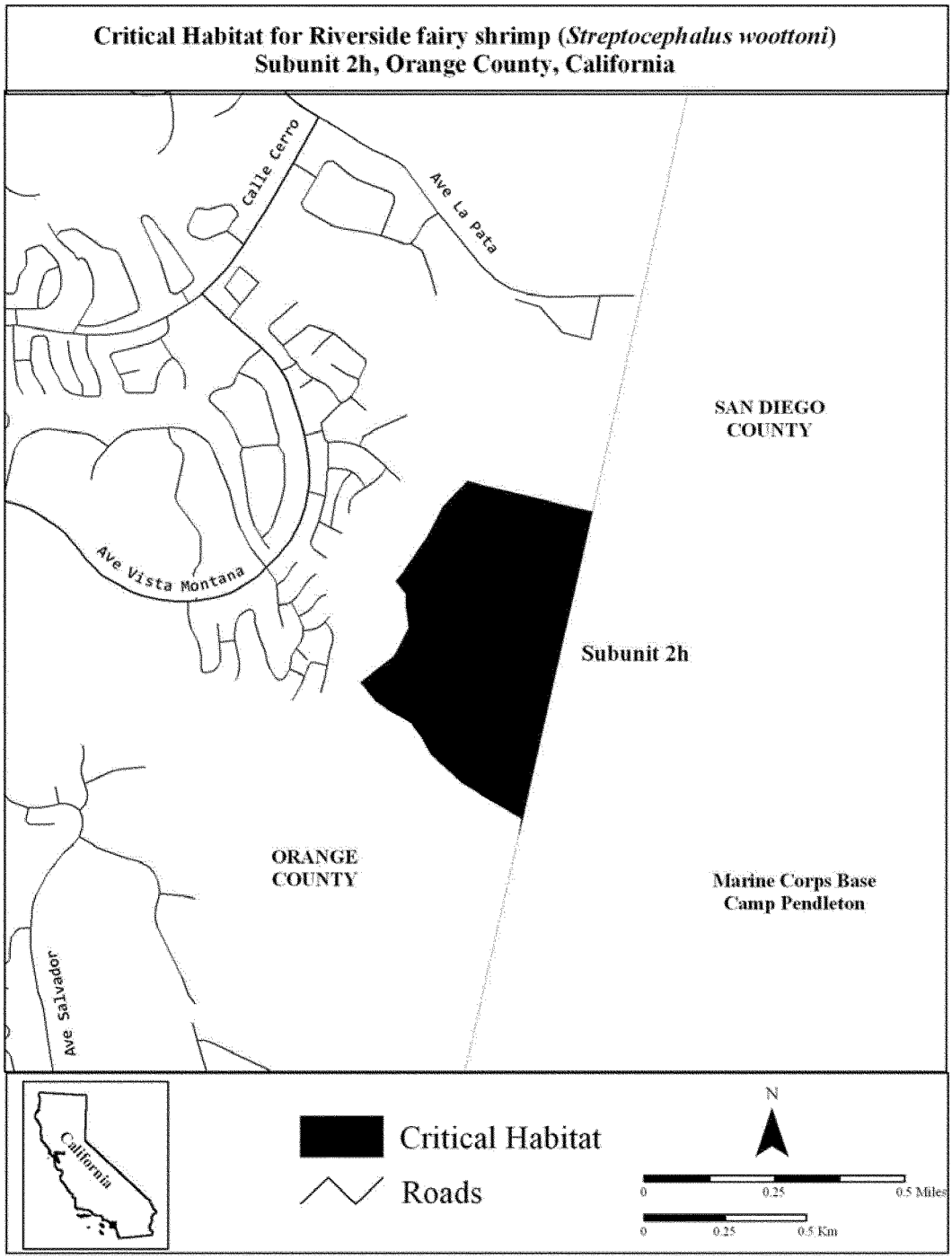
(i) Map of Subunit 2dA, Saddleback Meadows, and Subunit 2dB, O'Neill Regional Park (near Trabuco Canyon), follows:



(ii) Map of Subunit 2e, O'Neill Regional Park (near Cañada Gobernadora), follows:

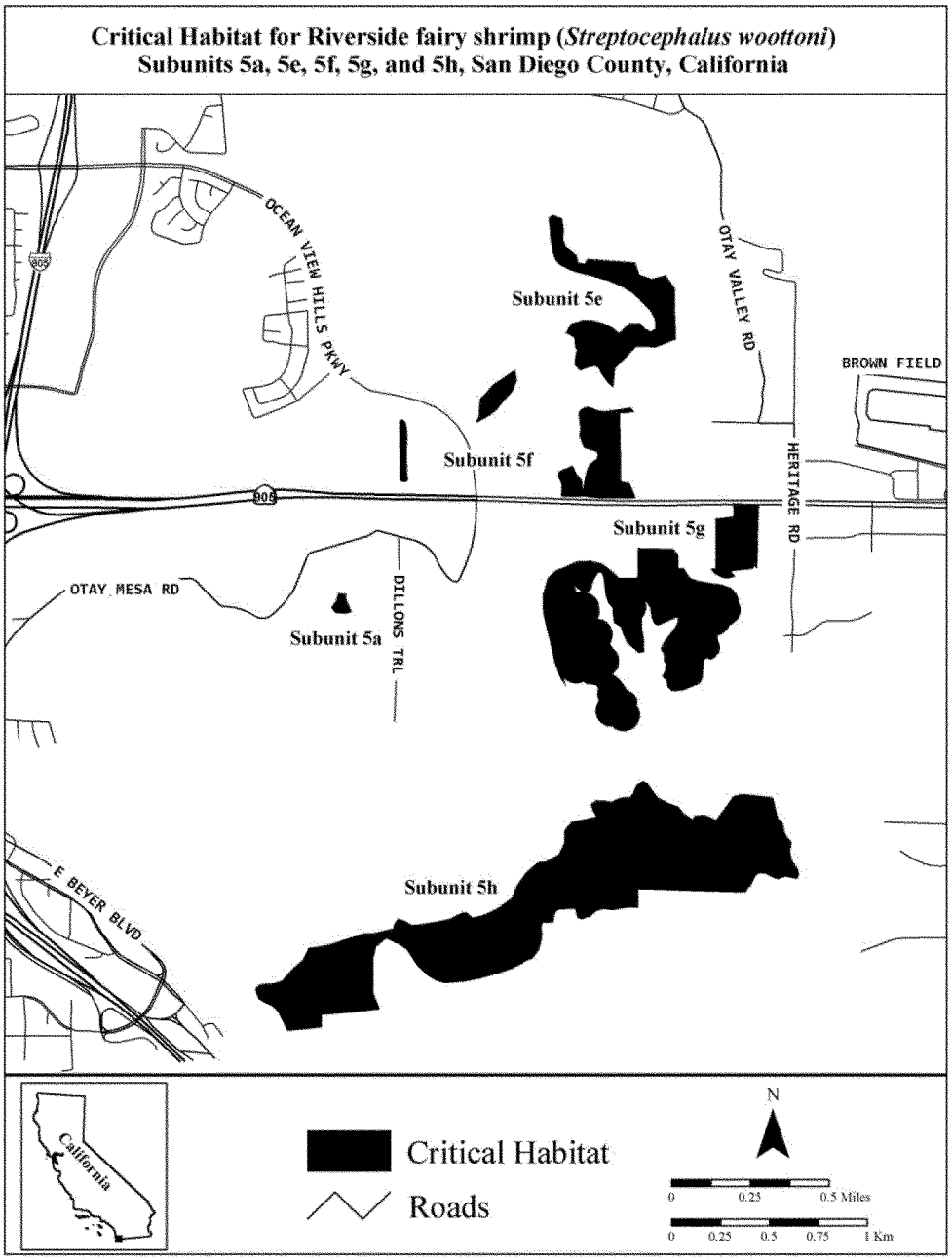


(iii) Map of Subunit 2h, San Onofre State Beach, State Park-leased land (near Christianitos Creek foothills) (near Camp Pendleton), follows:

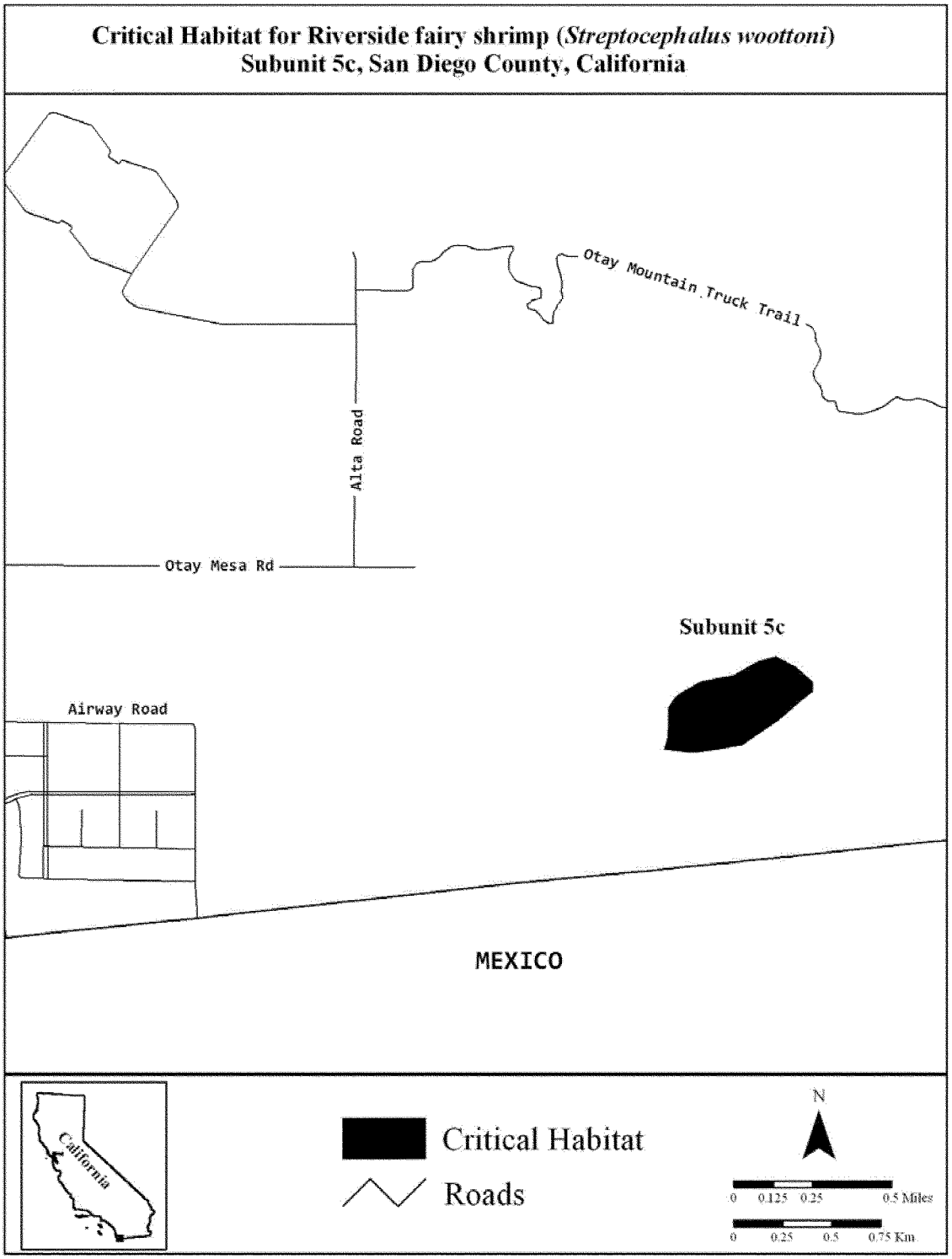


(8) Unit 5: San Diego Southern Coastal Mesas, San Diego County, California.

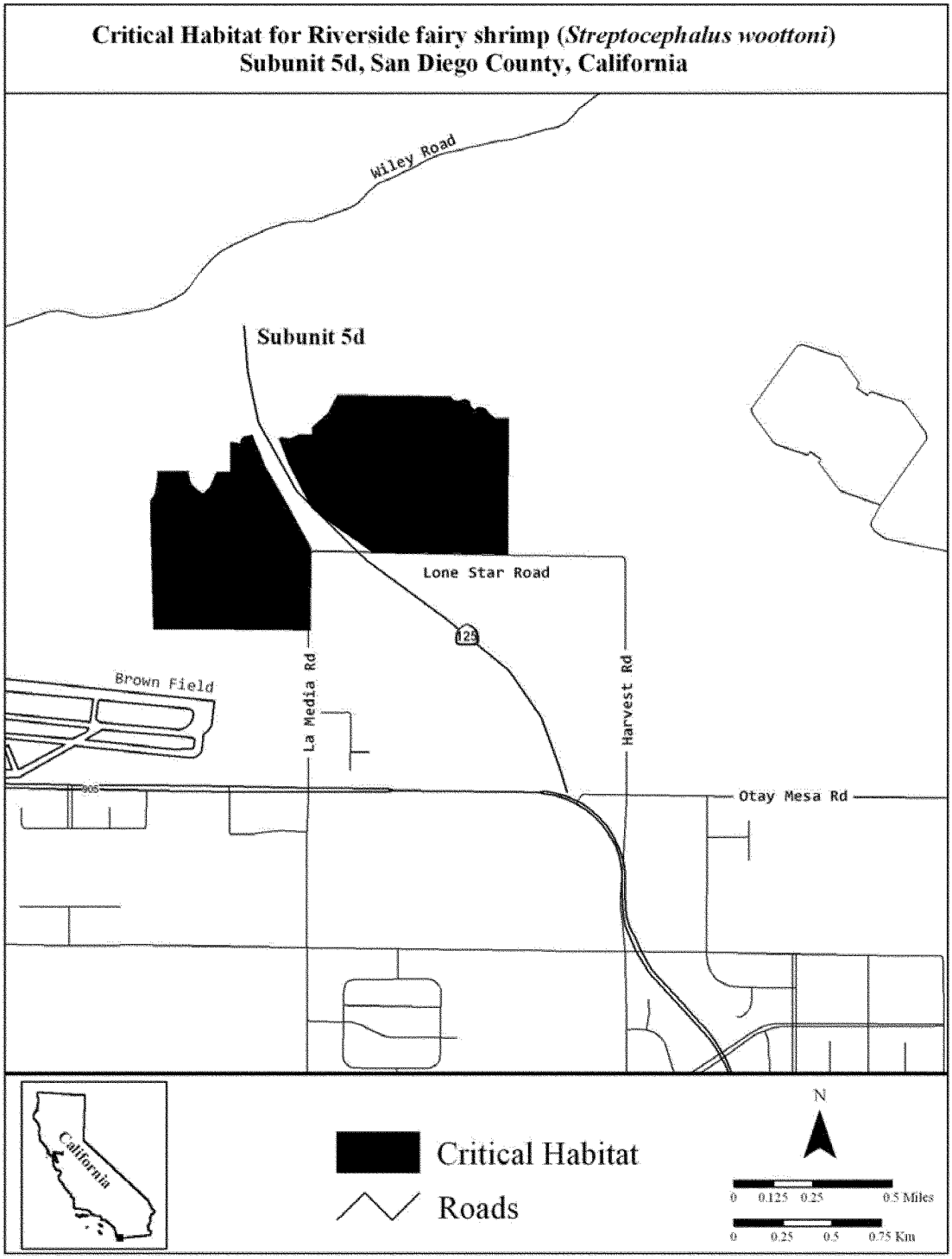
(i) Map of Subunit 5a, Sweetwater (J33); Subunit 5e, J2 N, J4, J5 (Robinhood Ridge); Subunit 5f, J2 W and J2 S (Hidden Trails, Cal Terraces, Otay Mesa Road); Subunit 5g, J14; and Subunit 5h, J11 E and J11 W, J12, J16–18 (Goat Mesa), follows:



(ii) Map of Subunit 5c, East Otay Mesa, follows:



(iii) Map of Subunit 5d, J29–31, follows:



* * * * *

Dated: November 14, 2012.

Rachel Jacobson,

Principal Deputy Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–28250 Filed 12–3–12; 8:45 am]

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Part IV

Department of Labor

Office of the Secretary

29 CFR Part 18

Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges; Proposed Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 18

RIN 1290–AA26

Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor proposes to revise and reorganize the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, from our regulations, which provide procedural guidance to administrative law judges, claimants, employers, and Department of Labor representatives seeking to resolve disputes under a variety of employment and labor laws. The Office of Administrative Law Judges promulgated these regulations in 1983. The regulations were modeled on the Federal Rules of Civil Procedure (FRCP) and have proved extraordinarily helpful in providing litigants with familiar rules governing hearing procedure.

Since 1983, the FRCP have been amended many times. Moreover, in 2007 the FRCP were given a complete revision to improve style and clarity. The nature of litigation has also changed in the past 28 years, particularly in the areas of discovery and electronic records. Thus, OALJ has revised its regulations to make the rules more accessible and useful to parties, and to harmonize administrative hearing procedures with the current FRCP. The goal in amending the regulations is to provide clarity through the use of consistent terminology, structure and formatting so that parties have clear direction when pursuing or defending against a claim.

In addition to revising the regulations to conform to modern legal procedure, the rules need to be modified to reflect the types of claims now heard by OALJ. When the rules were promulgated in 1983, OALJ primarily adjudicated occupational disease and injury cases. Presently, and looking ahead to the future, OALJ is and will be increasingly tasked with hearing whistleblower and other workplace retaliation claims, in addition to the occupational disease and injury cases. These types of cases require more structured management and oversight by the presiding administrative law judge and more sophisticated motions and discovery procedures than the current regulations provide. In order to best manage the complexities of whistleblower and discrimination claims, OALJ needs to update its rules to address the procedural questions that arise in these cases.

DATES: Submit comments on or before February 4, 2013.

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

Electronically: You may submit your comments and attachments electronically at *www.regulations.gov.*

Mail, hand delivery, express mail, messenger or courier service: You may submit your comments and attachments to the U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW., Suite 400-North, Washington, DC 20001–8002; telephone (202) 693–7300. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Office of Administrative Law Judges' normal business hours, 8:00 a.m.–4:30 p.m., e.t.

Instruction for submitting comments: Please submit only one copy of your comments via any of the methods noted in this section. All submissions received must include the agency name, as well as RIN 1290–AA26. Also, please note that due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, in order to ensure that comments are received on time, the Department encourages the public to submit comments electronically as indicated above. For further information on submitting comments, plus additional information on the rulemaking process, see the ''Public Participation'' heading in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Todd Smyth at the U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW Suite 400-North, Washington, DC 20001–8002; telephone (202) 693–7300.

SUPPLEMENTARY INFORMATION:

I. Background

Administrative law judges at the Office of Administrative Law Judges (OALJ), United States Department of Labor (Department), conduct formal hearings under the Administrative Procedure Act, 5 U.S.C. 554 through 557. An administrative law judge manages hearings that mirror federal civil litigation, is bound by applicable rules of evidence and procedure, and is insulated from political influence. *See Tennessee* v. *U.S. Dep't of Transp.,* 326 F.3d 729, 735–36 (6th Cir. 2003). An administrative law judge acts as the functional equivalent of a trial judge. *See Fed. Mar. Comm'n* v. *S.C. State Ports Auth.,* 535 U.S. 743, 756–57 (2002). The types of cases heard by administrative law judges involve a full range of complexity, from simple administrative review of an existing administrative record to de novo, trial-type litigation. Consequently, rules of practice and procedure are essential to a just, speedy, and inexpensive determination of every proceeding.

The current Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR part 18, subpart A (Part 18, Subpart A), were published on July 15, 1983. *See* 48 FR 32538, 32538, July 15, 1983. Rarely have they been altered. Some rules relating to discovery were amended in 1994. *See* 59 FR 41874, 41876, Aug. 15, 1994. The most recent amendment, made in August 1999, permitted the appointment of settlement judges in cases arising under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.,* and associated statutes. *See* 64 FR 47088, 47089, Aug. 27, 1999. Since its original publication, Part 18, Subpart A has never been comprehensively revised to keep abreast of ongoing changes to the procedures that govern civil litigation in federal trial courts.

The OALJ rules of practice and procedure are analogous to the Federal Rules of Civil Procedure used in the United States District Courts. Congress authorized the Supreme Court to prescribe rules for the United States District Courts in 1934, under the Rules Enabling Act, 28 U.S.C. 2072. The original version of those rules became effective on September 16, 1938.[1] Since 1938, thirty-three sessions of Congress have approved changes to the FRCP, from 1941 through the most recent amendments that took effect on December 1, 2010. Significant amendments became effective in 1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, 2000, 2006, 2007, 2009, and 2010. *Id.* The procedural rules for OALJ have not kept pace with the eight groups of changes to the FRCP since the early 1980s.

The disputes that comprise the docket at OALJ have also changed with time. When the rules of practice and procedure were first published, OALJ's judges mainly (but not exclusively) were devoting their efforts to deciding benefit claims under two broad statutory categories:

[1] Staff of H. Comm. on the Judiciary, 111th Cong., Federal Rules of Civil Procedure with Forms at vii (Comm. Print 2010), *www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf.*

• The Black Lung Benefits Act, subchapter 4 of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 *et seq.* (1969); and

• The Longshore Act and its extensions, which included the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 (1927); the Outer Continental Shelf Lands Act, 43 U.S.C. 1333 (1953); and the Defense Base Act, as amended, 42 U.S.C. 1651 (1941).[2]

Over the last nearly two decades, Congress charged the Department of Labor (and consequently the OALJ) with the responsibility to hear and decide matters under many new statutes. Most relate to complaints by employees who assert their employers retaliated against them after they engaged in whistleblower activity. Some of these statutes for example are:

• Section 110 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, Public Law 96–510, 94 Stat. 2787, enacted on December 11, 1980;

• Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. 31105, Public Law 97–424, 96 Stat. 2097, 2157–58, first enacted on January 6, 1983 (and originally codified as 49 U.S.C. 2301 *et seq.*), and last amended by sec. 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, 121 Stat. 464, enacted on August 3, 2007;

• Section 212(n)(2)(C)(iv) of the Immigration and Nationality Act, 8 U.S.C. 1182(n)(2)(C)(iv), as amended by the American Competitiveness and Workforce Improvement Act of 1998, which was part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Public Law 105–277, div. C, tit. IV, sec. 411(a), 112 Stat. 2681–641 to 2681–657, enacted on October 21,1998;

• Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, Public Law 106–181, 114 Stat. 145, enacted on April 5, 2000;

• Section 6(a) of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. 60129, Public Law 107–355, 116 Stat. 2989, enacted on December 17, 2002;

• Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the Sarbanes-Oxley Act), 18 U.S.C. 1514A, Public Law 107–204, 116 Stat. 802, first enacted on July 30, 2002, and last amended by sec. 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1848, 1852, enacted on July 21, 2010;

• Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, 6 U.S.C. 1142, Public Law 100–53, 121 Stat. 414, that amended the National Transit Systems Security Act on August 3, 2007; and

• Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, 49 U.S.C. 20109, Public Law 100–53, 121 Stat. 444, that amended the Federal Railroad Safety Act on August 3, 2007.

Congress remains active in the area of whistleblower protection. On July 21, 2010, Congress created and expanded whistleblower protection for employees in the financial services industry under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203. On October 15, 2010, it amended another employment protection program that includes the opportunity for a hearing before an administrative law judge at the OALJ. *See* the amendment to the Seaman's Protection Act in sec. 611 of the Coast Guard Authorization Act of 2010, 46 U.S.C. 2114, Public Law 111–281, 124 Stat. 2969. This year Congress established an additional right to an administrative hearing for whistleblowing employees in sec. 402 of the FDA Food Safety Modernization Act, 21 U.S.C. 399d, Public Law 111–353, 124 Stat. 3968, enacted January 4, 2011.

The substantive program regulations the Department has published to implement many of the statutes that grant workers and employers formal hearings on claims of workplace retaliation offer limited guidance about the procedures those adjudications should follow. Regulations often incorporate instead the procedural rules of Part 18, Subpart A. *See, e.g.,* 29 CFR 1978.107(a), 1979.107(a), 1980.107(a) (2011) (STAA, AIR21, and Sarbanes-Oxley regulations, respectively). In adopting program regulations, the Department has acknowledged it was leaving matters like the ''place of hearing, right to counsel, procedures, evidence and record of hearing, oral arguments and briefs, and dismissal for cause'' to the Part 18, Subpart A rules precisely ''because the Office of Administrative Law Judges has adopted its own rules of practice that cover these matters.'' 76 FR 2808, 2814, Jan. 18, 2011 (amending the 29 CFR part 24 regulations that cover whistleblowers in the nuclear power and environmental industries).

The growth in whistleblower jurisdiction has led OALJ to search for ways to manage those proceedings efficiently. Implementing procedures the federal district courts have developed or refined since 1983 will improve the current Part 18, Subpart A rules.

For example, several regulations that govern whistleblower claims explicitly grant the presiding judge ''broad discretion to limit discovery'' as a way to ''expedite the hearing.'' 29 CFR 1979.107(b), 1980.107(b), 1981.107(b). The Department's discussion when it published the final rules on Sarbanes-Oxley matters offered as an illustration that the judge may ''limit the number of interrogatories, requests for production of documents or depositions allowed.'' 69 FR 52104, 52110, Aug. 24, 2004. Other program regulations, such as those that govern disputes under the Energy Reorganization Act and six environmental statutes that cover whistleblowers in the nuclear and environmental industries published at 29 CFR part 24, incorporate the Part 18, Subpart A regulations without an explicit reference to a judge's authority to control discovery. *See* 29 CFR 24.107(a). The Preface to those Part 24 regulations nonetheless recognizes that the current Part 18, Subpart A regulations invest a judge with broad authority ''to limit discovery in appropriate circumstances.'' 76 FR at 2815. Whether a program regulation specifically recognizes a judge's authority to limit or manage discovery, or implicitly does so by adopting the Part 18, Subpart A regulations, the judge will consider the parties' views on the discovery appropriate to develop the facts for hearing before limiting it. As detailed below, the early initial disclosures the federal courts now require parties to exchange under Fed. R. Civ. P. 26(a)(1) obviates the need for some formal discovery. The discovery plan that parties craft under Fed. R. Civ. P. 26(f) after they confer at the outset of the litigation offers a ready way to tailor discovery to the proceeding.

A 2010 study surveyed lawyers who were the attorneys of record in federal civil cases that terminated in the last quarter of 2008 about their satisfaction with the current FRCP. Lawyers from the Litigation Section of the American Bar Association and from the National Employment Lawyers Association were sampled too. The survey instrument had been developed jointly by the American

[2] Judges at OALJ continue to hear a very few claims under another Longshore Act extension, the District of Columbia Workmen's Compensation Act of 1928, 36 DC Code § 501 *et seq.,* despite the District's adoption of its own workers' compensation law. For claims that involve an injury suffered before the District's own law took effect in mid-1982, judges at OALJ continue to hear them. *Keener* v. *Wash. Metro. Transit Auth.,* 800 F.2d 1173, 1175 (D.C. Cir. 1986).

College of Trial Lawyers and the Institute for the Advancement of the American Legal System. A majority of lawyers across all the groups responded that active case management by judges offered a useful way to limit or avoid abusive, frivolous, or unnecessary discovery. Emery G. Lee & Thomas E. Willging, Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules 3, 9 (2010). These survey results mesh comfortably with comments the Department received as the 29 CFR part 24 regulations were amended. Some lawyers who commented there urged the Department, among other things, to require parties to those whistleblower claims to exchange the initial disclosures now mandated by Fed. R. Civ. P. 26(a)(1). 76 FR at 2815.

Updating the Part 18, Subpart A regulations has value beyond whistleblower litigation. Regulations for the Longshore and Harbor Workers' Compensation Act published at 20 CFR 702.331 through 702.351 predate Part 18, Subpart A. They sketch out only broad outlines of how hearings should proceed, so the parties and judges fall back on the Part 18, Subpart A rules in cases brought under the Longshore Act and its extensions. Workers, their employers, and insurance carriers also will profit from updated procedures that avoid the need to serve discovery to learn basic information, and allow more focused case management.

The Department believes that in many instances the current Part 18, Subpart A rules provide limited guidance. Judges have addressed the current rules' limitations by managing procedural matters through orders, often directing parties to follow aspects of the various updates to the FRCP. The consequent variety in approaches to case management has troubled some lawyers, especially those with nationwide client bases who routinely practice before different judges throughout the nation.

Lastly, the Department recognizes that the current Part 18, Subpart A rules can be stated more clearly, something the 2007 style amendments to the FRCP highlight. The style amendments were the first comprehensive overhaul since the FRCP were adopted in 1938. Taking more than four years to complete, they aspired to simplify and clarify federal procedure. The more austere sentence structure used throughout the restyled FRCP made them shorter, easier to read and more clearly articulated. The amendments proposed to Part 18, Subpart A emulate those improvements.

The Department's principal goals in revising Part 18, Subpart A were to:

- Bring the rules into closer alignment with the current FRCP;
- Revise the rules to aid the development of facts germane to additional sorts of adjudications the Department's judges handle;
- Enhance procedural uniformity, while allowing judges to manage cases flexibly, because (a) An administrative proceeding is meant to be less formal than a jury trial; (b) local trial practice in different regions of the country should be accommodated when doing so does not affect substantive rights; and (c) governing statutes and substantive regulations may impose their own specific procedural requirements; and
- Make the rules clearer and easier to understand through the use of consistent terminology, structure, and formatting.

II. Alignment With the Federal Rules of Civil Procedure

The decisions and orders that judges enter to resolve cases under sec. 556 and 557 of the Administrative Procedure Act resemble findings of fact and conclusions of law federal district and magistrate judges enter in non-jury cases under Fed. R. Civ. P. 52. Matters proceed before OALJ much the way non-jury cases move through the federal courts.

Using language similar or identical to the applicable FRCP gains the advantage of the broad experience of the federal courts and the well-developed precedent they have created to guide litigants, judges, and reviewing authorities within the Department on procedure. Parties and judges obtain the additional advantage of focusing primarily on the substance of the administrative disputes, spending less time on the distraction of litigating about procedure.

Part 18, Subpart A currently provides that the ''Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.'' 29 CFR 18.1(a). Experienced practitioners know to consult the FRCP for guidance in circumstances the current Part 18, Subpart A rules do not explicitly cover. Given the developments in the FRCP since 1983, parties and judges switch back and forth between two different sources of procedure (the Part 18, Subpart A rules and the FRCP). This is a less than ideal situation. The proposed revision continues the current practice of looking to the federal civil rules to resolve procedural questions that the revised Part 18, Subpart A rules do not explicitly cover, a principle that § 18.1(a) has embodied for over twenty-five years.

Pretrial procedures under the FRCP have significantly changed since Part 18, Subpart A was published in 1983. Some of the most significant changes have encompassed:

- The scope of pretrial discovery;
- How time is computed under the FRCP;
- The innovation of early mandatory disclosures about documentary proof and lay and expert witness testimony that were unknown to litigation practice in 1983, the related discovery plans the parties now negotiate, and the ongoing duty parties now bear to supplement their mandatory disclosures and discovery responses;
- Alterations to the rule on pretrial conferences to encourage judges to manage cases, and give them the tools to do so;
- Imposing presumptive limitations on aspects of discovery;
- Adding rules on the discovery of electronically stored information, a rare source of information in the early 1980's that has become ubiquitous today; and
- The procedure, but not the standard, for granting summary judgment under Fed. R. Civ. P. 56 that was substantially revised in 2010.

The 2007 style amendments to the FRCP in some instances altered the original numbering of provisions that first came into being after 1983. The current rule numbers from the 2010 edition of the FRCP are used in the following discussion of significant changes in litigation practice since 1983.

A. Scope of Discovery

The scope of discovery has changed. The formulation used in current Part 18, Subpart A at § 18.14 extends discovery to ''any matter, not privileged, which is relevant to the subject matter involved in the proceeding.'' The FRCP now permits parties the somewhat narrower opportunity to learn about unprivileged matters ''relevant to a party's claim or defense.'' Advisory Committee Notes to the 2000 Amendments to Fed. R. Civ. P. 26(b)(1); Jeffery W. Stemple & David F. Herr, *Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery,* 199 F.R.D. 396, 398 (2001).

B. Time Computation

Litigation requires timely filings and actions. The way time is calculated under Fed. R. Civ. P. 6 changed in 2009. In the Department's view, the Part 18, Subpart A rules should be harmonized with the FRCP so parties and their lawyers use the simpler, clearer, and more consistent way federal courts now

calculate time. Part 18, Subpart A presently excludes weekends and legal holidays when computing some deadlines but not others. *See* current 29 CFR 18.4(a). Fed. R. Civ. P. 6 now counts intervening weekends and holidays for all time periods. Most short periods found throughout the FRCP were extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. Five-day periods became 7-day periods and 10-day periods became 14-day periods, in effect maintaining the status quo.

Time periods in the FRCP shorter than 30 days also were revised to multiples of 7 days, to reduce the likelihood of ending on weekends. Other changes to the FRCP time-computation rules affect how to tell when the last day of a period ends, and how to compute backward-counted periods that end on a weekend or holiday.

C. Mandatory Disclosures, Their Supplements, and Discovery Plans

The Department believes that the success the federal courts have had with requiring parties to exchange elementary information early in the dispute, without the need for a formal discovery demand, should be incorporated into OALJ's procedures for most cases. The same is true for the way the federal courts require parties to disclose the opinions of experts, and to supplement disclosures and discovery responses.

Disclosures of information relevant to the claims or defenses a party may raise in the litigation were required in the 1993 amendments to the FRCP. *See* David D. Siegel, *The Recent (Dec. 1, 1993) Changes in the Federal Rules of Civil Procedure: Background, the Question of Retroactivity, and a Word about Mandatory Disclosure,* 151 F.R.D. 147 (1993). Although originally subject to variation by local rule of a district court, by 2000 the disclosures became mandatory and nationally uniform (although the federal courts exempted a narrow group of cases that were unlikely to benefit from required disclosures).

The disclosure obligation was narrowed in 2000 to embrace only information the party would use to support its claims or defenses at a pretrial conference, to support a motion, to question a witness during a discovery deposition, or at trial. Advisory Committee Notes to the 2000 Amendments to Fed. R. Civ. P. 26(a). These mandatory disclosures cover basic information needed to prepare most cases for trial or to make an informed decision about settlement. Advisory Committee Notes to the 1993 Amendments to Fed. R. Civ. P. 26(a). They must be exchanged at the outset of the proceeding, even before the opponent issues any discovery request, and for the most part there is a moratorium on discovery until the automatic disclosures are made. Fed. R. Civ. P. 26(d)(1). Few excuses for failing to make timely disclosures are countenanced. Fed. R. Civ. P. 26(a)(1)(E). These prompt initial disclosures lead to an early conference where the parties discuss whether the case can be settled and negotiate a proposed discovery schedule they report to the judge. Fed. R. Civ. P. 26(f)(2).

Other amendments enhanced the pretrial disclosure of the opinions of an expert witness. A party now is required to:

- Provide a detailed written report, signed by an expert who is retained or specially employed to give expert testimony, under Fed. R. Civ. P. 26(a)(2)(B);
- Deliver the report before the expert is deposed, under Fed. R. Civ. P. 26(b)(4); and
- Prepare and serve a disclosure of the expert's testimony if the expert was not retained or specially employed to testify (and so not required to write and sign a report), under Fed. R. Civ. P. 26(a)(2)(C).

By signing and serving a required disclosure (or any discovery response), the lawyer attests that it is complete and correct; consistent with the rules; not interposed for an improper purpose; and not unreasonable nor unduly burdensome or expensive, given the needs and prior discovery in the case, the amount in controversy, and the importance of the issues at stake. Fed. R. Civ. P. 26(g).

A required disclosure that turns out to have been incomplete or incorrect in some material respect must be supplemented ''in a timely manner.'' Fed. R. Civ. P. 26(e). The duty to supplement extends to a required report or disclosure about expert witness testimony and to a discovery response. *Id.*

D. Case Management Through Pretrial Conferences and Orders

The amendments to Fed. R. Civ. P. 16 made in 1993 enhanced a judge's authority to manage litigation with the goal of achieving the just, speedy, and inexpensive determination of a matter through the use of scheduling orders under Fed. R. Civ. P. 16(b) and pretrial conferences under Fed. R. Civ. P. 16(c). Those revisions to Fed. R. Civ. P. 16 expanded the judge's authority to ''take appropriate action'' in a civil case. Charles R. Ritchey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of the Bench and Bar,* 157 F.R.D. 69, 75 (1994).

A pretrial conference offers the opportunity to appropriately control the extent and timing of discovery. At a conference the parties and judge may consider ways to avoid unnecessary proof and cumulative evidence at trial (including expert testimony) under what is now Fed. R. Civ. P. 16(c)(2)(D). Determining whether a motion for summary adjudication is even appropriate, and setting the time to file it, may be discussed under Fed. R. Civ. P. 16(b)(3)(A), (c)(2)(E). *See generally* D. Brock Hornby, *Summary Judgment Without Illusions,* 13 Green Bag 2d 273, 284–85 (2010) (explaining the complexity of the summary judgment process). Controlling discovery and setting deadlines for initial, expert, and pretrial disclosures under Fed. R. Civ. P. 26; for stipulations under Fed. R. Civ. P. 29; and dealing with failures to make disclosures or to cooperate in discovery under Fed. R. Civ. P. 37, all may be considered at a pretrial conference under Fed. R. Civ. P. 16(c)(2)(F). A pretrial order that limits the length of trial under Fed. R. Civ. P. 16(c)(2)(O) offers the parties a better opportunity to determine their priorities and be selective in presenting their evidence than if limits are imposed only at the time of trial. Limits on trial time must be reasonable in the circumstances and ordinarily imposed only after the parties are given the opportunity to outline the nature of the testimony they expect to offer through various witnesses and the time they expect to need for direct and cross-examination. *See* Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 16(c)(15). Exploring settlement and the use of alternative dispute resolution procedures can be considered under Fed. R. Civ. P. 16(c)(2)(I). Separate trials may be set for potentially dispositive issues under Fed. R. Civ. P. 16(c)(2)(M).

E. Presumptive Limitations on Discovery

Discovery practice in federal court litigation has been altered since 1983 in a number of ways. The amendments were not meant to block needed discovery, but to provide judicial supervision to curtail excessive discovery. Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 33(a). The FRCP now presumptively limit the number of interrogatories a party may serve, including ''all discrete subparts;'' the number of depositions taken by oral examination or on written questions; taking the deposition of a

witness more than once; and restricting the deposition of a witness to one day of no more than seven hours. Fed. R. Civ. P. 33(a); Fed. R. Civ. P. 30(a)(2)(A)(i), (ii), (d)(1); and Fed. R. Civ. P. 31(a)(2)(A)(i).

These presumptive limitations are adjusted as a case requires, often through the scheduling order the judge enters on the discovery plan the parties propose after their initial conference. Fed. R. Civ. P. 26(b)(2)(A), (f)(3)(E); *see also,* Advisory Committee Notes to the 2000 Amendments to Fed. R. Civ. P. 26(b)(2).

Parties also must seek to resolve discovery disputes informally before filing a motion. Fed. R. Civ. P. 26(c)(1); *see also,* Advisory Committee Notes to the 1993 Amendments to Fed. R. Civ. P. 26(a) (concerning what was then the new subparagraph (B)).

F. Discovery of Electronically Stored Information

E-discovery provisions that recognize how pervasive digital information has become were incorporated into the FRCP in 2006. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?,* 236 F.R.D. 598, 604–605 (2006). The amendments recognize the integral role digital data such as email, instant messaging, and web-based information play in contemporary life and in discovery; they introduced into the FRCP the concept of ''electronically stored information.'' As with changes to the presumptive limits on various discovery methods, the discovery plan the parties develop is expected to address any issues about disclosure or discovery of electronically stored information, including the form in which it should be produced. Fed. R. Civ. P. 26(f)(3)(C); Fed. R. Civ. P. 34(b)(2)(D), (E); *see also* Advisory Committee Notes to the 2006 Amendments to Fed. R. Civ. P. 26(f); Advisory Committee Notes to the 2006 Amendments to Fed. R. Civ. P. 34(b); *Hopson* v. *Mayor & City Council of Balt.,* 232 F.R.D. 228, 245 (D. Md. 2006).

Digital information is so omnipresent that federal courts now deride as ''frankly ludicrous'' arguments that a trial lawyer who claims to be ''computer illiterate'' should be excused from fulfilling the rules' e-discovery obligations. *Martin* v. *Nw. Mut. Life Ins. Co.,* No. 804CV2328T23MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 19, 2006) (unpublished). Today a lawyer bears an affirmative duty not just to ask a client to locate and gather paper and electronic documents, but to search out sources of electronic information. *Phoenix Four, Inc.* v. *Strategic Res. Corp.,* No. 05 Civ. 4837(HB), 2006 WL 2135798, at *5 (S.D.N.Y. Aug. 1, 2006) (unpublished); *In re A & M Fla. Prop. II, LLC,* No. 09–15173, 2010 WL 1418861, at *6 (Bankr. S.D.N.Y. Apr. 7, 2010) (unpublished). Those efforts must, however, be proportional to what is at stake in the litigation. Fed. R. Civ. P. 26(b)(2)(C)(iii); *see also, The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production*, Principle 2, cmt. 2.b., at 17 (2007) (''Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.''); *cf., Pension Comm. of the Univ. of Montreal Pension Plan* v. *Banc of Am. Sec., LLC,* 685 F.Supp.2d 456, 464–65 (S.D.N.Y. 2010) (describing significant discovery burdens that were reasonable in a $550 million claim arising from the liquidation of hedge funds; but those burdens may be inappropriate in litigation where much less is at stake).

In addition, the parties should discuss and agree at the initial conference on how to handle inadvertent disclosure of digital information that otherwise would enjoy attorney-client privilege or work product protection. Fed. R. Civ. P. 26(f)(3)(D). Their agreement plays a pivotal role under recently enacted Fed. R. Evid. 502(b), (d), and (e). They avoid a waiver of privilege or work product protection when their agreement is incorporated into a scheduling order or another order. *See* Advisory Committee Notes to the 2006 amendments to Fed. R. Civ. P. 26(f).

The current FRCP not only guide the resolution of discovery disputes, but also set standards for allocating the potentially high cost of discovery among the parties when the sources of digital data are not readily accessible. Advisory Committee Notes to 2006 Amendments to Fed. R. Civ. P. 26(b)(2) (''The conditions [the judge imposes] may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.'')

G. Summary Decision

A motion for summary adjudication carries the potential to dispose of an entire claim or portions of it with finality but without a trial, so it plays a key role in litigation. The procedure ought to be the same at the OALJ as in U.S. district courts; any divergence creates an incentive for a party to prefer the forum with the summary decision régime most favorable to its position. This matters because under many statutes whistleblower litigation begins at OALJ, but the complainant may proceed in U.S. district court if a final order has not been entered within a relatively short time after the claim is first brought to the attention of the Department. *See, e.g.,* 18 U.S.C. 1514A(b)(1)(B) (2010) (Sarbanes-Oxley Act); 42 U.S.C. 5841(b)(4) (2010) (Energy Reorganization Act); 46 U.S.C. 2114(b) (2010) (Seaman's Protection Act); 49 U.S.C. 31105(c) (2010) (Surface Transportation Assistance Act).

Federal Rule of Civil Procedure 56 was recently revised effective December 1, 2010. It now instructs the judge to state a reason for granting or denying the motion, usually by identifying the central issues, which can help the parties focus any further proceedings. Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 56(a). The judge is not obliged to search the record independently to determine whether there is a factual dispute for trial, but nonetheless may consider record materials the parties never called to the judge's attention. Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 56(c)(3). A formal affidavit is not required to support the motion; an unsworn declaration signed under penalty of perjury suffices, recognizing the status 28 U.S.C. 1746 gives to those statements. Fed. R. Civ. P. 56(c)(4). Even if the motion is not granted, or granted only in part, the judge may find that certain facts are undisputed and treat them as established. Fed. R. Civ. P. 56(g). Invoking this authority demands care, however. To limit litigation expenses, a nonmovant who feels confident a genuine dispute as to one or a few facts will defeat the motion may choose not to file a detailed response to all facts the movant stated. That choice should not expose the party to the risk that the additional facts will be treated as established under subdivision (g). Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 56(h).

The judge may sanction a party who submits an affidavit or declaration with its motion papers in bad faith or solely for delay. Fed. R. Civ. P. 56(h).

H. Additional Matters

Other portions of the FRCP have also undergone significant changes, including rules on the subjects of:

- Sanctions under Fed. R. Civ. P. 11 in 1993, *see* Edward D. Cavanagh, *Rule 11 of The Federal Rules of Civil Procedure: The Case Against Turning Back the Clock,* 162 F.R.D. 383, 396 (1995); and
- Subpoenas under Fed. R. Civ. P. 45 in 1991, *see* David D. Siegel, *Federal*

Subpoena Practice Under the New Rule 45 of The Federal Rules of Civil Procedure, 139 F.R.D. 197, 197 (1992).

The proposed revisions to Part 18, Subpart A reflect the general tenor of these amendments.

III. Evolution in Types of Cases

Congress has vested the Department (and therefore OALJ) with the responsibility to conduct formal hearings pursuant to more than 60 laws, including at least 19 that protect employees from retaliation for whistleblowing.

The bulk of hearings conducted by OALJ involve longshore workers' compensation and black lung benefits claims. This was true when OALJ's rules of practice were published in 1983 and is still true today.[3] These cases have benefited from having established rules of practice and procedure modeled on the FRCP. The evolution in the types of cases heard by OALJ, however, has resulted in a significant increase in hearings that are the functional equivalent of a civil trial in federal or state court, absent only the jury. In particular, whistleblower cases now account for a significant portion of OALJ's workload, disproportionate to their percentage of the overall docket. As noted above, many of the statutes creating the responsibility for whistleblower adjudication by the Department of Labor were promulgated after the Part 18, Subpart A rules were published in 1983. Nine whistleblower laws with the potential for ALJ hearings within the Department of Labor were enacted after the year 2000. Hearings arising under these statutes often involve complex fact patterns and novel legal issues. Overall, whistleblower litigation typically requires more extensive discovery, case management, motion work, summary decision practice, and time in trial than many of the other types of cases heard by OALJ.

Moreover, intensive litigation is typical in cases arising under the Defense Base Act. Although the Defense Base Act has been in existence since World War II, increasing use of contract services by the military and other parts of the federal government has resulted in significantly more hearings conducted by OALJ under that law in recent years. These cases tend not to settle, and therefore require more case management by judges as compared with other workers' compensation cases adjudicated by OALJ. OALJ also now conducts hearings involving labor condition applications of employers who employ H–1B nonimmigrant workers. OALJ's experience is that many of these cases do not settle; they also involve extensive procedural motions and multi-day hearings.

Thus, the change in the case mix before OALJ has heightened the need for procedural rules that are clearly written, permit improved and more consistent case management by judges, and are familiar to the national legal community under current federal court practice.

IV. Flexibility/Uniformity

Notwithstanding the variety of statutes and regulations that generate disputes at OALJ, the provisions of the Administrative Procedure Act at 5 U.S.C. 556 offer broad guidance to administrative law judges about how to conduct proceedings. Flexibility in applying procedural rules is desirable, so that judges manage litigation according to the needs of an individual case. The Department's opportunity to review the decision of its administrative law judges under 5 U.S.C. 557(b) safeguards a party from an abuse of that discretion.

Some cases by their nature need special management. For example, applying a general rule that sets the time to respond to formal discovery demands may be inappropriate in a case that demands expedited handling. A striking illustration of an expedited proceeding is one to review a denial of an employer's application to the Office of Foreign Labor Certification under 20 CFR 655.103 to certify the use of non-immigrant workers in temporary agricultural employment under the H–2A visa program of the Immigration & Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188(e). In such cases, the employer only has five business days to seek review of an application's denial under 20 CFR 655.141(b)(4) and 655.142(c). Where the employer requests administrative review, the judge has only five business days after receipt of the administrative file from the Office of Foreign Labor Certification to render a decision. 20 CFR 655.171(a) (2011). Where the employer requests de novo review, the Part 18, Subpart A rules apply, but the hearing must be convened within five business days after the administrative law judge receives the administrative file, and the decision must follow within ten calendar days. 20 CFR 655.171(b). Additionally, for some types of cases—for example, those adjudicated under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.,* and its extensions such as the Defense Base Act, 42 U.S.C. 1651, *et seq.,* and the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*—the Department's substantive regulations also include procedural provisions. *See* 20 CFR parts 702 (Longshore) and 725 (Black Lung).

The proposed rules have been drafted to authorize a judge to tailor procedures to the case, through a prehearing order. A judge may take a broad range of actions under proposed § 18.50(b)(2) and (3). Parties may be ordered to confer about settlement early in the case, required to make prehearing disclosures without any formal discovery demand from the other party, and directed to draft a discovery plan. Yet the judge also may relieve the parties from the obligation to make initial disclosures, and alter the general limitations on the number of interrogatories and the number and length of depositions. This flexibility permits a judge to address, in an individualized way, the needs of any specific case. The judge also may address any regional differences in litigation practices that may require direction or clarification.

V. Clarity/Re-Organization

The FRCP underwent a complete revision that culminated in 2007 to improve their style and clarity. Restyled Federal Rules of Appellate Procedure took effect in 1998, as the restyled Federal Rules of Criminal Procedure did in 2002. Sources that guided drafting, usage, and style for all three revisions included the *Guidelines for Drafting and Editing Court Rules,* which the Standing Committee on Federal Rules of Practice and Procedure of the Judicial Conference of the United States published at 169 F.R.D. 171 (1997), and Bryan A. Garner's *A Dictionary of Modern Legal Usage* (2d ed. 1995). The purpose of the style revisions was twofold: to make the rules easier to understand, and to make style and terminology consistent throughout the rules. *See* Advisory Committee's Notes to the 2007 Amendments to Fed. R. Civ. P. 1. The restyled federal civil rules reduced the use of inconsistent, ambiguous, redundant, repetitive, or archaic words. For example, the restyled rules replaced ''shall'' with ''must,'' ''may,'' or ''should,'' as appropriate, based on which one the context and the established interpretation made correct. *Id.* The sole exception was the highly controversial restoration of the ''shall'' in Fed. R. Civ. P. 56(a) on summary judgment when it was amended in 2010. Advisory Committee's Notes to the 2010 Amendments to Fed. R. Civ. P. 56(a).

The drafting guidelines the authors of the 2007 style amendments used to

[3] OALJ also conducts administrative review in a large number of immigration-related appeals involving both permanent and temporary labor certification applications. Many of these reviews do not require an evidentiary hearing because the review is on the existing record.

enhance the clarity and readability of the FRCP also were used as the Department revised Part 18, Subpart A. Proposed revisions typically are based on the text of the restyled federal civil rule for the corresponding subject, unless there was a reason to deviate from the federal rule's language. As one example, the word ''court'' is replaced throughout with the word ''judge,'' because administrative adjudications do not take place in a court. Where substantive deviations from the FRCP were made, the reason for the deviation is noted in the portion of the Notice of Proposed Rulemaking pertaining to the specific proposed rule. Where there is no corresponding federal civil rule, the Department used the FRCP drafting guidelines to revise the existing Part 18, Subpart A rules, to improve their clarity and internal consistency. The ordering of some rules was altered to improve the overall clarity of the Part 18, Subpart A regulations. A conversion table that shows the current Part 18, Subpart A rules and their corresponding proposed rule appears at the end of this Preface. In drafting the text of the proposed rules, the Department also took into account two Executive Orders:

- Executive Order 12866 (1993), which requires that regulations be ''simple and easy to understand, with the goal of minimizing uncertainty and litigation * * *'' 58 FR 51735, sec. 1(b)(12), Sept. 30, 1993 (amended 2002 & 2007); and
- Executive Order 12988 (1996), which requires that regulations be written in ''clear language.'' 61 FR 4729, sec. 3(b)(2) (Feb. 5, 1996).

The Plain Writing Act of 2010, 5 U.S.C. 301, Public Law 111–274, 124 Stat. 2861 (2010), while not directly applicable to regulations, recognizes the value of plain writing in government documents by requiring clear, concise, and well-organized publications. The Office of Management and Budget has published a ''Best Practices Guide for Regulations'' available on the internet.[4] These proposed rules follow the guidance these sources offer.

Section 6(a) of Executive Order 13,563 (dated January 18, 2011), states: ''To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' 76 FR at 3821. The Executive Order also requires each agency to prepare a plan for reviewing its regulations. Although the revision of Part 18, Subpart A began well before this recent Executive Order, the proposed revisions meet the Order's requirements, by replacing outmoded rules with a more-readily understandable version.

VI. Regulatory Review

A. Executive Order 12866 (Regulatory Planning and Review)

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866. The Department of Labor, in coordination with the Office of Management and Budget (OMB), has determined that this proposed rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f) because rule because the rule will not have an annual effect on the economy of $100 million or more; nor create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Furthermore, the rule does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities or the principles set forth in this Executive Order. Accordingly, the proposed rule has not been reviewed by OMB.

B. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Department concludes that the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.* does not apply since the changes proposed here consist of amendments to rules of agency organization, procedure and practice, and consequently are exempt from the notice and public comment requirements of the Administrative Procedure Act, *see* 5 U.S.C. 553(b)(3)(A).

C. Executive Order 12291 (Federal Regulation)

The Department has reviewed this rule in accordance with Executive Order 12291 and determined it is not a ''major rule'' under Executive Order 12291 because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

D. Unfunded Mandates Reform Act of 1995 and the Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with the requirements of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.,* and Executive Order 13132. The Department concludes that the requirements of these provisions do not apply to the proposed rule, because the proposed rule does not place any mandate on State, local, or tribal governments.

E. Paperwork Reduction Act

The Department certifies that this proposed rule has been assessed in accordance with the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (1995)(PRA). The Department concludes that the requirements of the PRA do not apply to this rulemaking because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

F. The National Environmental Policy Act of 1969 (Environmental Impact Assessment)

The Department has reviewed the proposed rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*) and the Department of Labor's NEPA procedures (29 CFR part 11). The Department concludes that the requirements of the NEPA do not apply to this rulemaking as there are no requirements or provisions contained in this proposed rule that involve assuring the maintenance of a healthful environment and there are no provisions impacting the responsibilities to preserve and enhance that environment contained herein and, thus, has not conducted an environmental assessment or an environmental impact statement.

G. The Privacy Act of 1974, 5 U.S.C. 552a, as Amended

The Department has reviewed this proposed rule in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). This rulemaking would not require any new process, filing or collection of any new information in the proceedings before the Office of

[4] This guide is available at *http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.*

Administrative Law Judges and therefore, the Department has determined this proposed rule would not result in a new or revised Privacy Act System of Records.

H. Federal Regulations and Policies on Families

The Department has reviewed this proposed rule in accordance with the requirements of the Federal Regulations and Policies on Families, Section 654 of the Treasury and General Government Appropriations Act of 1999. These proposed regulations were not found to have a potential negative effect on family well-being as it is defined there under.

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

The Department certifies that this proposed rule has been assessed regarding environmental health risks and safety risks that may disproportionately affect children. These proposed regulations were not found to have a potential negative effect on the health or safety of children.

J. Executive Order 12630 (Governmental Actions and Interference With Constitutionally Protected Property Rights)

The Department has reviewed this proposed rule in accordance with E.O. 12630 and has determined that it does not contain any ''policies that have takings implications'' in regard to the ''licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.''

K. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

The Department has reviewed this proposed rule in accordance with E.O. 13175 and has determined that it does not have ''tribal implications.'' The proposed rule does not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

L. Executive Order 12988 (Civil Justice Reform)

This regulation has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

M. Executive Order 13211 (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use)

The Department has reviewed this proposed regulation in accordance with Executive Order 13211 and determined that the proposed rule is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866, will not have a significant adverse effect on the supply, distribution, or use of energy, and has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

VII. Public Participation

A. APA Requirements for Notice and Comment

The changes proposed here consist of amendments to rules of agency organization, procedure and practice, and consequently are exempt from the notice and public comment requirements of the Administrative Procedure Act, *see* 5 U.S.C. 553(b)(3)(A). However, the Department wishes to provide the public with an opportunity to submit comments on any aspect of the entire proposed rule.

B. Publication of Comments

Please be advised that the Department will post all comments without making any change to the comments, including any personal information provided. The *www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments received electronically or by mail, hand delivery, express mail, messenger or courier service are available and accessible to the public on this Web site. Therefore, the Department recommends that commenters safeguard their personal information by not including social security numbers, personal addresses, telephone numbers, and email addresses in comments. It is the responsibility of the commenter to safeguard his or her information.

C. Access to Docket

In addition to all comments received by the Department being accessible on *www.regulations.gov,* the Department will make all the comments available for public inspection during normal business hours at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the proposed rule available, upon request, in large print or electronic file on computer disc. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternate format, contact Todd Smyth at the U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW., Suite 400-North, Washington, DC 20001–8002; telephone (202) 693–7300.

PART 18, SUBPART A—CROSS REFERENCING CHART

New section	New section title	Old section	Old section title	Federal rule of civil procedure
		GENERAL PROVISIONS		
18.10	Scope and purpose	18.1/18.26	Scope of rules and conduct of hearings.	Fed. R. Civ. P. 1
18.11	Definitions	18.2	Definitions	
18.12	Proceedings before administrative law judge.	18.25/18.29(a)	Proceedings before administrative law judge/authority of the administrative law judge.	
18.13	Settlement judge procedure	18.9	Consent order or settlement; settlement judge procedure.	
18.14	Ex parte communication	18.38	Ex parte communications	
18.15	Substitution of administrative law judge.	18.30	Unavailability of administrative law judge.	Fed. R. Civ. P. 63
18.16	Disqualification	18.31	Disqualification	

PART 18, SUBPART A—CROSS REFERENCING CHART—Continued

New section	New section title	Old section	Old section title	Federal rule of civil procedure
18.17	Legal assistance	18.35	Legal assistance	
PARTIES AND REPRESENTATIVES				
18.20	Parties to a proceeding	18.10	Parties, how designated	
18.21	Party appearance and participation	18.39/18.34(a)	18.39, Waiver of right to appear and failure to participate or to appear—text was incorporated into proposed "participation" rule.	
18.22	Representatives	18.34	Representatives	
18.23	Disqualification and discipline of representatives.			
18.24	Briefs from amicus curiae	18.12	Amicus curiae	
SERVICE, FORMAT AND TIMING OF FILINGS AND OTHER PAPERS				
18.30	Service and filing	18.3	Service and filing	Fed. R. Civ. P. 5
18.31	Privacy protection for filings and exhibits.			Fed. R. Civ. P. 5.2
18.32	Computing and extending time	18.4	Time computations	Fed. R. Civ. P. 6
18.33	Motions and other papers	18.6	Motions and requests	Fed. R. Civ. P. 7(b) & 43(c)
18.34	Format of papers filed			
18.35	Signing motions and other papers; representations to the judge; sanctions.			Fed. R. Civ. P. 11
18.36	Amendments after referral to the Office of Administrative Law Judges.	18.5	Responsive pleadings—answer and request for hearings.	
PREHEARING PROCEDURE				
18.40	Notice of hearing	18.27	Notice of hearing	
18.41	Continuances and changes in place of hearing.	18.28	Continuances	
18.42	Expedited proceedings	18.42	Expedited proceedings	
18.43	Consolidation; separate hearings	18.11	Consolidation of hearings	Fed. R. Civ. P. 42
18.44	Prehearing conference	18.8	Prehearing conferences	Fed. R. Civ. P. 16
DISCLOSURE AND DISCOVERY				
18.50	General provisions governing disclosure and discovery.			Fed. R. Civ. P. 26(a), (d), (f), (g)
18.51	Discovery scope and limits	18.14	Scope of discovery	Fed. R. Civ. P. 26(b)
18.52	Protective orders	18.15	Protective orders	Fed. R. Civ. P. 26(c)
18.53	Supplementing disclosures and responses.	18.16	Supplementation of responses	Fed. R. Civ. P. 26(e)
18.54	Stipulations about discovery and procedure.	18.17	Stipulations regarding discovery	Fed. R. Civ. P. 29
18.55	Using depositions at hearings	18.23	Use of depositions at hearings	Fed. R. Civ. P. 32
18.56	Subpoena	18.24	Subpoenas	Fed. R. Civ. P. 45
18.57	Failure to make disclosures or to cooperate in discovery; sanctions.	18.21	Motion to compel discovery	Fed. R. Civ. P. 37
TYPES OF DISCOVERY				
18.60	Interrogatories to parties	18.18	Written interrogatories to parties/	Fed. R. Civ. P. 33
18.61	Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes..	18.19	Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.	Fed. R. Civ. P. 34
18.62	Physical and mental examinations	18.19	Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.	Fed. R. Civ. P. 35
18.63	Requests for admission	18.20	Admissions	Fed. R. Civ. P. 36
18.64	Depositions by oral examination	18.22	Depositions by oral examinations	Fed. R. Civ. P. 30
18.65	Depositions by written questions			Fed. R. Civ. P. 31
DISPOSITION WITHOUT HEARING				
18.70	Motions for dispositive action			
18.71	Approval of settlement and consent findings.	18.9		

PART 18, SUBPART A—CROSS REFERENCING CHART—Continued

New section	New section title	Old section	Old section title	Federal rule of civil procedure
18.72	Summary decision	18.40/18.41	18.40, Motion for summary decision *merged with* 18.41, Summary decision.	Fed. R. Civ. P. 56
		HEARING		
18.80	Prehearing statement	18.7	Prehearing statements	
18.81	Formal hearing	18.43	Formal hearings	Fed. R. Civ. P. 43(a)
18.82	Exhibits	18.47/18.48 18.49/18.50	Exhibits/records in other proceedings/designation of parts of documents/authenticity.	
18.83	Stipulations	18.51	Stipulations	
18.84	Official notice	18.45	Official notice	
18.85	Privileged, sensitive, or classified materials.	18.46/18.56	In camera and protective orders/restricted access.	
18.86	Hearing room conduct	18.37	Hearing room conduct	
18.87	Standards of conduct	18.36	Standards of conduct	
18.88	Transcript of proceedings	18.52	Record of hearings	
		POST HEARING		
18.90	Closing the record; additional evidence.	18.54/18.55	Closing the record/receipt of documents after hearing.	
18.91	Post-hearing brief	18.57	Decision of the administrative law judge and post-hearing briefs.	
18.92	Decision and order	18.57	Decision of the administrative law judge and post-hearing briefs.	
18.93	Motion for reconsideration			Fed. R. Civ. P. 59(e)
18.94	Indicative ruling on a motion for relief that is barred by a pending petition for review.			Fed. R. Civ. P. 62.1
18.95	Review of Decision	18.58	Appeals	
		DELETED SECTIONS		
	Deleted	18.13	Discovery methods	
	Deleted	18.32	Separation of functions	
	Deleted	18.33	Expedition	
	Deleted	18.53	Closing of hearings	
	Deleted	18.59	Certification of official record	

General Provisions

§ 18.10 Scope and purpose.

The Department proposes to remove the current § 18.1 and add § 18.10. The proposed § 18.10 is modeled after Fed. R. Civ. P. 1.

As in the current rule, the proposed rule states that in the event the procedures in Part 18, Subpart A are inconsistent with a governing statute, regulation, or executive order, the latter controls. The Department recognizes that specific procedural regulations have already been promulgated for some statutes under which administrative law judges adjudicate cases, and that these regulations may prescribe procedures inconsistent with these proposed rules. The Department has found that the phrase ''rule of special application'' has not clearly conveyed the intent of this sentence. Thus, proposed § 18.10 rephrases this sentence as follows: ''To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation.''

Subdivision (a) recognizes that some of the Department's regulations involving proceedings before OALJ include extremely detailed procedures and requirements. These rules do not address requirements that are specific to certain types of cases. For example, the regulations for Black Lung compensation benefits proceedings, at 20 CFR parts 718 and 725, include specific evidentiary limitations (*see* 20 CFR 725.414). Similarly, the regulations in both Black Lung and Longshore compensation cases require that hearings be held within 75 miles of the claimants residence if possible. *See* 20 CFR 725.454(a), 702.337(a).

Additionally, the Department recognizes that the provisions of a specific regulation may be inconsistent with these rules. In such event, the specific regulation—and not these rules—applies. For example, in a case arising under the Black Lung Benefits Act, there is inconsistency between the regulation at proposed § 18.93, *Motion for reconsideration,* which provides parties 10 days after service of the judge's decision and order to file a motion for reconsideration, and the black lung regulation at 20 CFR 725.479(b), which provides 30 days after the filing of the judge's decision and order to file a motion for reconsideration. Because the regulations at 20 CFR part 725 govern proceedings arising under the Black Lung Benefits Act, the regulation at sec. 725.479(b) would control.

The Department proposes to relocate the language from current § 18.26 to proposed § 18.10 because it is more properly located with the other general guiding principles. The Department proposes to clarify the meaning of

current § 18.26 under subdivision (b). First, current § 18.26 only references sec. 554 of the APA. However, Subchapter II of Chapter 5 of the APA determines how the entire proceeding, including the hearing, will be conducted. Accordingly, the proposed rule revises and expands the reference to include all of Subchapter II, instead of only referencing sec. 554. Second, Subchapter II instructs how the entire proceeding should be conducted; accordingly, the reference to hearings in the current rule was changed to proceedings in order to encompass the entire process of adjudicating a case before OALJ.

The current § 18.1(b)—renumbered as § 18.10(c)—is revised to improve the clarity of the rule. The Department does not propose changes to the judge's ability to waive, modify, or suspend the rules by these revisions.

§ 18.11 Definitions.

The Department proposes to revise the current § 18.2 and renumber it as § 18.11. The definitions in § 18.2 supplement the definitions stated in sec. 551 of the Administrative Procedure Act. The Department proposes to amend the opening sentence of this section by referencing the definitions provided in sec. 551 of the Administrative Procedure Act. The definitions in sec. 551 apply to OALJ proceedings.

The Department proposes to delete the following terms from the current § 18.2: (a), *Adjudicatory proceeding;* (c), *Administrative Procedure Act;* (d), *Complaint;* (g), *Party;* (h), *Person;* (i), *Pleading;* (j), *Respondent;* (k), *Secretary;* (l), *Complainant;* (m), *Petition;* (n), *Consent Agreement;* (o), *Commencement of Proceeding.* Except for the ''Administrative Procedure Act,'' those terms are no longer used in the proposed revisions to the rules or sec. 551 of the APA defines the term. When a proposed section references the Administrative Procedure Act, the name of the Act and the appropriate section number is stated.

The Department proposes to define the following terms that are not defined by the APA: (a), *Calendar call;* (b), *Chief Judge;* (c), *Docket clerk;* and (h), *Representative.* The terms ''calendar call,'' ''docket clerk'' and ''representative'' are used with more frequency in the proposed revision of the rules. The Department proposes to define ''Chief Judge'' to clarify that the term also includes a judge to whom the Chief Judge delegates authority. The Department proposes to define ''representative'' to clarify that, unless otherwise specified, the term applies to all representatives who represent a person or party before OALJ. The Department proposes to define ''docket clerk'' to clarify current practice before OALJ. When a case is first filed with OALJ it is received by the Chief Docket Clerk in the national office located in Washington, DC. But once a case is assigned to a judge in a district office all filings should be made with the docket staff in that office.

The Department proposes to amend the definitions of the following terms to improve clarity and specificity: (d), *Hearing;* (e), *Judge;* (f), *Order;* and (g), *Proceeding.* The Department proposes to expand the definition of ''hearing'' to encompass more than sessions where evidence is submitted. Hearings to determine issues of fact may rely on official notice rather than oral testimony subject to cross examination, and hearings to determine issues of law may not require the submission of evidence. The Department proposes to revise the definition of ''judge'' to eliminate the reference in the current rule to presiding officers not appointed as administrative law judges pursuant to 5 U.S.C. 3105.

The Department proposes to revise the definition of ''order'' and delete the reference in the current rule to rulemaking. The Part 18, Subpart A rules and these proposed revisions apply to the adjudication of cases and not rulemaking. This reference is therefore superfluous. The Department proposes to revise the definition of ''proceeding'' to avoid defining a term using the term itself; the proposed definition provides a more accurate definition, one that includes the creation of a record leading to an adjudication or order.

§ 18.12 Proceedings before administrative law judge.

The Department proposes to revise the current §§ 18.25 and 18.29(a) and combine the content into proposed § 18.12.

The proposed § 18.12 is divided into two subdivisions: designation and authority. The Department proposes to relocate the content of current § 18.25 to proposed § 18.12(a). This section incorporates the revised definition of ''judge'' and ''Chief Judge'' from proposed § 18.11.

The Department proposes to relocate the content of current § 18.29(a) to proposed § 18.12(b). The enumerated powers of the judge in the proposed subdivision (b) are similar to those listed in sec. 556 of the APA (5. U.S.C. 556) and those listed in the current § 18.29(a), except for stylistic changes. For example, proposed subparagraphs (b)(4), (b)(5) and part of (b)(2) are taken directly from sec. 556. Under subdivision (b), the Department clarifies that OALJ may conduct hearings as determined by the Secretary of Labor when no statute entitles a person to an ''on the record'' hearing. The proposed subparagraph (b)(1) is meant to clarify the administrative law judge's powers to regulate both formal and informal proceedings, including setting prehearing conferences, and when appointed as a settlement judge, to conduct settlement conferences. The current § 18.29 (a)(1) only addresses formal hearings. The current § 18.29(a)(6) and (a)(9) has been deleted because these provisions are redundant of the proposed introductory statement.

The difference between paragraph (b)(3) and (b)(4) is that the former applies to parties to the cause of action whereas the later applies to non-parties. Under (b)(3) judges have the authority to grant motions to compel a party to respond to a request for the production of documents, requests for written responses to interrogatories, requests for admission, and attendance at a proceeding. Issuing subpoenas authorized by law is the only way a judge can exercise control over non-parties.

The Department proposes to delete current § 18.29(b), because its content is addressed in the applicable statutes (e.g., 33 U.S.C. 927(b)(Longshore and Harbor Workers' Compensation Act).

§ 18.13 Settlement judge procedure.

The Department proposes to revise the current § 18.9 and renumber it as proposed § 18.13.

There are three topics addressed in the current § 18.9: (1) Motions for consent findings and order; (2) approval of settlement agreements; and (3) the settlement judge procedure. Motions for approval of a settlement agreement and for a consent finding and order (current § 18.9 (a)–(d)) are now addressed in the proposed § 18.71, *Approval of settlement or consent findings*). Proposed § 18.13 provides the procedures for parties wishing to use the settlement judge process. The revisions to the previous subdivision (e) are largely structural and stylistic.

Under proposed subdivision (c) the Department proposes to extend the number of days for the settlement proceeding from 30 to 60 days. Based on OALJ's experience related to Longshore and Harbor Worker's Compensation Act cases, 30 calendar days is not enough time to complete a settlement agreement. For example, parties may need more than 30 days in cases dealing with location issues, or Medicare set asides, or in international negotiations under the Defense Base Act.

The Department proposes to delete the cross-referencing clause in current subdivision (d) because it is inherent within the rule that a settlement judge's powers terminate immediately if settlement negotiations are terminated.

Under proposed subdivision (f) the Department proposes to provide the settlement judge the option of conducting the settlement conference in the manner he or she considers most appropriate, giving the settlement judge wider discretion over the mode of the settlement conference. The current § 18.9 requires the settlement judge to conduct the settlement conference by telephone, except in specific situations. The Department determined that telephone conferences have not been the most expedient way to conduct settlement conferences; therefore the proposed change expands the judge's authority to determine what process the parties want to use and to best utilize changing technology.

Under the proposed subdivision (g) the Department proposes to delete the language in current § 18.9(e)(8) regarding the inadmissibility of settlement statements and conduct because the confidentiality of dispute resolution communications is now extensively addressed by the Administrative Dispute Resolution Act. *See* 5 U.S.C. 574.

The Department proposes to delete the current § 18.9(e)(9) because the requirements for a consent order or settlement agreement are generally covered by the governing statute or implementing regulation. This language is possibly misleading because it implies that all settlements must have the elements of consent findings. There are also additional requirements found in specific regulations. *See, e.g.,* Clean Air Act 29 CFR 1979.11(d)(2) and Longshore and Harbor Worker's Compensation Act 20 CFR 702.242 and 702.243.

The language from the current § 18.9(e)(10) is relocated to proposed subdivision (h). The Department is extending the period of time parties have to submit the required settlement documents to the presiding judge from 7 days to 14 days. This will allow parties additional time to draft the settlement documents and will decrease the number of requests for an extension of time.

§ 18.14 Ex parte communication.

The Department proposes to revise the current § 18.38 and renumber it as proposed § 18.14.

The Department proposes stylistic changes to the current § 18.38, specifically subdivision (a). The language in the proposed rule clarifies that the prohibition against ex parte communication applies to the parties, their representatives, and other interested persons, as well as the judge. The Department proposes to change ''any person'' to ''interested persons'' to be consisted with the Administrative Procedure Act. *See* 5 U.S.C. 557(d)(1)(A).

The Department proposes to delete the description of ex parte communication; however, this change is not intended to change the definition of ex parte communication. The notification of procedural request requirement is now covered by proposed §§ 18.33, *Motions and other papers,* and 18.41, *Continuances and changes in place of hearing.*

The Department deleted the current subdivision (b), *Sanctions,* because sanctions are covered in applicable statutes. In particular, the Administrative Procedure Act provides an option of imposing sanctions following ex parte communications if sufficient grounds exist. *See* 5 U.S.C. 556(d)(2000); 5 U.S.C. 557(d)(1). Section 5 U.S.C. 557(d)(1)(D) gives the administrative law judge broad authority to sanction any knowing violation of the APA's prohibition on ex parte contacts. Accordingly, it is unnecessary to repeat the statute in these regulations.

§ 18.15 Substitution of administrative law judge.

The Department proposes to revise the current § 18.30 and renumber it as proposed § 18.15.

The Department proposes to change the title of this section to ''Substitution of administrative law judge'' to more accurately reflect the procedure provided by the rule—how a substitute judge is appointed when the presiding judge becomes unavailable.

The Department proposes a revision to the current subdivision (a) modeled after Fed. R. Civ. P. 63. The Department proposes to require the successor judge to certify that he or she is familiar with the record before continuing with the presentation of the evidence. Included in this subpart is a reference to proposed § 18.12, the section that defines the procedure for appointing a judge to a case.

Under the proposed subdivision (b), the Department proposes to codify the longstanding Department of Labor policy, based on *Strantz* v. *Director,* OWCP, 3 B.L.R. 1–431 (1981), of notifying the parties that the original judge is no longer available, allowing them to object to the successor judge issuing a decision based on the existing record, and ordering supplemental proceedings upon a showing of good cause.

Finally, administrative need within OALJ routinely requires that cases be reassigned among judges prior to the submission of evidence, such as where a case is continued prior to a scheduled docket. The proposed § 18.15 does not affect those reassignments.

§ 18.16 Disqualification.

The Department proposes to revise the current § 18.31 and renumber it as proposed § 18.16. The proposed revisions are largely stylistic.

Under subdivision (a), the Department proposes to delete the current notice requirement; however, this is not a procedural change. Parties will be notified when a presiding judge has disqualified himself or herself in due course with the appointment of a new judge.

The current § 18.31 requires a motion to disqualify to be accompanied by a supporting affidavit. The Department proposes to clarify in § 18.16(b) that as an alternative or addition to a supporting affidavit a motion to disqualify may be accompanied by supporting declarations or other documents. A presiding judge who receives a motion to disqualify must rule on the motion in a written order that states the grounds for the ruling.

The Department proposes to delete the current subdivision (c), which provides that the Chief Judge will appoint a new presiding judge if a judge recuses himself or herself. This procedure is covered by the substitution provisions of proposed § 18.15 and, therefore, is superfluous here.

§ 18.17 Legal assistance.

The Department proposes to revise the current § 18.35 and renumber it as proposed § 18.17. The Department proposes largely stylistic revisions to this section. The rule continues to be that OALJ does not appoint representatives or refer parties to representatives. In addition, the Department proposes to revise this section to expressly state that OALJ does not provide legal assistance to parties. The Department proposes to change the reference to ''counsel'' to ''representative'' because the former is too narrow and does not include non-attorney representatives.

Parties and Representatives

§ 18.20 Parties to a proceeding.

The Department proposes to revise the current § 18.10 and renumber it as proposed § 18.20.

The Department proposes to delete the definition of ''party'' in the current subdivision (a) because this definition is provided in the APA. *See* 5 U.S.C. 551(3).

The current § 18.10 includes provisions regarding how a party may intervene in a case. The Department proposes to delete subdivisions (b)–(d) because impleading and intervention are rare circumstances before OALJ. If circumstances require, then the parties or judge may refer to the Fed. R. Civ. P. 19, *Required joinder of parties,* Fed. R. Civ. P. 20, *Permissive joinder of parties,* and Fed. R. Civ. P. 24, *Intervention.* As set forth in proposed § 18.10(a) the rules of civil procedure will apply to circumstances not covered by the Department's rules.

§ 18.21 Party appearance and participation.

The Department proposes to revise and combine the current §§ 18.34(a) and 18.39 into proposed § 18.21, *Party appearance and participation,* because both address a party's right to appear.

The Department proposes to relocate the content from the current § 18.34(a) to proposed § 18.21(a). This subpart states that a party has a right to appear and participate in a proceeding in person or through a representative. The enumeration of the rights currently included in § 18.34(a) is summarized by the words ''appear and participate in the proceeding.'' The current § 18.34(a) addresses the possible actions a party may take during the course of a proceeding as provided by the rules. The Department proposes to delete this language because these actions are covered by other sections within the Rules, most specifically within Title III: Filings, Title V: Discovery, and Title VIII: Hearings.

The proposed subdivisions (b) and (c) are based on the current § 18.39(a) and (b), respectively. The Department has removed the 10-day timeframe with the intention that the presiding judge will set an appropriate time for response.

§ 18.22 Representatives.

The Department proposes to revise the current § 18.34 and renumber it as proposed § 18.22.

The Department proposes to narrow the scope of proposed § 18.22 so that it functions as a list of qualifications and duties for attorneys and non-attorney representatives who represent parties before OALJ. The content from the current subdivision (a) is not included in proposed § 18.22, as explained in the note to the proposed § 18.21, *Party appearance and participation.*

The Department proposes not to include the content from current subdivisions (c) through (f) in proposed § 18.22 because the substantive rights of parties and subpoenaed witnesses are delineated by other regulations under Part 18, Subpart A.

The Department proposes to relocate the current subdivision (b) to subdivision (a), *Notice of appearance.* Under the proposed subdivision (a), the Department clarifies that each representative must file a ''notice of appearance'' when first making an appearance and that the notice is to include the statements and documentation required for admission to appear as either an attorney or non-attorney representative. This provision codifies current practice and clarifies the timing of when the ''notice of appearance'' must be filed.

The Department proposes to relocate the current subdivision (g) to proposed subdivision (b), Categories of representation; admission standard. Under proposed paragraph (b)(1), the Department defines the terms ''attorney'' and ''attorney representative'' under the proposed rules. The current § 18.34(g) uses the phrase ''attorney at law'' to describe whose appearance is governed by current subsections (g)(1) and (g)(2); however, the Department proposes to delete this phrase from the proposed rules because it is ambiguous. As in the current § 18.34, an attorney who is in good standing in his or her licensing jurisdiction may represent a party or subpoenaed witness. An attorney's own representation of good standing is sufficient proof thereof, unless otherwise directed by the judge. Under new subparagraph (b)(1)(B), an attorney who is not in good standing in his or her licensing jurisdiction will not be permitted to appear before OALJ unless that attorney establishes in writing why the failure to maintain good standing is not disqualifying.

The Department proposes to add a new provision under subparagraph, (b)(1)(C) *Disclosure of discipline,* that places the duty on an attorney to promptly disclose to the judge any current action suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.

Under the proposed paragraph (b)(2), the Department clarifies that an individual who is not an attorney may represent a party or a subpoenaed witness upon the judge's approval. The Department proposes to clarify what information must be included in a written request to serve as a non-attorney representative and provides the standard the judge will use to determine whether the non-attorney representative has the qualifications or ability to render assistance. The judge may deny a person's request to serve as a non-attorney representative only after providing the party or subpoenaed witness with notice and an opportunity to be heard.

The Department proposes to add subdivisions (c), *Duties,* (d), *Prohibited actions,* and (e), *Withdrawal of appearance,* to proposed § 18.22. In subdivision (c), the Department determined that the best approach to determining the governing code of conduct is to require attorneys to adhere to the rules of conduct of their licensing jurisdiction. Under subdivision (d), the Department proposes to state specific actions a representative is prohibited from taking while representing a party before OALJ. The proposed subdivision (e) provides the procedure for a representative of record to withdraw as a representative before OALJ and codifies current practice.

§ 18.23 Disqualification and discipline of representatives.

The Department determined that a separate rule identifying the grounds and creating procedures for disqualification of a representative was appropriate. The proposed § 18.22, *Representatives,* addresses a representative's qualifications and duties. The proposed § 18.87, *Standards of conduct,* creates a procedure for excluding a party or representative for poor behavior during the course of a particular proceeding. The Department determined that the grounds and procedures for disqualifying a representative are distinct and separate from the concepts addressed in the current §§ 18.34 and 18.36, and, accordingly, proposes § 18.23.

The proposed § 18.23 deals with both the disqualification of lawyers from practicing before the Department because professional discipline has been imposed on them in other jurisdictions, and discipline the Department itself may impose on lawyers or other representatives who misbehave during administrative litigation.

Lawyers traditionally have been regulated under a state-centered regime of professional self-regulation, in which federal administrative agencies played no role. State supreme courts, the admitting and disciplinary authority for their states' lawyers, often delegate to the state bar association the regulatory task of writing advisory ethics opinions; they also rely heavily on the American Bar Association to develop model ethics

rules and to suggest how to structure their systems of lawyer discipline.

Administrative agencies may discipline lawyers who represent clients before them. Before the advent of the Administrative Procedure Act, the U.S. Supreme Court recognized that quasi-judicial agencies empowered to adopt rules of procedure could set admission requirements. *Goldsmith* v. *U.S. Bd. of Tax Appeals,* 270 U.S. 117, 122 (1926). The legislative history of sec. 6(a) of the federal Administrative Procedure Act ''leaves no doubt that Congress intended to keep unchanged the agencies' existing powers to regulate practice before them.'' 5 U.S.C. 555(b); Attorney General's Manual on the Administrative Procedure Act (U.S. Dep't of Justice 1947) (hereinafter Attorney General's Manual), at 65.

Congress later abolished nearly all agency requirements for admission to practice with the Agency Practice Act of 1965. 5 U.S.C. 500(b), first enacted in Public Law 89332, 79 Stat. 1281, later incorporated into the U.S. Code by Public Law 9083, 81 Stat. 195 (Sept. 11, 1967) (with minor stylistic changes). *See also* the Report to Accompany S. 1758, House Committee on the Judiciary, H.R. Rep. No. 1141, 89th Cong., 1st Sess.(1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News, 89th Cong., 1st Sess at 4170. Any lawyer who is a member in good standing of a state bar could practice before federal agencies, unless an agency is authorized to impose additional requirements, something Congress did for the Patent and Trademark Office. 5 U.S.C. 500(d)(4). The Agency Practice Act is neutral on the authority of agencies to discipline representatives, including lawyers. 5 U.S.C. 500(d)(2) (stating that the Agency Practice Act does not ''authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.''). The courts of appeals read the authority to adopt rules of practice and procedure as power to discipline the wayward, to protect the integrity of the agency's procedures and the public generally. *Polydorff* v. *ICC,* 773 F.2d 372 (DC Cir. 1985) (upholding the authority of the ICC to discipline an attorney); *Touche Ross & Co.* v. *SEC,* 609 F.2d 570, 581–582 (2d Cir. 1979) (upholding the authority of the SEC to discipline accountants who practice before it); *Koden* v. *U.S. Dep't of Justice,* 564 F.2d 228 (7th Cir. 1977) (upholding the authority of the Immigration and Naturalization Service to discipline attorneys who appeared before it).

According to the Reporter for the American Bar Association Special Committee on Evaluation of Ethical Standards, who drafted the Model Code of Professional Responsibility a generation ago, the ABA has long stated that its ethical standards apply to the conduct of lawyers before all adjudicatory entities. Michael P. Cox, Regulation of Attorneys Practicing Before Federal Agencies, 34 Case W. Res. L. Rev 173, 202 & n. 132 (1982). The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983, and have been amended several times thereafter. They serve as models for the legal ethics rules of most states. The current ABA Model Code of Professional Conduct (2010) imposes many obligations on trial lawyers. Among them are duties to exhibit candor; to follow procedural rules; to deal fairly with opposing parties and their lawyers, including the obligation to turn over evidence in discovery and refrain from altering evidence; and to avoid disruptive behavior. *See* Model Rules 3.3; 8.4 (c) and (d); 3.4(a) and (c); and 3.5(d). All apply to lawyers who practice before ''tribunals,'' a term that specifically embraces administrative agencies as well as courts. *See* Model Rule 1.0(m).

The Department proposes to divide § 18.23 into four subdivisions: (a), *Disqualification,* (b), *Discipline,* (c), *Notification,* and (d), *Reinstatement.* Under subdivision (a), the Department proposes to regulate lawyers who gained the right to practice before the Department through admission to the bar of the highest court of a State or similar governmental unit, but lost it or had the right to practice limited due to a criminal conviction or proven professional misconduct. The Department proposes that representatives qualified under proposed § 18.22 may be disqualified upon conviction of any of the serious crimes described in subparts (a)(1)(A) and (B).

A lawyer may also become disqualified under subparts (a)(1)(C) and (D), as reciprocal discipline when another jurisdiction finds the lawyer guilty of professional misconduct, or the lawyer consents to disbarment, suspension, or resigns while an investigation into allegations of misconduct is pending. Federal courts routinely enforce reciprocally any limitations on practice state courts have imposed, after satisfying themselves that those disciplinary proceedings met the substantive requirements the U.S. Supreme Court set nearly a century ago in *Selling* v. *Radford,* 243 U.S. 46 (1917). The Department has relied on this rule, and given reciprocal effect to discipline state courts imposed on lawyers who have appeared before the Department's administrative law judges. *In The Matter of the Qualifications of Edward A. Slavin, Jr.,* ARB Case No. 05–003, OALJ Case No. 2004–MIS–5 (Nov. 30, 2005), *also available* at 2005 WL 3263825 (DOL Adm.Rev.Bd).

Lawyers who litigate before the Department are expected to adhere to the rules of conduct promulgated by the jurisdiction(s) where they are admitted to practice, which typically are founded on the American Bar Association's Model Rules of Professional Conduct. Contumacious behavior, the violation of the rules of practice the Department has adopted, or failure to follow the procedural dictates of a governing statute, program regulation or of a judge's order also opens the lawyer to discipline by the Department. *See* proposed § 18.23 (b)(1). State supreme courts have disciplined lawyers for misconduct in litigation before the Department.

Under paragraph (a)(2), the Chief Judge must provide notice and an opportunity to be heard as to why the representative should not be disqualified from practice before the Office of Administrative Law Judges. The Chief Judge's determination must be based on the ''reliable, probative and substantial evidence of record, including the notice and response.''

Under subdivision (b), the Department proposes the procedure for disciplinary proceedings initiated because of a representative's conduct before OALJ. The disciplinary procedure is structured so that the representative's conduct and defense will be reviewed by a presiding judge, who applies the APA's review standard of reliable, probative, and substantial evidence of record. The representative may appeal the presiding judge's decision to the Chief Judge who reviews the decision under the substantial evidence standard. The Chief Judge's decision is not subject to review within the Department of Labor. The proposed § 18.95, *Review of Decision,* provides that the statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision.

Under subdivision (c), the Department proposes to provide notice that when an attorney representative is suspended or disqualified by OALJ, the Chief Judge will alert the attorney's licensing jurisdiction(s) and the National Lawyer Regulatory Data Bank by providing a copy of the decision and order. The National Lawyer Regulatory Data Bank is the national clearing house of

disciplinary information, maintained by the American Bar Association Standing Committee on Professional Discipline. All states and the District of Columbia, as well as many federal courts and some agencies, provide disciplinary information to the Data Bank. *See http://www.americanbar.org/groups/professional_responsibility/services/databank.html.*

Under subdivision (d), the Department proposes the procedure a representative suspended or disqualified under this section must follow to request reinstatement to practice before OALJ.

§ 18.24 Briefs from amicus curiae.

The Department proposes to delete the current § 18.12 and replace it with proposed § 18.24.

The title of § 18.24 was drafted to emphasize that an amicus curiae may participate in a proceeding only by filing a brief. The final statement that an amicus curiae brief must be filed by the close of the hearing was added to provide a timeframe for filing. If an amicus curiae wishes to participate in the formal hearing, then the person or organization must petition the judge to participate as an intervenor.

Service, Format and Timing of Filings and Other Papers

§ 18.30 Service and filing.

The Department proposes to revise the current § 18.3 and renumber it as proposed § 18.30. The proposed § 18.30 is modeled after Fed. R. Civ. P. 5. In the current Part 18, Subpart A rules service and filing requirements are listed under several sections. The Department proposes to delete those references and have this section address all the general service and filing procedures.

Similar to Fed. R. Civ. P. 5, the Department proposes to restructure the current § 18.3 into two subparts: (a), *Service on parties* and (b), *Filing with Office of Administrative Law Judges.* Portions of the current subdivision (a) and subdivision (e) that address the actual form of filings are not included in proposed § 18.30 and are instead addressed in proposed § 18.34, *Format of papers filed.* For example, current subdivision (a) states: ''All documents should clearly designate the docket number, if any, and short title of the matter.'' This language is included in proposed § 18.34.

The Department proposes to incorporate the content from the current subdivision (d) into proposed subdivision (a) because the service process is the same for all papers, including complaints.

Under subdivision (a), the Department proposes to provide general guidance on how parties are served. The Department proposes to add a certificate of service requirement under subparagraph (a)(3). The current Part 18, Subpart A does not define a certificate of service, so including the definition in the service and filing section clarifies the requirements of certifying that a paper was served on another party. In the past, pro se parties before OALJ have failed to provide certificates of service, requiring judges to follow up with the other parties to the case to verify that a paper was served.

In order to distinguish between a clerk employed at a party's place of business and the OALJ clerk who receives documents for the Office, the Department proposes to amend item (a)(2)(B)(iv) and paragraph (b)(2) by adding the term ''docket clerk.'' Docket clerk is defined in proposed § 18.2, *Definitions,* to clarify that the docket clerk is the Chief Docket Clerk at the Office of Administrative Law Judges in Washington, DC or, once a case is assigned to a judge in a district office, the docket staff in that office.

Under proposed subdivision (b), the Department specifies the procedure for filing papers with OALJ. Under subparagraph (b)(1), parties are required to file within a reasonable time papers served on other parties or participants. However, like the current rule, parties are not required to file discovery documents, unless the judge orders or the party uses them in the proceeding. The required filing provision also extends to any required disclosures ordered by the judge under § 18.50, *General provisions governing discovery and disclosure.*

The Department proposes to provide the procedure for filing by facsimile in proposed subparagraph (b)(3)(A)—currently subdivision (f). In recognition of OALJ's nationwide jurisdiction and circumstances requiring last-minute filings, the Department proposes to clarify that parties may file by facsimile only as directed or permitted by the judge.

The Department proposes to relocate the content from the current subdivisions (f)(6) and (g) to proposed subdivision (b) because theses subdivisions address those parts of the filing process.

The Department proposes to delete the current (f)(3) because paragraph (a)(3) will apply in all cases. The proposed section adds a specific mechanism by which the parties can establish that the fax was sent and received and puts the burden on the party to maintain the original document.

The Department proposes to delete the current (f)(7) to limit the use of fax submissions to times when ordered by the Judge.

§ 18.31 Privacy protection for filings and exhibits.

Proceedings before OALJ are open to the public. The current Part 18, Subpart A does not include a privacy requirement that parties redact personal data identifiers from filings. OALJ has a policy statement encouraging such redaction, but the notice is advisory, not mandatory. *See www.oalj.dol.gov/ACCESS_TO_COURT_RECORDS.HTM/.*

The 2007 revision of the FRCP included the addition of Fed. R. Civ. P. 5.2 in response to the E-Government Act of 2002, 44 U.S.C. 3501. The Advisory Committee Note addressing Fed. R. Civ. P. 5.2 states that the privacy and security concern addressed by this rule is the electronic availability of filed documents. The scope of Fed. R. Civ. P. 5.2 is limited to filings with the court, and extends to trial exhibits when they are filed with the court.

The Department proposes a privacy protection rule based on Fed. R. Civ. P. 5.2 which will serve two agency-specific purposes. Like Fed. R. Civ. P. 5.2, proposed § 18.31 will reach any electronic filings with OALJ. In addition, § 18.31 will clarify the job of the Freedom of Information Act officer who reviews files in the case of a FOIA request. As a result of the broader purpose of OALJ's privacy protection rule, the § 18.31 extends to filings and exhibits. The majority of personal information to be redacted by the FOIA officer is contained in the exhibits, not the filings.

The proposed subdivision (a) lists the personal data identifiers that parties must redact from filings submitted to OALJ, unless the judge orders otherwise. The Department also lists filings that are exempted from the redaction requirement under proposed subdivision (b). Under subdivision (b), OALJ has exempted the record of administrative proceedings and exhibits filed within the Department of Labor and submitted to OALJ.

Under subdivision (c), the Department proposes to provide parties with the option to file a reference list of redacted information. The term ''redacted'' is intended to govern a filing that is prepared with abbreviated or blocked-out identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Under subdivision (d), the Department proposes to allow a person to waive the protections of the rule as to that person's own personal

information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the judge.

The proposed subdivision (d) provides that a judge may, for good cause, require more extensive protection of material than otherwise required by this section. The Department does not intend for this subdivision to affect the limitations on sealing that are otherwise applicable to the judge. *See* § 18.85, *Privileged, sensitive and classified material.*

§ 18.32 Computing and extending time.

The Department proposes to delete the current § 18.4 and replace it with proposed § 18.32. The proposed § 18.32 is modeled after Fed. R. Civ. P. 6. References to service and filing in the current § 18.4 are now addressed in proposed § 18.30, *Service and filing.*

The Department proposes to increase the scope of the computation provisions in current § 18.4(a) to apply to time periods set out in ''these rules, [the] judge's order, or in any statute, regulation, or executive order that does not specify a method for computing time.'' The expanded scope creates consistency in cases that fall under statutes and regulations that do not have time computation provisions. The revisions do not supplant a computation scheme from another agency or rule.

Under proposed subdivision (a), the Department proposes to add the definitions of ''last day,'' ''next day,'' and ''legal holiday.'' The current subdivision (a) includes a sentence explaining the computation of time for periods less than 7 days. The Department proposes to delete this sentence from the proposed rule to be consistent with the Department's general revision to provide at least 14 days to respond or file.

Subdivision (b) provides the criteria judges will use when responding to a request for an extension of time. The Department proposes this subdivision to provide litigants with fair notice as to the applicable standard of review.

The Department proposes to delete the current § 18.4(c)(1) and (3), which permit the addition of 5 days for filing by mail and when a party is served by mail. Some litigants have found this time-calculation provision confusing. To replace these provisions, the Department proposes to add subdivision (c) to function like Fed. R. Civ. P. 6(d). Three days are added after particular types of service listed in proposed § 18.30(a)(2)(B)(iii) or (iv). The decrease in the number of days for responding is offset by the extension of time to respond from 10 days to 14 days. Days are no longer added to the date of filing when filing by mail. The Department proposes this change to make the practice before OALJ more uniform and consistent with the procedure in the district courts.

§ 18.33 Motions and other papers.

The Department proposes to revise current § 18.6 and renumber it as proposed § 18.33. Proposed § 18.33 is modeled after Fed. R. Civ. P. 7(b) and Fed. R. Civ. P. 43(c).

Under § 18.33, the Department proposes to clarify the filing requirements for motions and other papers and add the language from Fed. R. Civ. P. 7(b) to proposed § 18.33 (a) and (b). Under proposed subdivision (a) ''[a] request for an order must be made by motion.'' This applies to any requests made to a judge. A motion must: (1) Be in writing, unless made during a hearing; (2) state with particularity the grounds for seeking the order; (3) state the relief sought; and (4) unless the relief sought has been agreed to by all parties, be accompanied by affidavits, declarations, or other evidence, and (5) if required by subsection (C)(4), include a memorandum of the points and authorities supporting the movant's position.

The proposed subdivision (b) provides that ''the rules governing captions and other matters of form apply to motions and other requests.''

Under subdivision (c), the Department proposes to add that written motions before a hearing must be served with supporting papers at least 21 days prior to hearing. A written motion served within 21 days before the hearing must state why the motion was not made earlier. The current version of this section does not set a timeframe for serving and filing motions prior to the hearing. The Department proposes to add this timeframe to provide judges sufficient time to rule on pre-hearing motions. This may narrow the issues for the hearing and save witness travel time and expenses. The exceptions to this regulation include: (A) When the motion may be heard ex parte; (B) when these rules or an appropriate statute, regulation, or executive order set a different time; or (C) when an order sets a different time.

The proposed subdivision (d) requires that a response to a motion be filed within 14 days after the motion is served. The Department proposes to increase the amount of time a party has to respond from the 10 days in the current version of the rule to 14 days. The change to 14 days comports with the general revision to set time periods based on multiples of 7.

Under paragraph (c)(3), the Department proposes to add the requirement that counsel for the moving party confer or attempt to confer with opposing counsel in a good faith effort to resolve the subject matter of the motion, except when a party is unrepresented or for particular types of motions listed under subparagraphs (c)(3)(A) through (c)(3)(C). This provision is consistent with the FRCP and the Department anticipates that this will reduce the number of motions by encouraging the parties to resolve issues amongst themselves. Paragraph (c)(4) clarifies that unless the motion is unopposed, the supporting papers for the motion must include affidavits, declarations or other proof to establish the factual basis for the relief. For a dispositive motion and a motion relating to discovery, a memorandum of points and authorities must also be submitted. A judge may direct the parties file additional documents in support of any motion.

The Department proposes to delete the language in current § 18.6(d) from this section and address motions to compel in §§ 18.35, *Signing motions and other papers; representations to the judge; sanctions,* 18.56, *Subpoena,* and 18.57, *Failure to make disclosures or to cooperate in discovery; Sanctions.*

Cases may be reassigned to different judges based on the administrative needs of the Office of Administrative Law Judges. Therefore, the Department proposes to add subdivision (f) to address renewed or repeated motions made to a different judge than the judge who previously ruled on the motion.

§ 18.34 Format of papers filed.

The Department proposes to add a new § 18.34, *Format of papers filed,* to provide the format a party should use when filing papers with OALJ. This proposed section expands the current document filing requirements located under current § 18.3(a) to provide litigants with more specific formatting requirements. The current § 18.3(a) provides that ''all documents should clearly designate the docket number, if any, and short title of the matter'' and ''each document filed shall be clear and legible.'' The proposed § 18.34 states that every paper filed must be printed in black ink on 8.5 x 11-inch opaque white paper. The Department proposes the black ink requirement because litigants sometimes file handwritten papers with colored ink that can be difficult to read.

The current caption requirements are located under current § 18.3(e). Under proposed § 18.34, the Department clarifies that filed papers must begin with a caption that includes: (a) the parties' names, (b) a title that describes the paper's purpose, and (c) the docket number assigned by the Office of Administrative Law Judges. If the case number is an individual's Social Security number then only the last four digits may be used. *See* 18.31(a)(1). If OALJ has not assigned a docket number, the paper must bear the case number assigned by the Department of Labor agency where the matter originated. The Department proposes to relocate the address and telephone number requirement in the current § 18.3(e) to proposed § 18.35(a).

§ 18.35 Signing motions and other papers; representations to the judge; sanctions.

The Department proposes to add a new § 18.35 modeled after Fed. R. Civ. P. 11. This section establishes the standards attorneys and parties must meet when filing motions or other documents with OALJ. It also regulates the circumstances in which sanctions may be imposed if the standards of § 18.35 are not met.

Under subdivision (a), every written motion and other paper filed with OALJ must be dated and signed by a representative of record or by a party personally if the party is unrepresented. The paper must state the signer's address, telephone number, facsimile number and email address, if any. If a document subject to § 18.35 is not signed, the judge has the power to strike the document unless the proponent signs it promptly upon notification of the missing signature.

Under subdivision (b), the Department sets the standards that motions and other papers regulated by § 18.35 must meet. It also specifically provides that the standards are applicable to later advocacy of such documents, as well as to the initial submission of the documents.

The Department proposes to regulate who may be sanctioned for violations of § 18.35(b), as well as how the sanctions process may be initiated under subdivision (a). This subdivision also governs the extent and limitations of the judge's sanctioning power.

Sections 18.50 through 18.65, governing the discovery process, control the circumstances when sanctions may be imposed for inappropriate behavior in discovery. For that reason, § 18.35(d) clarifies that § 18.35(a), (b) and (c) have no applicability to discovery issues.

§ 18.36 Amendments after referral to the Office of Administrative Law Judges.

The Department proposes to revise the current § 18.5 and renumber it as proposed § 18.36.

Proceedings before the Office of Administrative Law Judges are rarely initiated by a complaint and answer. Accordingly, the Department proposes to delete subdivisions (a)–(d) in current § 18.5. However, a judge may still require the parties to file a complaint and answer in certain cases for the purpose of clarifying the issues in the proceeding.

Amendments and supplemental pleadings are an infrequent occurrence because proceedings are rarely initiated before OALJ with a complaint and answer. If amended or supplemental complaints and answers are required, then the judge may apply Fed. R. Civ. P. 15. Accordingly, current § 18.5(e) is deleted and the proposed § 18.36 provides the judge discretion to allow parties to amend and supplement their filings.

Prehearing Procedure

§ 18.40 Notice of hearing.

The Department proposes to revise the current § 18.27 and renumber it as proposed § 18.40.

The current subdivision (a) makes reference to notice of prehearing conferences. Notice of prehearing conferences is controlled by proposed § 18.44, *Prehearing conferences,* so the Department deleted this reference in proposed § 18.40. In proposed § 18.40 (a), the number of days for timely notice is changed from 15 days to 14 days. The change comports with the general revision to set time periods based on multiples of 7.

The current subdivision (b) addresses the judge's ability to change the date, time, or place for a hearing and the number of days notice required for a change. The Department determined that this provision is appropriately grouped with continuances, instead of with the notice of hearing requirements. The Department proposes to relocate a revised version of this subpart to proposed § 18.41(a), *Continuances and changes in place of hearing.*

The current subdivision (c)—now proposed subdivision (b)—is edited to not only address how the judge will determine the location for the hearing, but also the date and time of the hearing. This proposed subdivision also includes a consideration of the ''necessity of the parties and witnesses in selecting the date, time and place of the hearing.'' This requirement is expressed in sec. 554 of the APA and more accurately reflects the considerations a judge must make when determining the date, time, and place for the hearing.

§ 18.41 Continuances and changes in place of hearing.

The Department proposes to revise the current § 18.28 and renumber it as proposed § 18.41.

The Department proposes to clarify in this section when a judge may continue a hearing. This procedure in part is located under current § 18.27(b); however, the Department determined that the procedure of a judge continuing a case is more appropriately grouped in this continuance rule. Under § 18.41(a), the Department proposes to require that the judge provide reasonable notice to the parties of a change in date, time or place of the hearing. The proposed change permits the judge to inform the parties of the changes within a reasonable time based on the circumstances of the continuance. This flexibility permits the judge to adjust the hearing schedule as needed without having to comport with a 14-day notice requirement. However, the reasonable notice still protects a party's due process rights to have notice of the hearing.

The Department proposes to revise the current subdivision (b) to address a party's request to continue or change the place of a hearing. The current regulation requires a party to file a motion for a continuance at least 14 days before the date set for hearing. The Department proposes to eliminate the 14-day filing requirement. Instead, the proposed regulation requires that a party ''promptly'' file a motion after becoming aware of the circumstances supporting a continuance. If a party is immediately aware of the conflict upon receipt of the notice of hearing, the party should file a motion to continue at once.

Under subdivision (b), the Department proposes to permit a party to orally move to continue a hearing, but only in exceptional circumstances. The proposed § 18.33, *Motions and other papers,* requires that motions be made in writing; this section, however, provides a limited exception. For the reasons discussed above, the time limit for an oral motion if the request is made 10 days before the hearing is not included. Under proposed paragraph (b)(1), if a party makes an oral motion for a continuance it must immediately notice the other parties of the request.

The final sentence of the current subdivision (b) addresses oral motions for a continuance at a calendar call or hearing. The Department proposes to

address oral motions at a hearing in proposed § 18.33(e). Therefore, the Department proposes to omit this reference from proposed subdivision (b).

The Department proposes to add a regulation under § 18.41 (b)(2). Under this paragraph, a party may move to change the location of the hearing. This proposed provision permits the parties to inform the judge when a more suitable hearing location is available.

§ 18.42 Expedited proceedings.

The Department proposes to delete the current § 18.42 and replace it with proposed § 18.42.

The Department proposes to delete the references to expedited proceedings that are required by statute or regulation in current subdivisions (a)-(d) and (f). Expedited hearings are controlled by the statute or regulation requiring the accelerated proceedings and do not require either party to file a motion requesting an expediting proceeding. The timing of the hearing and decision in cases expedited by statute or regulation is determined by the governing statute or law. For example, under 20 CFR 655.171(a), *Temporary Employment of Foreign Workers in the United States,* when an employer requests administrative review an ALJ must issue a decision within 5 business days of receipt of the administrative file. *See also* 20 CFR 655.33(f). The Department proposes not to include the current subdivision (f) in its entirety because it is unnecessary and may be in conflict with the governing law.

The proposed § 18.33, *Motions and other papers,* provides the requirements for filing a written motion, including a motion for an expedited proceeding. The Department proposes to delete the provisions in existing paragraphs (b)(1), (b)(2), and (b)(4) because a motion filed in accordance with proposed § 18.33 must be in writing and describe with particularity the circumstances for seeking relief. The time for responding to a motion under proposed § 18.33(d) is 14 days, an addition of 4 days to the 10 days required in existing § 18.42(d). This change to 14 days comports with the general revision to set time periods based on multiples of 7.

The Department proposes not to include the current subdivision (c) because service is addressed by proposed § 18.30, *Service and filing.*

The Department proposes to omit the provision in current subdivision (e) that provides for advanced pleading schedules, prehearing conferences, and hearings. The Department proposes to delete this regulation because setting the date for conferences is within the judge's general powers set forth in proposed §§ 18.44, *Prehearing conferences,* and 18.12, *Proceedings before administrative law judge.* The 5-day limitation on advancing the hearing is extended to 7 days. The change to 7 days comports with the general revision to set time periods based on multiples of 7.

§ 18.43 Consolidation; separate hearings.

The Department proposes to delete the current § 18.11 and replace it with the proposed § 18.43. The proposed § 18.43 is modeled after Fed. R. Civ. P. 42, *Consolidation; separate trials.*

The Department proposes to revise this section to more accurately reflect the practice before OALJ. The current § 18.11 describes the process of consolidating hearings, whereas the proposed § 18.43 addresses the judge's power to order consolidated and separate hearings. The proposed subdivision (a) clarifies that an administrative law judge may join for hearing any or all matters at issue in the proceedings or may issue any other order to avoid unnecessary cost or delay. The proposed subdivision (b) clarifies that for convenience, to avoid prejudice, or to expedite and economize, the judge may order a separate hearing on one or more issues.

§ 18.44 Prehearing conference.

The Department proposes to delete the current § 18.8 and replace it with proposed § 18.44. The proposed § 18.44 is modeled in part after Fed. R. Civ. P. 16.

The current § 18.8 states that the purpose of a prehearing conference is to ''expedite'' the proceedings. The Department proposes to expand the purpose for a prehearing conference in proposed subdivision (a) to include: establishing early and continuing control so that the case will not be protracted because of lack of management; discouraging wasteful prehearing activities; improving the quality of the hearing through more thorough preparation; and facilitating settlement. This revision more accurately reflects the purpose of prehearing conferences before OALJ.

The Department proposes subdivision (b) to provide guidance on the scheduling and notice of the prehearing conference. This procedure is currently located in § 18.8(a).

The Department proposes subdivision (c) to require parties to participate in the conference as directed by the judge. This requirement is currently located in § 18.8(a). In this subpart, the Department proposes to clarify that if a party is represented by an attorney or non-attorney representative, the representative must have authority to make stipulations and admissions and, to settle.

The Department proposes subdivision (d) to expand the current subparagraph (a)(2) to include additional matters for consideration that the judge can take action on during prehearing conferences. This revision is modeled after Fed. R. Civ. P. 16(c)(2) and accurately reflects the breadth of issues addressed in prehearing conferences before OALJ.

The Department proposes to combine the current subdivisions (b) and (c) into subdivision (e). Under this subdivision, the Department proposes to change the default by stating that judges may direct that the prehearing conference be recorded and transcribed. The current § 18.8 requires stenographic recording and transcription, unless otherwise directed by the judge. This change reflects the routine practice of unrecorded prehearing conferences. Typically there is no testimony taken during prehearing conferences so unrecorded conferences are more cost-efficient. In certain cases, such as those involving unrepresented parties, judges may continue to order recorded prehearing conferences.

Disclosure and Discovery

§ 18.50 General provisions governing disclosure and discovery.

The Department proposes to adopt a new section to govern discovery and disclosure, incorporating portions of Fed. R. Civ. P. 26 not already addressed by specific Part 18, Subpart A regulations. The current Part18A provides limited guidance regarding discovery and disclosure. The Department, therefore, is establishing better guidance in proposed § 18.50. The proposed subdivisions (a), (c), and (d) apply to all cases, except as specified, while subdivision (b) is invoked by a judge's order.

Under subdivision (a), a party may seek discovery at any time after a judge issues an initial notice or order. The rule creates a possibility that a party may seek discovery prior to the judge issuing an order requiring the parties to confer under § 18.50(b). Instead of providing for that situation in this section, the Department anticipates that the judge's initial notice or order would address discovery sought before the conference, or that a party may file an appropriate motion requesting relief or instruction.

Unless, on motion, the judge orders otherwise for the parties' and witnesses' convenience and in the interests of

justice, the methods of discovery may be used in any sequence and discovery by one party does not require any other party to delay its discovery. There is also no requirement that a party conduct discovery in a manner like that used by other parties; each party is free to conduct any authorized discovery in any sequence regardless of the discovery conducted by other parties.

Under subdivision (b), a judge may order parties to confer and develop a proposed discovery plan, to be submitted in writing, addressing the discovery schedule and any modifications to the limits or scope of discovery. The discovery plan should indicate the parties' positions or proposals concerning: Automatic discovery; discovery scope and schedule; electronic information; privilege issues; discovery limits; and other discovery orders. Section 18.50(b) places a joint obligation on the representatives (and on unrepresented parties) to schedule the discovery conference and to attempt in good faith to agree on a proposed discovery plan and a report outlining the plan.

The results of the discovery conference may be reported to the judge using Form 52 of the Appendix of Forms that is incorporated into the FRCP through Fed. R. Civ. P. 84. The judge uses that information to craft a scheduling order that controls the development of the case.

Under subdivision (c), parties are required to disclose certain information automatically, without the need for discovery requests, at two points during the litigation. First, at the commencement of a proceeding before OALJ, each party must automatically provide to the other parties the identity of individuals (including experts) likely to have discoverable information, a description of documents by category and location, and a computation of each category of damages. Under proposed subparagraph (c)(1)(B), five categories of proceedings are excluded from this initial disclosure, because in these proceedings discovery is generally not applicable, or is limited due to the nature of the proceeding. Second, later in the case litigants must serve written reports of experts they retained to testify; an expert not retained or specially employed to provide expert testimony—a treating physician often falls into this category—need not write a report, but the party must serve an equivalent disclosure about that expert's opinions and their bases.

Under proposed subparagraph (c)(1)(C), representatives of the Department's Office of Workers' Compensation Programs are exempted from the requirement to provide initial disclosure, except under specified circumstances. Under the governing regulation for Black Lung cases, the District Director is required to provide a complete copy of the administrative record to all parties. 20 CFR 725.421(b). In Longshore cases, the District Director provides a copy of the pre-hearing statements to the Office of Administrative Law Judges, but under the regulation is prohibited from transmitting the administrative record. 20 CFR 702.319. The proposed subparagraph also recognizes that under certain situations the Department's representative actively litigates (e.g., when representing the Black Lung Disability Trust Fund in a case in which no responsible operator has been identified, *see* 20 CFR 725.497(d); or when an employer in a Longshore case has made a claim under 33 U.S.C. 908(f) for reimbursement by the ''special fund.'') Then the Department's representative must make the initial disclosures.

Expert opinions ultimately are disclosed in one of two ways. Each witness retained to provide expert testimony must produce a report. Each expert report must be in writing, signed by the expert, and must contain the specific information listed under subparagraph (c)(2)(B). Under subparagraph (c)(2)(A), judges have the discretion to set the time for this disclosure by prehearing order. For witnesses who are not required to provide a written report, under subparagraph (c)(2)(C) a party must state the subject matter on which the witness is expected to present expert opinion evidence and provide a summary of the facts and opinions to which the witness is expected to testify. For example, under 20 CFR 725.414(c) in Black Lung cases an expert may testify in lieu of a report and is not required to submit a written report. Such expert witnesses in Black Lung cases are commonly treating physicians who do not prepare written expert reports in the course of business. This provision drawn from Fed. R. Civ. P. 26(a)(2)(C) provides the mechanism to get the equivalent information. Under subparagraph (c)(2)(D), parties must supplement expert disclosures when required under proposed § 18.53, *Supplementing disclosures and responses.*

Under paragraph (c)(3), in addition to required disclosures, a party must provide to the other parties and promptly file the prehearing disclosures described in proposed § 18.80, *Prehearing statements.*

Under paragraph (c)(4) unless the judge orders otherwise, all disclosures under this section must be in writing, signed, and served.

Under subdivision (d), every disclosure under § 18.50(c) and every discovery request, response, or objection must be signed by at least one of the party's representatives in the representative's own name, or by the party personally if unrepresented. The document must also contain the signer's address and telephone number. The signature constitutes a certification that the document is complete and correct to the best of the signer's knowledge, information, and belief, and it is being served for proper purposes within the rules. Under paragraph (d)(2), parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed and the judge must strike it unless a signature is promptly supplied after the omission is called to the representative's or party's attention. If a certification violates this regulation without substantial justification, judges have the authority to impose an appropriate sanction, either on motion or on his or her own, under paragraph (d)(3).

§ 18.51 Discovery scope and limits.

The Department proposes to delete the current § 18.14 and replace it with proposed § 18.51. The proposed § 18.51 is modeled after Fed. R. Civ. P. 26(b), *Discovery scope and limits.*

The Department proposes to revise the scope of discovery in current § 18.14(a) based on a 2000 amendment to Fed. R. Civ. P. 26(b)(1) which narrowed the scope of discovery. The current subdivision (a) permits parties to seek ''discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding * * *'' In the proposed § 18.51, the parties are instructed to confine requests to ''any nonprivileged matter that is relevant to any party's claim or defense * * *'' The Department proposes to incorporate this amendment to control discovery costs without interfering with the fair resolution of the case. The parties are permitted to seek discovery related to the claims or defenses and, if needed, the judge may permit a party to seek discovery of any matter related to the case's subject matter.

The Department proposes to relocate the limitations in current § 18.14(b) regarding objections to discovery to the third sentence of proposed § 18.51(a). The Department proposes to clarify that a party may seek discovery of relevant information, even if the information would not be admissible at the hearing, as long as the discovery ''appears

reasonably calculated to lead to the discovery of admissible evidence.''

In § 18.51(b), the Department proposes additional limitations on the frequency and extent of discovery not contained in the current § 18.14. The limitations imposed by the current § 18.14 are limited to relevant information and information that is protected by a privilege. The Department proposes limitations on discovery that are designed to control the costs and burdens of discovery, as appropriate.

The Department proposes to provide limitations on the frequency of using discovery tools in §§ 18.64, *Oral depositions,* 18.65, *Written depositions,* 18.60, *Interrogatories,* and 18.63, *Requests for admission.* The Department proposes paragraph (b)(1) to provide a judge the discretion to alter the limits imposed by these regulations.

The Department proposes paragraph (b)(2) to limit the discovery of electronically stored information (ESI). The existing Part 18, Subpart A rules, promulgated in 1983, do not mention ESI; the proposed changes governing ESI reflect the contemporary nature of document management and discovery methods. In order to control the costs and burdens of producing documents, proposed paragraph (b)(2) establishes a requirement that a party need not provide discovery of ESI if the information is not reasonably accessible because of undue burden or cost. If the party requesting the information files a motion to compel or the party holding the information seeks a protective order, the judge must consider the items in proposed paragraph (b)(4).

Under paragraph (b)(3), the Department states that by requesting electronically stored information, a party consents to the application of Federal Rule of Evidence 502 with regard to inadvertently disclosed privileged or protected information. Because there is currently no equivalent to Fed. R. Evid. 502 in OALJ's rules of evidence, 29 CFR part 18, subpart B, the Department proposes this regulation to inform parties that Fed. R. Evid. 502 is applicable to inadvertently disclosed privileged or protected ESI.

The factors a judge must consider when determining whether to limit the frequency or extent of discovery under proposed paragraph (b)(4) involve balancing the need for the information and the costs and burdens of producing the information. The limitations in paragraph (b)(4) apply to all motions to limit the frequency and extent of discovery under subdivision (b).

The Department proposes subdivisions (c) and (d) to elaborate the limitations on discovery of hearing preparation materials and experts, respectively. The proposed subdivision (c) contains the same limitations as the current § 18.14(c). A party may not discover documents and tangible things prepared in anticipation of litigation or the hearing unless the information is discoverable as relevant under subdivision (a) and the party requesting the information can show that there is a substantial need for the information and the party cannot obtain substantially equivalent information without undue hardship. Although enumerated differently in proposed subdivision (c), the requirements remain the same. Like the current subdivision (c), proposed paragraph (c)(2) instructs the judge to protect against disclosure of an attorney's or other representative's mental impressions, conclusion, opinions, or legal theories when ordering the production of hearing preparation material.

Proposed paragraph (c)(3) permits a party or witness access to the person's own previous statement by request. A party or witness may have provided a statement prior to retaining legal counsel or understanding the consequences of the statement regarding the subject matter of the litigation. The party or witness may obtain a copy of the statement by request without making an additional showing.

Proposed subdivision (d) is modeled after Fed. R. Civ. P. 26(b)(4) and addresses requests for hearing preparation information prepared by experts who may testify at the hearing. Effective cross-examination of an expert requires advance preparation and effective rebuttal requires knowledge of the line of testimony of the other side. This regulation helps the parties narrow the issues and eliminates surprises through prehearing disclosure of expert opinions.

As is the current practice before OALJ, proposed paragraph (d)(1) provides that a party may depose an expert whose opinions may be presented at the hearing. The proposed subpart is modeled after Fed. R. Civ. P. 26(b)(4)(A), which requires the expert's report to be provided prior to the deposition. However, the exchange of a physician's report prior to the deposition has not been a common practice before OALJ, mostly based on time constraints of the testifying experts. Paragraph (d)(1), therefore, permits the parties to stipulate to taking a deposition before reviewing the expert's report and then produce the report when it is available.

Proposed paragraph (d)(2) applies if a judge orders the parties to exchange required disclosures under proposed § 18.50(c)(2)(B). If the judge orders the disclosure of expert opinions under § 18.50(c)(2)(B), then § 18.51(d)(1) provides that the protections in paragraphs (c)(1) and(c)(2) will apply.

Proposed subdivision (e) creates a procedure a party must follow to claim a privilege or to protect hearing preparation materials. Paragraph (e)(1) explains that a party must expressly claim a privilege or state that the information is subject to hearing preparation protection and describe the material well enough that the opponent can adequately assess the protection claim.

Proposed paragraph (e)(2) provides the steps a party must take if it wishes to claim a privilege or other protection for discovery already produced. This regulation is modeled after Fed. R. Civ. P. 26(b)(5)(B). The proposed subpart provides for *in camera* review by the judge so that such materials may be handled consistent with the parties' expectations regarding privileged or other protected documents, prior to creation of a final administrative record.

§ 18.52 Protective Orders.

The Department proposes to delete the current § 18.15 and replace it with proposed § 18.52. The proposed § 18.52 is modeled after Fed. R. Civ. P. 26(c), *Protective orders.*

Similar to the current § 18.15, the Department proposes § 18.52(a) to provide that a party, or any person from whom discovery is sought, may file a motion for a protective order to protect the party from annoyance, embarrassment, oppression, or undue burden or expense. The motion can only be brought by the individual whose interests are affected. Normally, the motion must be filed before the discovery is to occur, unless there is no opportunity to do so. The proposed regulation requires that the motion include a certification that the movant conferred or attempted to confer with the other affected parties to resolve the dispute before filing the motion. This requirement encourages the parties to work together to resolve discovery disputes, without involving the judge.

The Department continues to require that the judge find good cause for issuing a protective order regarding the discovery sought. The judge has broad discretion in determining what constitutes good cause. Proposed paragraphs (a)(1) through (8) provide examples of orders the judge may enter. The proposed paragraphs (a)(1) through (5) provide the same remedies as the current paragraphs (a)(1) through (5); however, each paragraph is revised for

clarity. Similarly, the current paragraph (a)(6) is relocated to proposed paragraph (a)(7). The Department proposes to add paragraphs (a)(6) and (8) to provide the same remedies a judge may impose under Fed. R. Civ. P. 26(c)(1). Respectively, the judge may order that a deposition be sealed and opened as the judge orders or the judge may order the parties to simultaneously file documents or information in sealed envelopes, to be opened as the judge orders.

The Department proposes to clarify under subdivision (b) that when a judge denies a motion for a protective order in whole or in part, the judge may order that the party or person provide or permit discovery. This provision clarifies the control the judge exercises in resolving discovery disputes, as there is currently no regulatory guidance on this issue.

§ 18.53 Supplementing disclosures and responses.

The Department proposes to delete the current § 18.16 and replace it with proposed § 18.53. The proposed § 18.53 is modeled after Fed. R. Civ. P. 26(e), *Supplementing disclosures and responses.* This revision improves the clarity of the section while retaining the same procedural requirements.

§ 18.54 Stipulations about discovery and procedure.

The Department proposes to delete the current § 18.17 and replace it with proposed § 18.54. The proposed § 18.54 is modeled after Fed. R. Civ. P. 29, *Stipulations about discovery and procedure.*

The revision improves the clarity of the section while retaining the same procedural requirements. The Department proposes to clarify in subdivision (b) that ''a stipulation extending the time for any form of discovery must have the judge's approval if it would interfere with the time set for completing discovery, for hearing a motion, or for a hearing.''

§ 18.55 Using depositions at hearings.

The Department proposes to delete the current § 18.23 and replace it with the proposed § 18.55. The proposed § 18.55 is modeled after Fed. R. Civ. P. 32.

The Department states a new procedure in proposed § 18.55(a) modeled after Fed. R. Civ. P. 32(a)(5), *Limitations on use.* The Department proposes a specific provision, at proposed § 18.55(a)(4), regarding depositions of experts, treating physicians, or examining physicians. Deposition testimony from physicians is quite commonly used in proceedings before the Department's administrative law judges. The provision at current § 18.23(a)(2) covers expert witnesses, but does not address a treating physician (who is not necessarily an expert retained to testify). The proposed rule codifies current practice. Under proposed paragraph (a)(6)—the current § 18.23(a)(6) is relocated to proposed § 18.55(a)(8)—a deposition may be used against any party who had reasonable notice of the deposition. A deposition cannot be used against a party who received less than 14 days' notice and who has filed a motion for a protective order that was pending at the time of the deposition. Likewise, a deposition cannot be used against a party who demonstrates an inability to obtain counsel for representation at the deposition despite the exercise of diligence. The provision in Fed. R. Civ. P. 32(a)(7), which reflects the impact of FRCP on substitution of parties, has not been included because the proposed rule does not address the issue of substitution of a party. In general, except for situations where a named party dies and a successor is substituted, there is no substitution of parties in matters before OALJ. Successors to deceased claimants in Black Lung and Longshore cases are not uncommon; these may be covered under specific provisions. *See, e.g.,* 20 CFR 725.360, 33 U.S.C. 919(f).

The Department proposes to add subdivision (c) to clarify that a party must provide a transcript of any deposition testimony the party offers. The judge may receive testimony in non-transcript form as well. This addition codifies a current common procedure within OALJ.

The Department proposes to add subdivision (d), *Waiver of objections,* with four new regulations. These regulations are modeled after Fed. R. Civ. P. 32 and should be familiar federal practice to attorneys. First, under paragraph (d)(1), *To the notice,* an objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving notice. Second, paragraph (d)(2), *To the officer's qualification,* provides that an objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made before the deposition begins or promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. The Department proposes this regulation to be consistent with the federal rule; however, officer disqualification rarely comes up in current practice.

Third, under subparagraph (d)(3)(C), *Objection to a written question,* the Department proposes to clarify that an objection to the form of a written question is waived if not served in writing on the party which submitted the question within the time for serving a responsive question or, if the question is a recross-question, within 7 days after being served with it. The current regulation, located in current paragraph (b)(3), does not designate a set length of time a party has to object to a written question.

Lastly, the Department proposes to add paragraph (d)(4), *To completing and returning the deposition,* to clarify that an objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known. This is not a procedural change from the current § 18.23(b)(2).

The Department proposes to delete the current subdivision (c) because it does not align with the federal rule and is substantive rather than procedural.

§ 18.56 Subpoena.

The Department proposes to delete the current § 18.24 and replace it with proposed § 18.56. The proposed § 18.56 is modeled after Fed. R. Civ. P 45, *Subpoena.* Judges may issue subpoenas only as authorized by a statute or law and the Department does not propose any procedural changes to this rule. Instead, the Department proposes this section to help litigants better understand the subpoena process before OALJ.

The Department proposes to add form and content requirements for subpoenas under paragraph (a)(2). Under this new provision, every subpoena must state the title of the matter and, where applicable, show the case number assigned by OALJ or the Office of Worker's Compensation Programs (OWCP). In the event that the case number is an individual's Social Security number only the last four numbers may be used. *See* § 18.31(a)(1). The subpoena must bear either the signature of the issuing judge or the signature of an attorney authorized to issue the subpoena under proposed paragraph (a)(3). The subpoena must command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or

permit inspection of premises. The subpoena must set out the text of proposed subdivisions (c) and (d) of this section.

The Department proposes to add the following provisions under paragraph (a)(2). The proposed subparagraph (a)(2)(B) provides that a subpoena commanding attendance at a deposition must state the method for recording the testimony. The proposed subparagraph (a)(2)(C) provides that a command to produce documents or to inspect premises may be issued separately or joined with a command to appear to testify. Under subparagraph (a)(2)(D), the Department proposes to clarify that a subpoena can be used to obtain inspections, testing or samplings of the property, documents, or electronic data of a non-party.

Under paragraph (a)(3), the Department proposes to permit subpoenas to be issued by an attorney representative only when authorized by the presiding judge. This provision applies only to representatives who are attorneys. In the authorizing document, the presiding judge may limit the parameters under which the authorized attorney may issue subpoenas.

Under subdivision (b), the Department proposes to clarify the process of serving subpoenas. Under paragraph (b)(1), if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served, a notice must be served on each party. The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. In current practice, this notice requirement from Fed. R. Civ. P. 45(b)(1) is stated on subpoenas to produce documents, information or objects, or to permit inspection of premises. Additionally, the proposed § 18.56(b)(1) retains the provision in the current § 18.24(a) which allows parties to serve subpoenas by certified mail.

Under paragraph (b)(1), if the subpoena requires a person's attendance, the fees for 1 day's attendance and the mileage allowed by law must be tendered with the subpoena. This is a procedural change as the current § 18.24(a) requires that fees to be paid ''in advance of the date of the proceeding.''

Under paragraph (b)(2), the Department clarifies that subject to proposed § 18.56(c)(3)(A)(ii), a subpoena may be served at any place within a State, Commonwealth, or Territory of the United States, or the District of Columbia. Paragraph (b)(3) provides that 28 U.S.C. 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country. Under paragraph (b)(4), if necessary, service can be proved by the person making service by filing with the judge a statement showing the date and manner of service and the names of the persons served. This statement must be certified by the server. This regulation does not establish any cutoff or deadline for serving subpoenas. However, a subpoena for a deposition or for the production of documents may be governed by the discovery deadline.

The Department proposes to delete the current § 18.24(b) because under the proposed paragraph (c)(3) the presiding judge, rather than the chief judge, has the power to quash or modify a subpoena if it fails to allow a reasonable time to comply.

The Department proposes to expand the current subdivision (c) to include other provisions that protect a person subject to a subpoena. The core concept of the proposed subdivision is that an attorney or representative responsible for requesting, issuing, or serving a subpoena has a duty not to issue a subpoena for improper purposes or to impose undue burden on the recipient of the subpoena. The proposed subdivision (c) continues to provide the mechanisms for recipients of subpoenas to challenge subpoenas. The cautionary language in § 18.56(c) *must* be reprinted on every subpoena.

The Department proposes to clarify under paragraph (c)(1) that a party or representative responsible for requesting, issuing, or serving a subpoena must take reasonable steps to avoid imposing undue burden on a person subject to the subpoena. The judge must enforce this duty and may impose an appropriate sanction.

Under subparagraph (c)(2)(A), the Department proposes a new regulation that a person subpoenaed to produce documents or things or to permit an inspection need not actually appear at the designated time, as long as the person complies with the subpoena, unless also commanded to appear for the deposition or hearing. A person subpoenaed to produce documents or things or to permit an inspection may serve an objection to all or part of the subpoena within 14 days after service of the subpoena (or before the time designated in the subpoena, if sooner).

Once an objection has been served on the party issuing the subpoena, the subpoena recipient is not obligated to comply with the subpoena. Failure to serve timely objections may constitute a waiver of objections to the subpoena other than objections relating to service. Only non-parties may serve objections; parties must contest a subpoena by a motion to quash or modify. If the subpoena recipient timely serves an objection to the subpoena under § 18.56(c)(2)(B), the serving party may file a motion to compel production or inspection under § 18.56(c)(2)(B)(i). This motion must be served on the subpoena recipient as well. Under § 18.56(c)(2)(B)(ii), the presiding judge may issue an order compelling the subpoena recipient to comply with the subpoena but the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

Under the proposed § 18.56, a subpoena recipient may still move to quash a subpoena under paragraph (c)(3). If the judge finds the subpoena objectionable he or she may quash it altogether or modify it to cure the objection. The Department proposes to delete the 10-day time period for filing and answering a motion and instead use Fed. R. Civ. P. 45(c)(3) as a model. Thus, under the proposed § 18.56 a motion to quash must be ''timely'' filed, and should certainly be filed before the subpoena's return date. Failure to file a motion to quash may constitute a waiver of objections to the subpoena. In subparagraph (c)(3)(A) the Department proposes to list situations in which a subpoena will be quashed or modified. These situations include: (i) Failing to allow a reasonable time to reply; (ii) requiring a non-party to travel too far; (iii) requiring disclosure of privileged or protected information; and (iv) subjecting a person to undue burden.

Under subparagraph (c)(3)(B), the Department proposes to list circumstances in which a subpoena will be quashed or modified unless the serving party shows a ''substantial need'' for the testimony, documents, or inspection. In such cases the judge will condition compliance on the serving party compensating the recipient. This subparagraph provides limited protection for trade secrets or other confidential research, development, or commercial information. It provides limited protection for unretained experts, so that parties cannot obtain their testimony without paying their fees. It also provides limited protection to nonparties who would incur substantial expenses to travel more than 100 miles to attend a hearing.

The Department proposes to add a new regulation under subdivision (d)—the current subdivision (d) is relocated to subdivision (e)—that provides that documents may be produced as they are normally kept or may be separated and

organized. When privileges are asserted, the privilege must be expressly described. The cautionary language of § 18.56(d) must be reprinted on every subpoena.

The Department proposes that the scope of production under a subpoena be the same as the scope of discovery generally under proposed § 18.51, *Discovery scope and limits.* The requirements also track closely those imposed in Fed. R. Civ. P. 45. Under proposed subparagraph (d)(1)(A), the Department proposes that the responding party has the option of allowing the serving party to inspect and copy the documents where they are normally kept or the party may collect the responsive documents and organize and label them to correspond to the categories in the demand. *See* Fed. R. Civ. P. 45(d)(1). The responding party may make copies for the requesting party, but is not obligated to do so. *See* Fed. R. Civ. P. 45(a)(1)(D).

Under subparagraph (d)(1)(B), the Department proposes to allow, but not require, the requesting party to specify the form in which it is requesting electronic data (i.e., hard copy or electronic; if electronic, the precise manner of production). If the requesting party does not specify the form, then the responding person must produce it in the form in which it is ordinarily maintained in or in a form that is reasonably usable. In any event, under proposed subparagraph (d)(1)(C) a party need not produce electronic data in more than one form. *See* Fed. R. Civ. P. 45(d)(1)(B) & (C).

Under subparagraph (d)(1)(D), the Department proposes that if the responding party believes that the production of electronic data from certain sources will cause undue burden or cost, the person can, in lieu of producing the documents, identify those sources. If a motion to compel or quash is filed, the responding party will have the burden of showing that production would cause undue burden or cost. The burden then shifts to the requesting party to show good cause why the data should be produced nonetheless. In such cases, the judge may specify conditions for the production. *See* Fed. R. Civ. P. 45(d)(1)(D).

Under paragraph (d)(2), the Department proposes that when a subpoena recipient seeks to withhold information that is privileged, the recipient must expressly claim the privilege and describe the nature of the documents, communications, or tangible things not produced in sufficient detail that the court and parties can assess the privilege. Under subparagraph (d)(2)(B), the Department proposes to establish a procedure to recall privileged information that has already been produced in response to a subpoena. *See* Fed. R. Civ. P. 45(d)(2)(A) & (B).

The Department proposes to relocate the content from the current subdivision (d) to subdivision (e) with no procedural changes.

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.

The Department proposes to delete the current § 18.21 and replace it with proposed § 18.57. The proposed § 18.57 is modeled after Fed. R. Civ. P. 37 and incorporates the current § 18.6(d) and the current § 18.15(a).

The proposed § 18.57 provides the mechanisms for enforcing the provisions of the other discovery rules by imposing sanctions on parties who violate the discovery regulations. In general, sanctions are imposed in a two-step process in which a party must first obtain an order compelling discovery under proposed § 18.57(a), and then move for sanctions under proposed § 18.57(b). If, however, the responding party totally fails to respond to an entire discovery request, the sanctions may be available immediately. The Department proposes to grant judges greater discretion when imposing sanctions.

Under subdivision (a), the Department proposes to combine and expand the regulations under current §§ 18.6(d) and 18.21(a), and 18.15(a). This subdivision covers motions to compel discovery and motions to compel disclosure. A party may file a motion to compel under § 18.57(a)(2) after the opponent fails to make the automatic disclosures required by § 18.50(c), fails to respond to discovery served pursuant to the discovery rules, or makes an improper or incomplete disclosure or discovery response. When taking a deposition, the party asking a question may complete or adjourn the examination before moving for an order. Under proposed subdivision (a)(1), the motion to compel must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other party or person in an effort to resolve the dispute without the action of the judge. This is a procedural change proposed by the Department to encourage litigants to resolve matters amongst themselves and to help reduce litigation expenses. In current practice, many judges encourage parties to confer before filing certain motions.

The Department proposes to expand current § 18.21(c) to apply to evasive or incomplete disclosures in proposed § 18.57(a)(3). As under the current § 18.21(d), if the motion to compel is denied the judge may issue any protective order authorized under proposed § 18.52.

The Department proposes to add § 18.57(b), which sets forth the sanctions that become available if a party or deponent fails to obey a judge's order regarding discovery. Under this provision, a judge has the discretion to impose one or more of the listed sanctions or any other procedural sanction deemed appropriate, including: deeming facts established; prohibiting evidence; striking pleadings; and issuing a stay, dispositive ruling, or default judgment. The judge is not limited to the sanctions listed under § 18.57(b)(1) and may make any order that is ''just.''

Under proposed § 18.57(b)(2), if a party fails to comply with an order under § 18.62 to produce another for a mental or physical examination, the party is subject to the same sanctions under § 18.57(b)(1) that would apply if the party failed to appear, unless the party can show that the party was unable to produce the individual.

The Department proposes to add § 18.57(c), *Failure to disclose, to supplement an earlier response, or to admit,* which is a procedural change modeled after Fed. R. Civ. P. 37. Under this section, if a party: (1) Fails to make the automatic disclosures under § 18.50(c) in a timely manner; (2) makes false or misleading disclosures; (3) fails to supplement a prior discovery response as required by § 18.53; or (4) fails to supplement a prior discovery request, the party will not be permitted to use at trial or in a motion the documents, information, or witnesses not properly disclosed, unless the party had ''substantial justification'' or the failure was harmless. Under § 18.57(c), in addition to or in lieu of precluding the evidence, upon motion and after an opportunity to be heard, the judge may impose other appropriate sanctions, including any of the orders listed in § 18.57(b)(1).

The sanctions under this provision apply to an improper statement of inability to admit or deny, as well as to improper denial. The sanctions in this subdivision do not apply to failure to respond to a request for admissions because such a failure is deemed an admission.

The Department proposes to add § 18.57(d), *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection.* This subdivision provides that upon motion sanctions are immediately available against a party who completely fails to participate in the discovery process. For example,

sanctions are available when the party fails to appear for the party's deposition after being served with proper notice, fails to answer or object to properly served interrogatories, or fails to serve a written response to a properly-served request to inspect documents or things. Thus, a judge's order is not a prerequisite to sanctions under this subdivision. While this subdivision does not specify when the motion for sanctions must be filed, it should be filed without ''unreasonable delay'' or before the entry of the decision and order.

The proposed subparagraph (d)(1)(B) states that a motion for sanctions under § 18.57(d), for failure to respond to interrogatories or requests for inspection, must include a certification that the movant has in good faith conferred or attempted to confer with the other party or person in an effort to obtain a response without court action. Note that this requirement does not apply to the failure to appear for a deposition.

The proposed paragraph (d)(2) states that a failure described in § 18.57(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a). Under proposed paragraph (d)(3), sanctions may include any of the orders listed in § 18.57(b)(1).

The Department proposes to add subdivision (e) to prohibit the imposition of sanctions for failure to produce certain types of electronically stored information, in the absence of exceptional circumstances. The Department recognizes that certain types of electronically stored information are lost during the regular operation of a computer system and therefore parties should not be sanctioned for failing to produce such data. An example of the type of data that is contemplated by this provision is the metadata (or data about data) that computers automatically store, such as the last time a document was opened. Each time the document is opened the information that was stored in that field is deleted and replaced by new data. A party would not likely be sanctioned for the loss of the data when a document was last opened.

The protections in proposed § 18.57(e) are expressly limited to the good-faith operation of the computer system. Thus, a party cannot exploit the protections of this subdivision to deliberately delete relevant information. Under certain circumstances, a party wishing to require another party to preserve electronic data can write a letter to the party placing it on notice that the electronic data may be relevant and should be preserved, or can seek a preservation order from the judge. If either action is taken, a party must suspend those features of its computer system that result in the routine loss of information.

The Department proposes subdivision (f) to provide the procedure a judge must follow in impose sanctions under this section. A judge may impose sanctions under this section upon (1) a separately filed motion; or (2) notice from the judge followed by a reasonable opportunity to be heard.

The Department proposes to include the content from the current § 18.21(d) in the proposed § 18.33(a).

Types of Discovery

§ 18.60 Interrogatories to parties.

The Department proposes to revise the current § 18.18 and renumber it as proposed § 18.60. The proposed § 18.60 is modeled after Fed. R. Civ. P. 33 and should be read in conjunction with proposed § 18.51, which establishes the scope of all discovery rules.

The Department proposes to change the current subdivision (a) to state that unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with proposed § 18.51. The Department proposes this change to model Fed. R. Civ. P. 33 as the current § 18.18 does not set a limit on the number of written interrogatories a party may serve on another party.

The procedure for answering interrogatories is relocated from the current subdivision (a) to proposed subdivision (b). The Department proposes to delete the service and filing language from this section because the Department is proposing § 18.30, *Service and Filing,* to cover the service and filing regulations before OALJ.

The Department proposes to relocate the current subdivision (c) to proposed § 18.60(a)(2), *Scope.* Under this proposed subpart, the scope of interrogatories is the broad discovery available under § 18.51; thus, an interrogatory may relate to any matter that may be inquired into under proposed § 18.51. Interrogatories may be served after the parties have conducted the discovery conference under § 18.51, or earlier if the judge so orders. In the proceedings listed in § 18.50(c)(1)(B) as exempted from initial disclosures, there is no preliminary waiting period to serve interrogatories. The Part 18, Subpart A rules do not set an outer limit on how late in the case interrogatories may be served, but the judge may set such a limit.

The Department proposes subdivision (b), *Answers and objections,* to provide the procedural requirements parties must adhere to in answering and objecting to interrogatories. As under the current regulation, the responding party must answer interrogatories separately and in writing within 30 days after service.

Failure to serve a response in a timely manner may constitute a waiver of all objections. Under subdivision (b) the Department clarifies that the time period to answer may be shortened or extended by written agreement under proposed § 18.54, *Stipulations about discovery procedure.* This subpart also clarifies that the grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure. This is a procedural change modeled after Fed. R. Civ. P. 33.

The Department proposes to add a new subdivision (c) which provides that an answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence. This reflects the varying evidentiary requirements applicable to claims brought before OALJ. Interrogatory answers are not admissions, but generally may be used as though made in court by the party. Interrogatories may not be used to obtain documents. Rather, a document request must be made under proposed § 18.61, *Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.* However, interrogatories may inquire about the existence of documents and the facts contained therein. Documents may, under certain circumstances, be produced in lieu of answering an interrogatory, as discussed in proposed subdivision (d).

The Department proposes to add a new subdivision (d), *Option to produce business records.* A party may produce business records in lieu of answering an interrogatory when the burden of extracting the requested information would be substantially equal for either party. Only business records may be used in lieu of interrogatory answers; thus, a party cannot produce pleadings or deposition transcripts instead of answering an interrogatory. The responding party must specify the records that must be reviewed in sufficient detail to enable the interrogating party to locate and identify

them as readily as the responding party could. It is not sufficient to state that the business records may contain the information. The responding party must also give the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

§ 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

The Department proposes to revise the current § 18.19 and renumber it as proposed § 18.61. The proposed § 18.61 is modeled after Fed. R. Civ. P. 34, *Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.*

The Department is proposing a separate section, § 18.62, for physical and mental examinations; therefore, the language regarding physical and mental examinations is not included in this proposed section. The purpose of proposed § 18.61 is to set forth the procedures for obtaining access to documents and things within the control of other parties, and for gaining entry upon other parties' land for inspection. This proposed section should be read in conjunction with proposed § 18.51, which establishes the scope of all discovery rules.

The proposed subdivision (a), like the current subdivision (a), generally addresses the scope of document requests. This subpart states that a party may serve on any party a request within the scope of § 18.51. Generally, any relevant, non-privileged document is discoverable unless it was prepared in anticipation of litigation, pertains to expert witnesses, or would be unreasonably burdensome to produce. ''Documents'' is broadly defined to include all forms of recorded information. For clarity, the proposed subdivision (a) lists writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations as discoverable documents. Under the proposed regulation, a party is generally not required to create documents to meet a document request, but only to produce documents already in existence.

The Department proposes to incorporate current subdivisions (c) and (d) into proposed § 18.61(b). These subparts are revised to improve clarity but retain the same procedural requirements.

Under subdivision (b), the Department proposes to regulate the form in which electronic data must be produced (i.e. hard copy or electronic, and if electronic, the precise manner of production). This regulation is not included in the current rule. It allows, but does not require, the requesting party to specify the form in which it is requesting electronic data. The responding party can then produce it in that form or object and specify the form in which it will produce the electronic data. If the requesting party does not specify the form, then the responding party must produce it in the form in which it is ordinarily maintained or in a form that is reasonably usable. Unless the responding party is producing the data in the form specified by the requesting party, the responding party must specify the form it intends to use for production in its written response to the document request. If the responding party objects to the form stated by the requesting party, or if the requesting party is not satisfied with the form specified by the responding party, then the parties must meet and confer under § 18.57(a)(1). Under any of these scenarios, a party need not produce electronic data in more than one form.

The Department proposes to add a new regulation under subdivision (c), *Nonparties,* as the current Part18A is silent on this issue. Although document requests or requests for inspection cannot be served on a non-party, documents or inspections can be obtained from a non-party by a subpoena under proposed § 18.56, *Subpoenas.*

The Department proposes to delete the service and filing language in the current subdivision (f) because the Department is proposing § 18.30, *Service and filing,* to cover the service and filing regulations before OALJ.

§ 18.62 Physical and mental examinations.

The Department proposes a new § 18.62 modeled after Fed. R. Civ. P. 35 to regulate physical and mental examinations. Physical and mental examinations are currently covered by § 18.19; however, due to the high frequency of requests for physical and mental examinations the Department determined that there is a need for a separate section that sets forth the procedure for such requests.

The Department proposes to divide § 18.62 into three subparts: Examinations by motion, examinations by notice, and examiner's reports. This proposal reflects the distinction between examination by notice and examination by motion found in the federal rule.

The proposed subdivision (a) clarifies that a party may serve upon another party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitable licensed or certified examiner. This provision notifies parties they may serve a request to attend and submit to an examination on another party only if their mental or physical condition is in controversy. The examiner must be licensed or certified to perform the examination.

The Department proposes to amend the content requirements of a notice to attend a physical or mental examination, currently located under § 18.19(c)(4). The proposed paragraph (a)(2) provides that a notice must specify: (A) The legal basis for the examination; (B) the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and (C) how the reasonable transportation expenses were calculated.

The Department proposes to add the requirement that ''unless otherwise agreed by the parties, the notice must be served no fewer than 14 days before the examination date.'' The Department determined that a 14-day notice period provides the person to be examined enough time to make arrangements to attend the physical or mental examination or file an objection. Under paragraph (a)(4), the person to be examined must serve any objection to the notice no later than 7 days after the notice is served. The objection must be stated with particularity. Under the current § 18.19, the party to be examined has 30 days to object after service of the request. The Department proposes to shorten the timeframe a party has to object in order to quickly resolve the objection and expedite the proceedings.

Under subdivision (b), the Department proposes to provide the procedure for objecting to an examination. Upon objection, the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by § 18.62(a)(2).

The Department proposes to provide the procedure for examiner's reports under subdivision (c) in order to delete the reference to Fed. R. Civ. P. 35(b) in the current § 18.19(c)(4). The party who initiated the examination must deliver a complete copy of the examination report to the party examined, together with like reports of all earlier examinations of the same condition. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

§ 18.63 Requests for admission.

The Department proposes to revise the current § 18.20 and renumber it as proposed § 18.63. The proposed § 18.63 is modeled after Fed. R. Civ. P. 36.

The Department proposes to combine the current subdivisions (b), (c), and (d) into proposed subdivision (a). Under subdivision (a), the Department proposes to establish the procedure whereby one party serves requests for admission on another party, who must investigate and either admit, deny with specificity, or object to each requested admission.

The scope of requests for admission is the broad discovery available under proposed § 18.51. The proposed subdivision (a) clarifies that a party may serve on any party a written request to admit facts relating to facts, the application of law to facts, or opinions about either.

Under paragraph (a)(2), *Form; copy of a document,* the Department clarifies that each fact or matter for which admission is requested should be set forth in a separate paragraph. All facts that are part of the request should be set forth in the request—it is improper to incorporate facts by reference to other text.

Proposed paragraph (a)(3), *Time to respond; effect of not responding,* retains the same procedural requirements of current subdivision (b) and clarifies that a shorter or longer time for responding may be stipulated to under proposed § 18.54 or be ordered by the judge.

Proposed paragraph (a)(4), *Answer,* retains the same procedural requirements of current subdivision (c) and clarifies that if a matter is not admitted the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.

Under proposed paragraph (a)(5), *Objections,* the grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing. The proposed paragraph (a)(6) retains the same procedural requirements of current subdivision (d).

The Department proposes to combine and relocate the current subdivisions (e) and (f) to proposed subdivision (b), *Effect of an admission; withdrawing or amending it.* There are no procedural changes to these subparts; however, the proposed subdivision (b) clarifies that a judge may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.

§ 18.64 Depositions by oral examination.

The Department proposes to revise the current § 18.22 and renumber it as proposed § 18.64. The proposed § 18.64 is modeled after Fed. R. Civ. P. 30, *Depositions by oral examination.*

Under § 18.64 the Department expands the procedures for taking depositions by oral examination and this section must be considered in conjunction with the other discovery rules, in particular proposed § 18.51 governing the scope of discovery. The Department's regulations for depositions by written questions are located under proposed § 18.65.

The Department proposes to revise subdivision (a) to address when a deposition may be taken. The language regarding how and by whom a deposition may be taken in current subdivision (a) is relocated to proposed subdivision (b). The Department proposes to limit the number of depositions that parties may take to 10 depositions per side, absent leave of the judge or stipulation with the other parties. Depositions may be taken at any time after an initial notice or order is entered acknowledging that the proceeding has been docketed at OALJ. If the judge orders the parties to confer under proposed § 18.50(b), depositions must be taken within the time and sequence agreed upon by the parties. The Department proposes to limit the number of depositions to 10 to emphasize that representatives have an obligation to develop a mutually cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of proposed § 18.51(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles.

Under paragraph (a)(1), the Department clarifies that a deponent's attendance may be compelled by subpoena under § 18.56, *Subpoena.*

Leave of the judge is required to depose someone if the parties have not stipulated to the deposition and (i) The deposition would result in more than 10 depositions being taken under this section or § 18.65 by one of the parties; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take the deposition before the time specified in § 18.50(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time. Leave of the judge must be obtained in order to take the deposition of a person confined to prison.

The Department proposes to combine current subdivisions (b) and (c) into proposed subdivision (b), *Notice of the deposition; other formal requirements.* The Department proposes to change the timeframes under § 18.64 to be consistent throughout Part18A. Under proposed paragraph (b)(1), except as stipulated or otherwise ordered by the judge, a party who wants to depose a person by oral questions must give reasonable written notice to every other party of no fewer than 14 days. The current § 18.22(c) provides that written notice must not be less than 5 days when the deposition is to be taken in the continental United States and not less than 20 days when the deposition is to be taken elsewhere. Under paragraph (b)(1), the Department proposes to clarify that if the name of the deponent is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

The Department proposes to delete the language in current subdivision (b) requiring that the party giving notice state the name of the person before whom the deposition is to be taken. The name of the person before whom the deposition is to be taken is not relevant as long as the person meets the requirements stated in the regulation.

The Department proposes to delete the filing language in the current subdivision (c) because the Department is proposing § 18.30, *Service and filing,* to cover the service and filing regulations before OALJ.

The Department proposes to add several regulations to proposed subdivision (b) that are not found in the current § 18.22. These provisions are modeled after Fed. R. Civ. P. 30(b)(2)–(b)(5) and come into current practice through the federal rule. Under proposed paragraph (b)(2), if a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. If the notice to a party-deponent is accompanied by a request for production under § 18.61, the notice must comply with the requirements of § 18.61(b).

The Department proposes to regulate the method of recording depositions under paragraph (b)(3). The notice of

deposition must specify the method of recording the deposition testimony. Unless the judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. Under proposed subparagraph (b)(3)(B) with prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. The party bears the expense of the additional recording or transcript unless the judge orders otherwise.

Under proposed paragraph (b)(4), the Department clarifies that parties may stipulate—or the judge may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

The Department proposes to regulate the officer's duties when taking a deposition. Under proposed subparagraph (b)(5)(A), unless the parties stipulate otherwise, a deposition must be conducted before a person having power to administer oaths. The officer must begin the deposition with an on-the-record statement that includes: (i) The officer's name and business address: (ii) the date, time, and place of the deposition; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation to the deponent; (v) the identity of all persons present; and (vi) the date and method of service of the notice of deposition. Specifically, (b)(5)(A)(vi) is in response to OALJ noticing that statements regarding notice are lacking in depositions.

The proposed subparagraph (b)(5)(B), provides that if the deposition is not recorded stenographically, the officer must repeat the items in proposed § 18.64(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

The proposed subparagraph (b)(5)(C), provides that at the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

The proposed paragraph (b)(6) provides that in its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

The Department proposes to incorporate a revised version of current subdivision (d) into proposed subdivision (c), *Examination and cross-examination; record of the examination; objections; written questions.* Proposed subdivision (c) clarifies that after putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under § 18.64(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

Under paragraph (c)(2), *Objections,* the Department proposes to add that an objection at the time of the examination— whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the judge, or to present a motion under § 18.64(d)(3).

Under paragraph (c)(3), *Participating through written questions,* the Department clarifies that instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

The Department proposes to delete the language in current § 18.22(d) regarding use of depositions at hearing because the Department is proposing section § 18.55, *Using depositions at hearing.*

The Department proposes to add subdivision (d), *Duration; sanction; motion to terminate or limit,* which incorporates current subdivision (e). The duration of depositions is not currently addressed by Part 18, Subpart A. Proposed subdivision (d), modeled after Fed. R. Civ. P. 30(d), provides for a 7-hour time limit on depositions, which may be extended by the judge's order. This subdivision also provides protections from unreasonable or vexatious examination during a deposition.

Under paragraph (d)(2) the judge may impose an appropriate sanction, in accordance with proposed § 18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent. Under proposed subparagraph (d)(3)(A), the Department clarifies that at any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

The Department proposes to relocate the language in the current § 18.22(e) regarding objections to the deposition conduct or proceeding to proposed § 18.55(b) and (d).

The Department proposes to add a new regulation under subdivision (e), *Review by the witness; changes,* modeled after Fed. R. Civ. P. 30(e). Under paragraph (e)(1), on request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) To review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. Under paragraph (e)(2) the officer must note in the certificate prescribed by proposed § 18.64(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

The Department proposes to add a new regulation under subdivision (f), *Certification and delivery; exhibits; copies of the transcript or recording; filing.* This subdivision provides that the officer must certify in writing that the witness was duly sworn and that the deposition transcript was a true record of the testimony given by the deponent. The certificate must accompany the record of the deposition. Unless the judge orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked ''Deposition of [witness's name}'' and must promptly send it to the party or the party's representative

who arranged for the transcript or recording. The party or the party's representative must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Proposed subparagraph (f)(2)(A) provides that documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. However, if the person who produced them wants to keep the originals, the person may: (i) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. Any party may move for an order that the originals be attached to the deposition pending final deposition or the proceeding under proposed subparagraph (f)(2)(B).

Proposed paragraph (f)(3) provides that unless otherwise stipulated or ordered by the judge, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. Proposed paragraph (f)(4) provides that a party who files the deposition must promptly notify all other parties of the filing. But depositions are not ordinarily filed. *See* proposed § 18.30(b)(1)(B).

The Department proposes to add a new regulation under subdivision (g), *Failure to attend a deposition or serve a subpoena.* This provision provides for a judge to order sanctions, in accordance with § 18.57, if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to: (1) Attend and proceed with the deposition; or (2) serve a subpoena on a nonparty deponent, who consequently did not attend. This sanction is permissive.

§ 18.65 Depositions by Written Questions.

The Department proposes to add a new § 18.65 modeled after Fed. R. Civ. P. 31. The Department proposes a new section to provide the procedure for taking depositions by written questions because the current Part 18, Subpart A rules do not specifically mention depositions by written questions. The current § 18.19 addresses written interrogatories to a party and the current § 18.22(a) states that ''[d]epositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.'' The current § 18.22(a) also provides that ''[d]epositions may be taken of any witness * * *.'' Since there is a specific rule addressing written interrogatories to a party, the Department determined that the current § 18.22 contemplates taking written depositions of any witness.

The proposed subdivision (a) addresses when a deposition may be taken. Any party may take depositions by serving written questions, which are asked by the deposition officer (stenographer) and answered orally by the witness. A party seeking to take a deposition by written questions must serve a notice on all other parties stating the name and address of the deponent, if known, or other general description sufficient to identify the deponent and providing the name or title and address of the stenographer or officer before whom the deposition will be taken.

The notice of written deposition may be served at any time after the parties have conducted the discovery conference under § 18.50(b), or earlier with leave of the judge. In proceedings listed in proposed § 18.51(c)(1)(B) as exempted from initial disclosures, there is no preliminary waiting period for written depositions. The latest time to conduct a deposition upon written questions will be governed by the judge's scheduling order. Subpoenas must be used to compel non-party witnesses.

The written deposition questions for direct examination are served upon all parties with the notice. Within 14 days of service of the notice and direct examination questions, any other party may serve cross-examination questions. The noticing party may then serve redirect examination questions within 7 days, and the other party may serve re-cross examination questions within 7 more days. The judge may shorten or lengthen these time periods upon motion and for cause shown. All questions must be served on all parties.

All parties, including third-party respondents, are limited to 10 depositions total, by written and/or oral examination. This number may be increased by stipulations or leave of the judge. Leave of the judge is required to depose someone a second time. If a deponent is in prison, leave of the judge is required to take a written deposition. The scope of the written questions is the same as oral questions, and is controlled by proposed § 18.50. Objections to the form of a written question must be served in writing upon the party propounding the question within the time for serving succeeding questions and within 5 days of the last questions authorized.

Under proposed subdivision (b), unless a different procedure is ordered by the judge, the party who noticed the deposition must deliver to the officer a copy of all the questions served and a copy of the notice. The officer then promptly proceeds in the manner provided in proposed § 18.64 (c), (e), and (f) to take the deponent's testimony in response to the questions; prepare and certify the deposition; and send it to the party, attaching a copy of the questions and of the notice. A transcript is then prepared and submitted to the witness as provided in § 18.64 governing oral depositions.

Under proposed subdivision (c), the party who noticed the deposition must notify all other parties when it is completed. A party who files the depositions must promptly notify all other parties of the filing. But depositions are not ordinarily filed. *See* proposed § 18.30(b)(1)(B).

Disposition Without Hearing

§ 18.70 Motions for dispositive action.

The Department determined that Part 18, Subpart A does not currently address all of the potential dispositive motions available to the parties. The Department proposes to add § 18.70, *Motions for dispositive action,* to provide the regulations for filing dispositive motions in a single section. This proposed section codifies current practice and does not model a particular federal rule. The Department determined that motions for summary decision should remain a separate section because of the multiple requirements for filing and deciding a motion for summary decision and the need for that section to stand out among the rest.

Under proposed subdivision (a), when consistent with statute, regulation or executive order, any party may move under proposed § 18.33 for disposition of the pending proceeding. If the judge determines at any time that subject-matter jurisdiction is lacking, the judge must dismiss the matter.

Under proposed subdivision (b), a party may move to remand the matter to the referring agency when not precluded by statute or regulation. A remand order must include any terms or conditions and should state the reason for the remand.

Under proposed subdivision (c), a party may move to dismiss part or all of the matter for reasons recognized under

controlling law, such as lack of subject-matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

Under the proposed subdivision (d), when the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

§ 18.71 Approval of settlement and consent findings.

The Department proposes to revise the current § 18.9 and renumber it as proposed § 18.71.

The current § 18.9, *Settlement judge procedure,* addresses three topics: (1) Motions for consent findings and order; (2) approval of settlement agreements; (3) and the settlement judge procedure. The Department proposes that new § 18.71 provide the regulations for approval of settlement agreements and motions for consent findings and order. The Department proposes to address the settlement judge procedure in proposed § 18.13, *Settlement judge procedure.*

In subdivision (a) the Department proposes to clarify when a party must submit a settlement agreement for the judge's review and approval. The Department does not propose any procedural changes from the current § 18.9.

In subdivision (b) the Department proposes to clarify when a party may file a motion for consent findings and what the order must contain. The Department does not propose any procedural changes from the current § 18.9.

§ 18.72 Summary decision.

The current Part 18, Subpart A contains two sections, §§ 18.40 and 18.41, that address summary decision. The Department determined these sections are repetitive and inadequately organized and, therefore, proposes § 18.72, *Summary decision,* to address summary decision in a single section. The proposed § 18.72 is modeled after Fed. R. Civ. P. 56 (December 2010 amendment).

In addition to the significant stylistic changes, the Department proposes several procedural changes in § 18.72. Under subdivision (b), the Department proposes to change the time requirements for filing and responding to motions for summary judgment. The current § 18.40(a) provides that a party may, at least 20 days before the date fixed for any hearing, file a motion for summary judgment. It states that any other party may within 10 days after service of the motion, serve opposing affidavits or countermove for summary judgment. The Department proposes to increase the timeframe for filing motions for summary decision to 30 days before the date fixed for the formal hearing.

Parties should refer to proposed § 18.33 for the procedure on responding to motions. Under proposed § 18.33(d), the Department proposes to increase the number of days a party has to respond to a motion from 10 days to within 14 days from the date of service. Given the increased timeframe a party has to file an opposition or other response to a motion, the time for filing a summary decision motion must be extended to allow the judge an acceptable period of time to rule on the motion. If a motion is filed 30 days prior to the hearing date and the opposing party files an opposition or other response 14 days after receiving the motion, the judge will generally have adequate time to rule on the motion before the hearing date.

The current § 18.40(a) permits a party to ''move with or without supporting affidavits for a summary decision * * *.'' Under paragraph (c)(1), the Department proposes to require a party to cite specific parts of the record to support or oppose the motion. This proposed change comports with the standard the judge uses to review the motion, ''that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.''

The last sentence of the current § 18.40(a) states that the administrative law judge may set the matter for argument and/or call for submission of briefs. The Department proposes to relocate this language to proposed § 18.33(d).

The current § 18.40(b) states the procedure for filing and serving a motion for summary judgment. This provision is not included in the proposed § 18.72 because the service and filing of papers is covered by proposed § 18.30, *Service and filing.*

Under subdivision (c), the Department proposes a revised version of the current § 18.40(c). This subdivision applies to both the moving and nonmoving party. Under paragraph (c)(4) the Department proposes to clarify that ''an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.''

Under subdivision (d), the Department proposes a revised version of current § 18.40(d). The Department proposes to provide the judge with more options when a moving party denies access to information during discovery. In addition to denying the motion for summary decision, the judge may permit more time for discovery, or issue any other appropriate order.

The Department proposes to address three new topics under subdivisions (f), (g), and (h). Under subdivision (f), the Department proposes to clarify that after giving notice and a reasonable time to respond, the judge may: (1) Grant summary decision for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely disputed. Under the current regulations, a judge who considers summary decision on his or her own must reference Fed. R. Civ. P. 56 in order to order summary judgment without a motion from the parties. The addition of this power within this proposed section allows the judge to rely on the Department's regulations.

The Department does not propose to change the power a judge has to issue an order granting partial summary judgment. Under this proposed subdivision, the Department proposes a procedure that the judge and parties must follow in the hearing after the judge grants partial summary judgment. The judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treat the fact as established in the case.

Under proposed subdivision (h), the Department proposes to address the actions a judge may take if an affidavit or declaration is submitted in bad faith. These remedies are part of the judge's power to regulate the hearing under the Administrative Procedure Act.

The Department proposes to delete the language in the current § 18.41(a)(2) stating what a summary judgment decision must contain. The Department proposes § 18.92, *Decision and order,* to regulate the contents of summary judgment decisions.

The Department proposes to relocate the language from the current § 18.41(b) to the proposed 18.33(g) *Motion hearing.*

Hearing

§ 18.80 Prehearing statement.

The Department proposes to revise the current § 18.7 and renumber it as proposed § 18.80.

Under subdivision (a), the Department proposes to add the requirement that a participating party file a prehearing statement at least 21 days prior to the

date set for hearing, unless the judge orders otherwise. The current § 18.7 does not have a timeframe for filing prehearing statements. However, judges typically include a timeframe in prehearing orders. It is not the Department's intention to require the applicable Department's agency to file a pre-hearing statement when it is not actively participating in the proceeding. For example, in a Black Lung claim in which an employer has been identified as the responsible operator, the Office of Workers' Compensation Programs, though a party-in-interest, does not normally take an active role. In such circumstance it is not necessary for the Department's representative to file a pre-hearing statement.

The Department proposes to add a new provision under subdivision (b) that requires the parties confer in good faith to stipulate to facts to the fullest extent possible and to prepare exhibit lists prior to filing prehearing statements. The Department proposes this change to help narrow the issues to be addressed at hearing and eliminate unnecessary travel for potential witnesses.

Under subdivision (c), the Department proposes to provide a revised version of the content requirements for a prehearing statement from the current § 18.7(b). The Department proposes to add that the prehearing statement must include a statement of the relief sought, a list of the party's exhibits and the joint exhibits. Otherwise, the content requirements remain procedurally the same as those in the current § 18.7.

The Department proposes to add a new regulation under subdivision (d) that permits the judge to require a joint prehearing statement instead of individual prehearing statements by the parties.

The Department proposes to add a new regulation under subdivision (e) that requires a party to file objections to an opposing party's proposed exhibits or use of deposition testimony within 14 days of being served. A party's failure to object waives the objection unless the judge finds good cause for the failure to object.

§ 18.81 Formal hearing.

The Department proposes to revise the current § 18.43 and renumber it as proposed § 18.81. The proposed § 18.81 is modeled after Fed. R. Civ. P. 43.

The Department proposes to revise the current subdivision (a) to more accurately address the situations when a hearing would be closed to the public. The current subdivision (a) states that hearings may be closed to the public when it is in the ''best interests of the parties, a witness, the public or other affected persons.'' The Department proposes to delete this language and instead state that hearings may be closed to the public ''when authorized by law and only to the minimum extent necessary.'' The proposed change states the standard a judge will apply when determining whether to close all or part of a hearing. The applicable law does not suggest that hearings are closed based on the ''best interests'' of the parties. Further, the presumption of open hearings is supported by the requirement that a judge close a hearing only to the minimum extent possible. The proposed subdivision (a) clarifies that the judge's order closing the hearing must explain why the reasons for closure outweigh the presumption of public access to the hearing. The Department proposes to clarify that the judge may also close the hearing to anticipated witnesses. Parties would not be excluded, however. *See* Fed. R. Evid. 615 cmt.

The Department proposes to delete current subdivisions (b) and (c). The judge's jurisdiction to decide all issues of fact and related issues of law is addressed by proposed § 18.12, *Proceedings before administrative law judge.* Amendments to conform to the evidence is addressed by proposed § 18.36, *Amendments after referral to the Office of Administrative Law Judges,* and the note referring the parties to Fed. R. Civ. P. 15.

The Department proposes to model a new subdivision (b) after Fed. R. Civ. P. 43(a). The proposed subdivision (b) requires that a witness testify in an open hearing. However, a judge may permit testimony in an open hearing by contemporaneous transmission from a different location ''for good cause and with appropriate safeguards.'' The Department determined that if a witness needs to testify remotely, the witness or party must show good cause, instead of having to show compelling circumstances, which is the higher legal standard set forth in Fed. R. Civ. P. 43(a). The Department's decision to set a lesser standard is not intended to diminish the importance of presenting live testimony in hearings. The very ceremony of a hearing and the presence of the factfinder may exert a powerful force for telling the truth. However, in contrast to the federal courts, OALJ has more relaxed evidentiary standards. Hearings take place worldwide and are not constrained by the concept of ''venue.'' Appropriate safeguards will be addressed by the judge in the prehearing order or conference and may include the exchange of exhibits and assurances that the witness will not be coached during the testimony.

Similarly, the Department proposes a new subdivision (c) to permit a party to participate in an open hearing by contemporaneous transmission from a different location for good cause and with appropriate safeguards. This provision accounts for the fact that some cases involve parties located outside the United States or in other remote locations that are unable to attend hearings in person. Subdivisions (b) and (c) are not intended to suggest that contemporaneous transmission is routine practice. The presiding judge may require advance notice to determine whether good cause exists.

§ 18.82 Exhibits.

The Department proposes to revise the current §§ 18.47 through 18.50 as part of the general restyling of the Part 18, Subpart A rules of procedure. The current §§ 18.47 through 18.50 are combined into a single section covering exhibits, proposed § 18.82.

The Department proposes to relocate the language from the current § 18.47 to subdivisions (a), *Identification,* (b), *Electronic data,* (c), *Exchange of exhibits,* and (e), *Substitution of copies for original exhibits,* in § 18.82. In subdivision (a), the Department proposes to add a provision stating that the exhibits should be numbered and paginated as the judge directs. The Department determined that this requirement is sufficiently broad to cover the variety of judges' preferences for organizing exhibits, so that references in the testimonial record to exhibit pages will be clear.

The Department proposes to relocate the language from the current § 18.48 to proposed subdivision (g), *Records in other proceedings.* The Department proposes to revise the structure of this subdivision for clarity, but does not propose any procedural changes.

The Department proposes to relocate the language from the current § 18.49 to proposed subdivision (f), *Designation of parts of documents.* The Department proposes to revise the structure of this subdivision and delete the redundant language. The Department proposes to revise the first sentence to emphasize the procedure for excluding irrelevant material. The second sentence is deleted as a matter left to each judge's discretion and because other rules will apply to submitting evidence and marking exhibits.

The Department proposes to relocate the language from current § 18.50 to proposed subdivision (d), *Authenticity.* The Department proposes to revise the structure of this subdivision to improve

clarity, but does not propose any procedural changes.

Under subdivision (b), *Electronic data,* the Department proposes that ''by order the judge may prescribe the format for the submission of data that is in electronic form.''

§ 18.83 Stipulations.

The Department proposes to revise the current § 18.51, renumber it as proposed § 18.83, and include it under subdivision (a). The Department does not propose any procedural changes to this subpart.

The Department proposes to add new regulations under subdivisions (b) and (c). These provisions are based on current practice as stipulations typically result from a judge's order. The proposed subdivision (b) applies to extensions of time not covered by proposed §§ 18.33, *Motions and other papers,* and 18.41, *Continuances and changes in place of hearing.* The new provision states that ''[e]very stipulation that requests or requires a judge's action must be written and signed by all affected parties or their representatives. Any stipulation to extend time must state the reason for the date change.''

Under proposed subdivision (c), the Department proposes that ''[a] proposed form of order may be submitted with the stipulation; it may consist of an endorsement on the stipulation of the words, 'Pursuant to stipulation, it is so ordered' with spaces designated for the date and the signature of the judge.''

§ 18.84 Official notice.

The Department proposes to revise the current § 18.45 and renumber it as proposed § 18.84.

Under this section, the Department proposes to clarify the procedures a judge must follow when taking official notice. The Department proposes that official notice may be taken on motion of a party or on the judge's own. The current § 18.45 states that official notice may be taken on ''any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice.'' This proposed change clarifies that official notice may be taken of any ''adjudicative fact or matter subject to judicial notice.''

The proposed § 18.63, *Request for admission* and the current § 18.201, *Official notice of adjudicative facts,* do not require advance notice before the judge takes official notice, but rather an opportunity to be heard. The Department, therefore, decided not to propose an advance notice requirement in this section. In some situations the judge may take official notice of a noncontroversial fact that was omitted in the evidence without noticing the parties before issuing a decision and order. The parties have an opportunity to be heard after the order is issued.

§ 18.85 Privileged, sensitive, or classified materials.

The Department proposes to revise the current §§ 18.46 and 18.56 and combine them into a single section, proposed § 18.85, covering privileged, sensitive, or classified material.

The Department proposes to relocate the content from the current § 18.46 to subdivision (a). The current § 18.46 addresses several topics: (1) Limiting discovery and the introduction of evidence based on claims of privilege; (2) limiting the introduction of evidence based on claims of classified or sensitive information; (3) providing a summary or extracted version of a document to limit disclosures of classified or sensitive material; (4) permitting access to classified or sensitive matters despite their nature; and (5) requiring a representative to seek a security clearance in order to view the information.

The proposed subdivision (a) is more limited in scope than the current § 18.46. The procedures to limit the scope of discovery based on claims of privilege or sensitive information are addressed by proposed §§ 18.51, *Discovery scope and limits,* and 18.52, *Protective orders.* Accordingly, the references to limiting discovery in current subdivision (a) and paragraph (b)(1) are deleted.

The references to obtaining a security clearance in current paragraph (b)(2) are also deleted. The need for a participant in a hearing to obtain a security clearance is a rare event before OALJ. The Part 18, Subpart A rules are designed to apply to the typical types of cases heard by OALJ; the rules do not address all of the exceptions or possibilities that may occur in specific cases. Further, the process for seeking a security clearance would be determined by the federal agency holding the classified or sensitive information. OALJ does not independently facilitate a security clearance process. For these reasons, the references to obtaining a security clearance are deleted from proposed § 18.85.

The Department proposes to relocate the content from the current § 18.56 to subdivision (b). The proposed rule retains the option provided in current subdivision (a) that a party or the judge may move to seal a portion of the record. This section continues to require that the sealed portion of the record be clearly marked and maintained separately from other parts of the record in the case.

The proposed subdivision (b) imposes new requirements on parties. When filing a motion to seal the record, a party must propose a redaction no broader than necessary for inclusion in the public record. If the movant finds that a redaction would be so extensive as to make the material meaningless, the movant must file a summary of the material to be included in the public record. The requirement of filing a redacted copy or summary along with the motion to seal the record ensures that the public continues to have access to as much information as possible regarding the proceedings.

Under paragraph (b)(2), if the judge issues an order sealing all or part of the record, the judge must explain why the need to seal part of the record outweighs the presumption of public access. A redacted version or summary of the material must be included in the record unless the redactions make the public version of the material meaningless, or if the redacted version or summary defeats the reason the original is sealed. Notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

§ 18.86 Hearing room conduct.

The Department proposes to revise the current § 18.37 and renumber it as proposed § 18.86.

The first sentence of the current § 18.37 states that proceedings are to be conducted in an orderly manner. The Department proposes to amend this sentence to directly address how participants must conduct themselves during a hearing, instead of generally stating how the hearing should be managed. The proposed change provides direct instructions to the participants.

The Department proposes to retain the prohibition on food and beverage consumption and the rearranging of furniture in the hearing location. The Department proposes to delete the reference to smoking. Prohibitions on smoking in public places, specifically hearing locations, are more ubiquitous than in 1983 when the current Part 18, Subpart A was adopted. A specific prohibition in Part 18, Subpart A, therefore, is not required.

The Department proposes to add a prohibition on disrupting proceedings with electronic devices. This addition is a result of changing technology since the current Part 18, Subpart A was adopted. Electronic devices and their use can be distracting and disruptive during a hearing. Accordingly, limiting

the use and noise produced by electronic devices facilitates the orderly conduct of a hearing. Parties, witnesses and spectators are also prohibited from using video or audio recording devices to record hearings.

§ 18.87 Standards of conduct.

The Department proposes to revise the current § 18.36 and renumber it as proposed § 18.87.

The Department proposes to divide the current subdivision (b) into two subdivisions: (b), *Exclusion for misconduct,* and (c), *Review of representative's exclusion.* Under 18.87 (b), the Department proposes to define the types of conduct that may result in a party or the party's representative being excluded from a proceeding.

Under subdivision (c), the Department proposes to provide the procedure a party's representative must initiate in order to be reinstated as a representative in a particular matter. The current § 18.36 does not indicate a time period in which the representative must seek reinstatement. The Department proposes a 7-day time period for a representative to request reinstatement. Seven days is proposed so as not to create too long a delay in proceeding with the claim.

§ 18.88 Transcript of proceedings.

The Department proposes to revise the current § 18.52 and renumber it as proposed § 18.88.

The Department proposes to limit the application of this section to hearing transcripts and corrections to the transcript. The Department, therefore, proposes to delete the second and third sentences of the current subdivision (a). The second sentence refers to the basis of the judge's decision, which is controlled by sec. 557(b) of the APA. Because this current provision is covered by a statute, it is unnecessary to include the provision in the proposed § 18.88. The Department propose to delete the references to exhibits in the third sentence because the identification, marking, and inclusion of exhibits in the record are addressed by proposed § 18.82, *Exhibits.*

The Department proposes to amend the first sentence of the current subdivision (a) to require that all hearings be recorded and transcribed. The Department proposes to delete the methods of recording and transcription in recognition of the variety of technologies used to record and transcribe proceedings. The deletion, however, does not alter the meaning or application of the rule. The rule continues to require a transcript of a hearing.

Under subdivision (b), the Department proposes to extend the time permitted to file a motion to correct a transcript to 14 days. The current subdivision (b) requires that a party file the motion within 10 days of receipt of the transcript. This change to 14 days comports with the general revision to set time periods based on multiples of 7.

The Department proposes to add a new provision under subdivision (b) to permit a judge to correct a transcript on his or her own, without a prior motion from a party, prior to issuing a decision. If a judge corrects the transcript, the judge must provide notice to the parties.

Post Hearing

§ 18.90 Closing the record; additional evidence.

The Department proposes to revise the current §§ 18.54 and 18.55 and combine them into proposed § 18.90.

The Department proposes to combine the current § 18.54(a) and (b) into proposed subdivision (a). The Department proposes only stylistic changes to the language of these current subdivisions.

The Department proposes to incorporate the provisions contained in existing §§ 18.54(c) and 18.55 into proposed subdivision (b). The paragraph (b)(1) provides the standard the judge will apply when ruling on a motion to admit additional evidence. The proposed section retains the requirement that the additional evidence be ''new and material evidence.'' The proposed section requires that the party demonstrate that it could not have discovered the new evidence with reasonable diligence before the record closed.

Under paragraph (b)(1), the Department proposes to require the party offering the additional evidence to file a motion promptly after discovering the evidence. This sentence makes several changes to the existing requirement in § 18.55. First, the proposed section emphasizes that a party must file a motion asking to reopen the record for filing additional evidence. Requiring the party to file a motion incorporates the requirements of proposed § 18.33, *Motions and other papers,* including the time to respond to motions.

The Department proposes to delete the timeframe for filing and responding to additional evidence in the current § 18.55. Constraining the party to filing new evidence 20 days after the close of the hearing was an unnecessarily restrictive time limit. If a party promptly files a motion seeking to reopen the record based on new and material evidence that was not available before the hearing, the judge will consider the motion based on the requirements of the proposed (b)(1).

The Department proposes to clarify in paragraph (b)(2) that if the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set.

The Department proposes to revise the final sentence of the current § 18.54(c) and relocate it to proposed subdivision (c). The Department proposes to revise this subdivision to instruct the parties that the record will remain open for additional appropriate motions; the content of the record is defined in proposed § 18.88.

§ 18.91 Post-hearing brief.

The Department proposes to revise the current § 18.57 and separate the content into two separate sections: §§ 18.91, *Post-hearing briefs,* and 18.92, *Decisions of the administrative law judge.* The Department proposes to relocate the content from the current § 18.57(a) to proposed § 18.91.

The Department proposes to eliminate the 20-day filing period set in the current § 18.57(a). The 20-day timeframe for filing proposed findings of fact, conclusions of law, and a proposed order is rarely used by parties before OALJ. Instead, the parties follow the schedule ordered by the judge at the close of the formal hearing or the judge's order granting a hearing on the record. Accordingly, the proposed section permits the parties to file closing briefs within the time period established by the judge.

The Department determined that parties before OALJ rarely file proposed findings of facts and proposed order, as litigants file in state or federal district court. Rather, parties or their representatives typically file post-hearing briefs. Under the proposed § 19.91, the Department proposes that judges allow a party or representative to file a post-hearing brief that emphasizes the three major items parties should emphasize in closing briefs: findings of fact, conclusions of law and the specific relief sought. Like the current regulation, the proposed section requires that the post-hearing briefs refer to all portions of the record and cite authorities supporting the party's assertions.

The Department proposes to delete the provision in the current § 18.57(a) that requires parties to serve post-hearing filings on all parties. Under proposed § 18.30, *Service and filing,* all papers must be served on every party.

Therefore, it is unnecessary to repeat the requirement in this section.

§ 18.92 Decision and order.

The Department proposes to revise the current § 18.57 and separate the content into separate sections: §§ 18.91, *Post hearing briefs* and 18.92, *Decisions and order*. The Department proposes to delete the language from the current § 18.57(b) and replace it with proposed § 18.92.

The Department proposes to delete the reference to issuing a decision and order within 30 days of receipt of proposed consent findings and order. Instead, the proposed section states that ''at the conclusion of the proceeding, the judge must issue a written decision and order.'' OALJ has jurisdiction to decide claims under a variety of statutes which impose different, but specific timeframes for issuing a decision and order. When a statute or regulation does not specifically mention a timeframe for issuing a decision and order, the judge, as is current practice, will issue a decision and order within a reasonable time.

The Department proposes to delete the last three sentences of the current § 18.57. The statements repeat the requirements imposed by sec. 557(c) of the APA, therefore, the Department determined that it is unnecessary to repeat the substantive requirements of the judge's decision in OALJ's rules of procedure. These APA requirements will continue to apply to decisions and orders issued by OALJ judges.

§ 18.93 Motion for reconsideration.

The Department proposes to add a new § 18.93 modeled after Fed. R. Civ. P. 59(e), *Motions to alter or amend a judgment*.

Under proposed § 18.93, the Department proposes that ''a motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.'' The purpose of this section is to make clear that judges possess the power to alter or amend a judgment after its entry.

The Department proposes to set a 10-day limitation on filing a motion for reconsideration; however, it recognizes that governing statutes, regulations, and executive orders, such as the Black Lung regulations, may provide a different time for filing motions for reconsideration. In those circumstances, the rule of special application will apply.

§ 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.

The Department proposes to add a new § 18.94 modeled after Fed. R. Civ. P. 62.1 (December 1, 2009). The current Part 18, Subpart A does not specifically mention indicative rulings on a motion for relief that is barred by a pending appeal or petition for review. The proposed § 18.94 applies to motions made before a judge after an appeal has been docketed with an appellate board, and the judge no longer has jurisdiction over the merits of the case. At OALJ parties occasionally file post-appeal motions, so the Department determined that it is helpful to have a section that informs the judge and the appellate board how the motion should be addressed. Inclusion of this section is consistent with the Department's approach to include provisions from the FRCP unless the rule is inapplicable to OALJ proceedings.

The proposed § 18.94 does not attempt to define the circumstances in which an appeal limits or defeats the judge's authority to act in the face of a pending appeal. This section applies only when the rules that govern the relationship between the judge and appellate review boards deprive the judge of the authority to grant relief without appellate permission. If a judge concludes that he or she has authority to grant relief without appellate permission, he or she may act without falling back on the indicative ruling procedure.

Often it will be appropriate for the judge to determine whether the judge in fact would grant the motion if the appellate review board remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the judge may prefer to state that the motion raises a substantial issue, and to state the reasons why the judge prefers to decide it only if the appellate review board agrees that it would be useful to decide the motion before decision of the pending appeal. The judge is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not to be granted.

§ 18.95 Review of Decision

The Department proposes to revise the current § 18.58 and renumber it as proposed § 18.95. As in the current rule, the proposed rule states that the statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision. The Department does not propose any procedural changes to this rule.

Section Deletions

The Department proposes to delete the current § 18.13. The first sentence of the rule lists the methods of discovery available to a party. Prior to the 2007 amendments, the FRCP included a similar provision under Fed. R. Civ. P. 26; however, the 2007 amendments to the FRCP deleted this provision. The 2007 Advisory Committee Notes to Fed. R. Civ. P. 26 state that ''former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant.'' Similarly, the Department proposes to delete the first sentence of the current § 18.13 just as Fed. R. Civ. P. 26(a)(5) was deleted. The second sentence to the current § 18.13 explains that, unless the judge orders otherwise, there are no limits on the frequency or sequence for use of the discovery methods. The frequency, timing, and sequence of discovery are addressed by proposed § 18.50, *General provisions governing disclosure and discovery*. Accordingly, the Department proposes to delete the second sentence of the current § 18.13.

The Department proposes to delete the current § 18.32. The text of current § 18.32 is based on § 554(d) of the APA. This regulation repeats the statute without adding additional procedures or guidance, therefore, the Department proposes to delete it.

The Department proposes to delete the current § 18.33. The parties' right to a hearing within a reasonable time is encompassed in proposed § 18.10, *Scope and purpose*. The proposed § 18.10(a) states that the rules of procedure ''should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.'' The Department determined that repeating the statement of a speedy determination in current § 18.33 is redundant.

The Department proposes to delete the current § 18.53. The proposed § 18.12, *Proceedings before administrative law judge,* which combines the current §§ 18.25 and 18.29, addresses the ability of the judge to conduct the hearing. The contents of the current § 18.53 are repetitious given the revisions to the proposed § 18.12.

The Department proposes to delete the current § 18.59. If OALJ receives a request for a certified copy of the record,

the request would originate with a reviewing body or court. The terms of sending the record would be controlled by the request or court order. Thus, it is not practicable to have a uniform rule governing the procedure for sending a certified copy of the record. Further, determining the appropriate record custodian and the procedures for certifying the record are internal matters within OALJ and the Department. Based on these facts, the Department has determined that the current § 18.59 should be deleted.

List of Subjects in 29 CFR Part 18

Administrative practice and procedure, Labor.

Signed at Washington, DC.

Hilda L. Solis,

U.S. Secretary of Labor.

For the reasons set out in the Preamble, the Office of the Secretary, Labor proposes to amend 29 CFR part 18 as set forth below.

PART 18—RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES

1. The authority citations for Part 18 continue to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 551–553; 5 U.S.C. 571 note; E.O. 12778; 57 FR 7292.

2. Revise Subpart A to read as follows:

Subpart A—General

Sec.

General Provisions

18.10 Scope and purpose.
18.11 Definitions.
18.12 Proceedings before administrative law judge.
18.13 Settlement judge procedure.
18.14 Ex parte communication.
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Parties and Representatives

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18.23 Disqualification and discipline of representatives.
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Service, Format and Timing of Filings and Other Papers

18.30 Service and filing.
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18.90 Closing the record; subsequent motions.
18.91 Post-hearing brief.
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18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.
18.95 Review of Decision.

General Provisions

§ 18.10 Scope and purpose.

(a) *In general.* These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

(b) *Type of proceeding.* Unless the governing statute, regulation, or executive order prescribes a different procedure, proceedings follow the Administrative Procedure Act, 5 U.S.C. 551 through 559.

(c) *Waiver, modification, and suspension.* Upon notice to all parties, the presiding judge may waive, modify, or suspend any rule under this subpart when doing so will not prejudice a party and will serve the ends of justice.

§ 18.11 Definitions.

For purposes of these rules, these definitions supplement the definitions in the Administrative Procedure Act, 5 U.S.C. 551.

(a) *Calendar call* means a meeting in which the judge calls cases awaiting hearings, determines case status, and assigns a hearing date and time.

(b) *Chief Judge* means the Chief Administrative Law Judge of the United States Department of Labor Office of Administrative Law Judges and judges to whom the Chief Judge delegates authority.

(c) *Docket clerk* means the Chief Docket Clerk at the Office of Administrative Law Judges in Washington, DC. But once a case is assigned to a judge in a district office, *docket clerk* means the docket staff in that office.

(d) *Hearing* means that part of a proceeding consisting of a session to decide issues of fact or law that is recorded and transcribed and provides the opportunity to present evidence or argument.

(e) *Judge* means an administrative law judge appointed under the provisions of 5 U.S.C. 3105.

(f) *Order* means the judge's disposition of one or more procedural or substantive issues, or of the entire matter.

(g) *Proceeding* means an action before the Office of Administrative Law Judges that creates a record leading to an adjudication or order.

(h) *Representative* means any person permitted to represent another in a proceeding before the Office of Administrative Law Judges.

§ 18.12 Proceedings before administrative law judge.

(a) *Designation.* The Chief Judge designates the presiding judge for all proceedings.

(b) *Authority.* In all proceedings under this Part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, 5 U.S.C. 556. Among them is the power to:

(1) regulate the course of proceedings in accordance with applicable statute, regulation or executive order;

(2) administer oaths and affirmations and examine witnesses;

(3) compel the production of documents and appearance of witnesses within a party's control;

(4) issue subpoenas authorized by law;

(5) rule on offers of proof and receive relevant evidence;

(6) dispose of procedural requests and similar matters;

(7) terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order;

(8) issue decisions and orders;

(9) exercise powers vested in the Secretary of Labor that relate to proceedings before the Office of Administrative Law Judges; and

(10) take actions authorized by the FRCP.

§ 18.13 Settlement judge procedure.

(a) *How initiated.* The Office of Administrative Law Judges provides settlement judges to aid the parties in resolving the matter that is the subject of the controversy. Upon a joint request by the parties or upon referral by the judge when no party objects, the Chief Judge may appoint a settlement judge. A settlement judge will not be appointed when settlement proceedings would be inconsistent with a statute, regulation, or executive order.

(b) *Appointment.* The Chief Judge has discretion to appoint a settlement judge, who must be an active or retired judge. The settlement judge will not be appointed to hear and decide the case or approve the settlement without the parties' consent and the approval of the Chief Judge.

(c) *Duration of settlement proceeding.* Unless the Chief Judge directs otherwise, settlement negotiations under this section must be completed within 60 days from the date of the settlement judge's appointment. The settlement judge may request that the Chief Judge extend the appointment. The negotiations will be terminated if a party withdraws from participation, or if the settlement judge determines that further negotiations would be unproductive or inappropriate.

(d) *Powers of the settlement judge.* The settlement judge may convene settlement conferences; require the parties or their representatives to attend with full authority to settle any disputes; and impose other reasonable requirements to expedite an amicable resolution of the case.

(e) *Stay of proceedings before presiding judge.* The appointment of a settlement judge does not stay any aspect of the proceeding before the presiding judge. Any motion to stay must be directed to the presiding judge.

(f) *Settlement conferences.* Settlement conferences may be conducted by telephone, videoconference or in person at the discretion of the settlement judge after considering the nature of the case, location of the participants, availability of technology, and efficiency of administration.

(g) *Confidentiality.* All discussions with the settlement judge are confidential; none may be recorded or transcribed. The settlement judge must not disclose any confidential communications made during settlement proceedings, except as required by statute, executive order, or court order. The settlement judge may not be subpoenaed or called as a witness in any hearing of the case or any subsequent administrative proceedings before the Department to testify to statements made or conduct during the settlement discussions.

(h) *Report.* The parties must promptly inform the presiding judge of the outcome of the settlement negotiations. If a settlement is reached, the parties must submit the required documents to the presiding judge within 14 days of the conclusion of settlement discussions unless the presiding judge orders otherwise.

(i) *Non-reviewable decisions.* Whether a settlement judge should be appointed, the selection of a particular settlement judge, or the termination of proceedings under this section, are matters not subject to review by Department officials.

§ 18.14 Ex parte communication.

The parties, their representatives, or other interested persons must not engage in ex parte communications on the merits of a case with the judge.

§ 18.15 Substitution of administrative law judge.

(a) *Substitution during hearing.* If the judge is unable to complete a hearing, a successor judge designated pursuant to § 18.12 may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. The successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(b) *Substitution following hearing.* If the judge is unable to proceed after the hearing is concluded, the successor judge appointed pursuant to § 18.12 may issue a decision and order based upon the existing record after notifying the parties and giving them an opportunity to respond. Within 14 days of receipt of the judge's notice, a party may file an objection to the judge issuing a decision based on the existing record. If no objection is filed, the objection is considered waived. Upon good cause shown, the judge may order supplemental proceedings.

§ 18.16 Disqualification.

(a) *Disqualification on judge's initiative.* A judge must withdraw from a proceeding whenever he or she considers himself or herself disqualified.

(b) *Request for disqualification.* A party may file a motion to disqualify the judge. The motion must allege grounds for disqualification, and include any appropriate supporting affidavits, declarations or other documents. The presiding judge must rule on the motion in a written order that states the grounds for the ruling.

§ 18.17 Legal assistance.

The Office of Administrative Law Judges does not appoint representatives, refer parties to representatives, or provide legal assistance.

Parties and Representatives

§ 18.20 Parties to a proceeding.

A party seeking original relief or action is designated a complainant, claimant or plaintiff, as appropriate. A party against whom relief or other action is sought is designated a respondent or defendant, as appropriate. When participating in a proceeding, the applicable Department of Labor's agency is a party or party-in-interest.

§ 18.21 Party appearance and participation.

(a) *In general.* A party may appear and participate in the proceeding in person or through a representative.

(b) *Waiver of participation.* By filing notice with the judge, a party may waive the right to participate in the hearing or the entire proceeding. When all parties waive the right to participate in the hearing, the judge may issue a decision and order based on the pleadings, evidence, and briefs.

(c) *Failure to appear.* When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

§ 18.22 Representatives.

(a) *Notice of appearance.* When first making an appearance, each representative must file a notice of appearance that indicates on whose behalf the appearance is made and the proceeding name and docket number. The notice of appearance shall also include the statements and documentation required for admission to appear for the applicable category of representation found in subdivision (b) of this section.

(b) *Categories of representation; admission standards.*

(1) *Attorney representative.* Under these rules, ''attorney'' or ''attorney representative'' means an individual who has been admitted to the bar of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(A) *Attorney in good standing.* An attorney who is in good standing in his or her licensing jurisdiction may represent a party or subpoenaed witness before the Office of Administrative Law Judges. The attorney's representation of good standing is sufficient proof of good standing, unless otherwise directed by the judge.

(B) *Attorney not in good standing.* An attorney who is not in good standing in his or her licensing jurisdiction may not represent a party or subpoenaed witness before the Office of Administrative Law Judges, unless he or she obtains the judge's approval. Such an attorney must file a written statement that establishes why the failure to maintain good standing is not disqualifying. The judge may deny approval for the appearance of such an attorney after providing notice and an opportunity to be heard.

(C) *Disclosure of discipline.* An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting him or her in the practice of law.

(2) *Non-attorney representative.* An individual who is not an attorney as defined by paragraph (b)(1) may represent a party or subpoenaed witness upon the judge's approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party or subpoenaed witness represented and certifies that the party or subpoenaed witness desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.

(c) *Duties.* A representative must be diligent, prompt, and forthright when dealing with parties, representatives and the judge, and act in a manner that furthers the efficient, fair and orderly conduct of the proceeding. An attorney representative must adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice.

(d) *Prohibited actions.* A representative must not:

(1) threaten, coerce, intimidate, deceive or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in the proceeding regarding any matter related to the proceeding;

(2) knowingly make or present false or misleading statements, assertions or representations about a material fact or law related to the proceeding;

(3) unreasonably delay, or cause to be delayed, without good cause, any proceeding; or

(4) engage in any other action or behavior prejudicial to the fair and orderly conduct of the proceeding.

(e) *Withdrawal of appearance.* A representative who desires to withdraw after filing a notice of appearance or a party desiring to withdraw the appearance of a representative must file a motion with the judge. The motion must state that notice of the withdrawal has been given to the party, client or representative. The judge may deny a representative's motion to withdraw when necessary to avoid undue delay or prejudice to the rights of a party.

§ 18.23 Disqualification and discipline of representatives.

(a) *Disqualification.*

(1) *Grounds for disqualification.* Representatives qualified under § 18.22 may be disqualified upon:

(A) conviction of a felony;

(B) conviction of a misdemeanor, a necessary element of which includes:

(i) interference with the administration of justice;

(ii) false swearing;

(iii) misrepresentation;

(iv) fraud;

(v) willful failure to file an income tax return;

(vi) deceit;

(vii) bribery;

(viii) extortion;

(ix) misappropriation;

(x) theft; or

(xi) attempt, conspiracy, or solicitation to commit a serious crime.

(C) suspension or disbarment by any court or agency of the United States, the District of Columbia, any state, territory, commonwealth or possession of the United States;

(D) disbarment on consent or resignation from the bar of a court or agency while an investigation into an allegation of misconduct is pending;

(2) *Disqualification procedure.* The Chief Judge must provide notice and an opportunity to be heard as to why the representative should not be disqualified from practice before the Office of Administrative Law Judges. The notice will include a copy of the document that provides the grounds for the disqualification. Unless otherwise directed, any response must be filed within 21 days of service of the notice. The Chief Judge's determination must be based on the reliable, probative and substantial evidence of record, including the notice and response.

(b) *Discipline.*

(1) *Grounds for discipline.* The Office of Administrative Law Judges may suspend, disqualify, or otherwise discipline a representative. Conduct that may result in discipline includes:

(A) an act, omission, or contumacious conduct relating to any proceeding before OALJ that violates these rules, an applicable statute, an applicable regulation, or the judge's order or instruction; or

(B) failure to adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice in any proceeding before OALJ.

(2) *Disciplinary procedure.*

(A) *Notice.* The Chief Judge must notify the representative of the grounds for proposed discipline, and of the opportunity for a hearing. A request for hearing must be filed within 21 days of service of the notice.

(B) *Default.* If the representative does not respond to the notice, the Chief Judge may issue a final disciplinary order.

(C) *Disciplinary proceedings.* If the representative responds to the notice, the Chief Judge will designate a judge to conduct a hearing, if requested, and to

issue a decision and order. The representative has the opportunity to present evidence, and argument. The decision must be based on the reliable, probative and substantial evidence of record, including any submissions from the representative.

(D) *Petition for review.* A petition to review the decision and order must be filed with the Chief Judge within 30 days of the date of the decision and order, and state the grounds for review. The Chief Judge reviews the decision and order under the substantial evidence standard. The Chief Judge's decision is not subject to review within the Department of Labor.

(c) *Notification of disciplinary action.* When an attorney representative is suspended or disqualified, the Chief Judge will notify the jurisdiction(s) in which the attorney is admitted to practice and the National Lawyer Regulatory Data Bank maintained by the American Bar Association Standing Committee on Professional Discipline, by providing a copy of the decision and order.

(d) *Application for reinstatement.* A representative suspended or disqualified under this section may be reinstated by the Chief Judge upon application. At the discretion of the Chief Judge, consideration of an application for reinstatement may be limited to written submissions or may be referred for further proceedings pursuant to paragraph (b)(2) of this section.

§ 18.24 Briefs from amicus curiae.

The United States or an officer or agency thereof, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief without the consent of the parties or leave of the judge. Any other amicus curiae may file a brief only by leave of the judge, upon the judge's request, or if the brief states that all parties have consented to its filing. A request for leave to file an amicus brief must be made by written motion that states the interest of the movant in the proceeding. Unless otherwise directed by the judge, an amicus brief must be filed by the close of the hearing.

Service, Format and Timing of Filings and Other Papers

§ 18.30 Service and filing.

(a) *Service on parties.*

(1) *In general.* Unless these rules provide otherwise, all papers filed with OALJ or with the judge must be served on every party.

(2) *Service: how made.*

(A) *Serving a party's representative.* If a party is represented, service under this section must be made on the representative. The judge also may order service on the party.

(B) *Service in general.* A paper is served under this section by:

(i) handing it to the person;

(ii) leaving it:

(a) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(b) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(iii) mailing it to the person's last known address—in which event service is complete upon mailing;

(iv) leaving it with the docket clerk if the person has no known address;

(v) sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(vi) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) *Certificate of service.* A certificate of service is a signed written statement that the paper was served on all parties. The statement must include:

(A) the title of the document;

(B) the name and address of each person or representative being served;

(C) the name of the party filing the paper and the party's representative, if any;

(D) the date of service; and

(E) how the paper was served.

(b) *Filing with Office of Administrative Law Judges.*

(1) *Required filings.* Any paper that is required to be served must be filed within a reasonable time after service with a certificate of service. But disclosures under § 18.50(c) and the following discovery requests and responses must not be filed until they are used in the proceeding or the judge orders filing:

(A) notices of deposition,

(B) depositions,

(C) interrogatories,

(D) requests for documents or tangible things or to permit entry onto land; and

(E) requests for admission.

(2) *Filing: when made—in general.* A paper is filed when received by the docket clerk or the judge during a hearing.

(3) *Filing how made.* A paper may be filed by mail, courier service, hand delivery, facsimile or electronic delivery.

(A) *Filing by facsimile.*

(i) *When permitted.* A party may file by facsimile only as directed or permitted by the judge. If a party cannot obtain prior permission because the judge is unavailable, a party may file by facsimile up to 12 pages, including a statement of the circumstances precluding filing by delivery or mail. Based on the statement, the judge may later accept the document as properly filed at the time transmitted.

(ii) *Cover sheet.* Filings by facsimile must include a cover sheet that identifies the sender, the total number of pages transmitted, and the matter's docket number and the document's title.

(iii) *Retention of the original document.* The original signed document will not be substituted into the record unless required by law or the judge.

(B) Any party filing a facsimile of a document must maintain the original document and transmission record until the case is final. A transmission record is a paper printed by the transmitting facsimile machine that states the telephone number of the receiving machine, the number of pages sent, the transmission time and an indication that no error in transmission occurred.

(C) Upon a party's request or judge's order, the filing party must provide for review the original transmitted document from which the facsimile was produced.

(4) *Electronic filing, signing, or verification.* A judge may allow papers to be filed, signed, or verified by electronic means.

§ 18.31 Privacy protection for filings and exhibits.

(a) *Redacted filings and exhibits.* Unless the judge orders otherwise, in an electronic or paper filing or exhibit that contains an individual's Social-Security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, the party or nonparty making the filing must redact all such information, except:

(1) the last four digits of the Social-Security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) *Exemptions from the redaction requirement.* The redaction requirement does not apply to the following:

(1) the record of an administrative or agency proceeding;

(2) the official record of a state-court proceeding;

(3) the record of a court or tribunal, if that record was not subject to the

redaction requirement when originally filed; and

(4) a filing or exhibit covered by paragraph (c) of this section.

(c) *Option for filing a reference list.* A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(d) *Waiver of protection of identifiers.* A person waives the protection of paragraph (a) of this section as to the person's own information by filing or offering it without redaction and not under seal.

(e) *Protection of material.* For good cause, the judge may order protection of material pursuant to §§ 18.85, *Privileged, sensitive, or classified material* and 18.52, *Protective orders.*

§ 18.32 Computing and extending time.

(a) *Computing time.* The following rules apply in computing any time period specified in these rules, a judge's order, or in any statute, regulation, or executive order that does not specify a method of computing time.

(1) When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *''Last day'' defined.* Unless a different time is set by a statute, regulation, executive order, or judge's order, the ''last day'' ends at 4:30 p.m. local time where the event is to occur.

(3) *''Next day'' defined.* The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(4) *''Legal holiday'' defined.* ''Legal holiday'' means the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and any day declared a holiday by the President or Congress.

(b) *Extending time.* When an act may or must be done within a specified time, the judge may, for good cause, extend the time:

(1) with or without motion or notice if the judge acts, or if a request is made, before the original time or its extension expires; or

(2) on motion made after the time has expired if the party failed to act because of excusable neglect.

(c) *Additional time after certain kinds of service.* When a party may or must act within a specified time after service and service is made under § 18.30(a)(2)(B)(iii) or (iv), 3 days are added after the period would otherwise expire under paragraph (a) of this section.

§ 18.33 Motions and other papers.

(a) *In general.* A request for an order must be made by motion. The motion must:

(1) be in writing, unless made during a hearing;

(2) state with particularity the grounds for seeking the order;

(3) state the relief sought;

(4) unless the relief sought has been agreed to by all parties, be accompanied by affidavits, declarations, or other evidence; and

(5) if required by subsection (c)(4), include a memorandum of points and authority supporting the movant's position.

(b) *Form.* The rules governing captions and other matters of form apply to motions and other requests.

(c) *Written motion before hearing.*

(1) A written motion before a hearing must be served with supporting papers, at least 21 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules or an appropriate statute, regulation, or executive order set a different time; or,

(C) when an order sets a different time.

(2) A written motion served within 21 days before the hearing must state why the motion was not made earlier.

(3) A written motion before hearing must state that counsel conferred, or attempted to confer, with opposing counsel in a good faith effort to resolve the motion's subject matter, and whether the motion is opposed or unopposed. A statement of consultation is not required with pro se litigants or with the following motions:

(A) to dismiss;

(B) for summary decision; and

(C) any motion filed as ''joint,'' ''agreed,'' or ''unopposed.''

(4) Unless the motion is unopposed, the supporting papers must include affidavits, declarations or other proof to establish the factual basis for the relief. For a dispositive motion and a motion relating to discovery, a memorandum of points and authority must also be submitted. A Judge may direct the parties file additional documents in support of any motion.

(d) *Opposition or other response to a motion filed prior to hearing.* A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

(e) A *motions made at hearing.* A motion made at a hearing may be stated orally unless the judge determines that a written motion or response would best serve the ends of justice.

(f) *Renewed or repeated motions.* A motion seeking the same or substantially similar relief previously denied, in whole or in part, must include the following information:

(1) the earlier motion(s);

(2) when the respective motion was made,

(3) the judge to whom the motion was made,

(4) the earlier ruling(s), and

(5) the basis for the current motion.

(g) *Motion hearing.* The judge may order a hearing to take evidence or oral argument on a motion.

§ 18.34 Format of papers filed.

Every paper filed must be printed in black ink on 8.5 x 11-inch opaque white paper and begin with a caption that includes:

(a) the parties' names,

(b) a title that describes the paper's purpose, and

(c) the docket number assigned by the Office of Administrative Law Judges. If the Office has not assigned a docket number, the paper must bear the case number assigned by the Department of Labor agency where the matter originated. If the case number is an individual's Social Security number then only the last four digits may be used. *See* 18.31(a)(1).

§ 18.35 Signing motions and other papers; representations to the judge; sanctions.

(a) *Date and signature.* Every written motion and other paper filed with OALJ must be dated and signed by at least one

representative of record in the representative's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, telephone number, facsimile number and email address, if any. The judge must strike an unsigned paper unless the omission is promptly corrected after being called to the representative's or party's attention.

(b) *Representations to the judge.* By presenting to the judge a written motion or other paper—whether by signing, filing, submitting, or later advocating it—the representative or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceedings;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) *Sanctions.*

(1) *In general.* If, after notice and a reasonable opportunity to respond, the judge determines that paragraph (b) of this section has been violated, the judge may impose an appropriate sanction on any representative, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates paragraph (b) of this section. The motion must be served under § 18.30(a), but it must not be filed or be presented to the judge if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the judge sets.

(3) *On the judge's initiative.* On his or her own, the judge may order a representative, law firm, or party to show cause why conduct specifically described in the order has not violated paragraph (b) of this section.

(4) *Nature of a sanction.* A sanction imposed under this section must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.

(5) *Requirements for an order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) *Inapplicability to discovery.* This section does not apply to disclosures and discovery requests, responses, objections, and motions under §§ 18.50 through 18.65.

§ 18.36 Amendments after referral to the Office of Administrative Law Judges.

The judge may allow parties to amend and supplement their filings.

Prehearing Procedure

§ 18.40 Notice of hearing.

(a) *In general.* Except when the hearing is scheduled by calendar call, the judge must notify the parties of the hearing's date, time, and place at least 14 days before the hearing. The notice is sent by regular, first-class mail, unless the judge determines that circumstances require service by certified mail or other means. The parties may agree to waive the 14-day notice for the hearing.

(b) *Date, time, and place.* The judge must consider the convenience and necessity of the parties and the witnesses in selecting the date, time, and place of the hearing.

§ 18.41 Continuances and changes in place of hearing.

(a) *By the judge.* Upon reasonable notice to the parties, the judge may change the time, date, and place of the hearing.

(b) *By a party's motion.* A request by a party to continue a hearing or to change the place of the hearing must be made by motion.

(1) *Continuances.* A motion for continuance must be filed promptly after the party becomes aware of the circumstances supporting the continuance. In exceptional circumstances, a party may orally request a continuance and must immediately notify the other parties of the continuance request.

(2) *Change in place of hearing.* A motion to change the place of a hearing must be filed promptly.

§ 18.42 Expedited proceedings.

A party may move to expedite the proceeding. The motion must demonstrate the specific harm that would result if the proceeding is not expedited. If the motion is granted, the formal hearing ordinarily will not be scheduled with less than 7 days notice to the parties, unless all parties consent to an earlier hearing.

§ 18.43 Consolidation; separate hearings.

(a) *Consolidation.* If separate proceedings before the Office of the Administrative Law Judges involve a common question of law or fact, a judge may:

(1) join for hearing any or all matters at issue in the proceedings;

(2) consolidate the proceedings; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) *Separate hearings.* For convenience, to avoid prejudice, or to expedite and economize, the judge may order a separate hearing of one or more issues.

§ 18.44 Prehearing conference.

(a) *In general.* The judge, with or without a motion, may order one or more prehearing conferences for such purposes as:

(1) expediting disposition of the proceeding;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful prehearing activities;

(4) improving the quality of the hearing through more thorough preparation; and

(5) facilitating settlement.

(b) *Scheduling.* Prehearing conferences may be conducted in person, by telephone, or other means after reasonable notice of time, place and manner of conference has been given.

(c) *Participation.* All parties must participate in prehearing conferences as directed by the judge. A represented party must authorize at least one of its attorneys or representatives to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at the prehearing conference, including possible settlement.

(d) *Matters for consideration.* At the conference, the judge may consider and take appropriate actions on the following matters:

(1) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(2) amending the papers that had framed the issues before the matter was referred for hearing;

(3) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(4) avoiding unnecessary proof and cumulative evidence, and limiting the number of expert or other witnesses;

(5) determining the appropriateness and timing of dispositive motions under §§ 18.70 and 18.72;

(6) controlling and scheduling discovery, including orders affecting disclosures and discovery under §§ 18.50 through 18.65;

(7) identifying witnesses and documents, scheduling the filing and exchange of any exhibits and prehearing submissions, and setting dates for further conferences and for the hearing;

(8) referring matters to a special master;

(9) settling the case and using special procedures to assist in resolving the dispute such as the settlement judge procedure under § 18.13, private mediation, and other means authorized by statute or regulation;

(10) determining the form and content of prehearing orders;

(11) disposing of pending motions;

(12) adopting special procedures for managing potentially difficult or protracted proceedings that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) consolidating or ordering separate hearings under § 18.43;

(14) ordering the presentation of evidence early in the proceeding on a manageable issue that might, on the evidence, be the basis for disposing of the proceeding;

(15) establishing a reasonable limit on the time allowed to present evidence; and

(16) facilitating in other ways the just, speedy, and inexpensive disposition of the proceeding.

(e) *Reporting.* The judge may direct that the prehearing conference be recorded and transcribed. If the conference is not recorded, the judge should summarize the conference proceedings on the record at the hearing or by separate prehearing notice or order.

Disclosure and Discovery

§ 18.50 General provisions governing disclosure and discovery.

(a) *Timing and sequence of discovery.*

(1) *Timing.* A party may seek discovery at any time after a judge issues an initial notice or order. But if the judge orders the parties to confer under paragraph (b) of this section:

(A) the time to respond to any pending discovery requests is extended until the time agreed in the discovery plan, or that the judge sets in resolving disputes about the discovery plan, and

(B) no party may seek additional discovery from any source before the parties have conferred as required by paragraph (b) of this section, except by stipulation.

(2) *Sequence.* Unless, on motion, the judge orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(b) *Conference of the parties; planning for discovery.*

(1) *In general.* The judge may order the parties to confer on the matters described in paragraphs (b)(2) and (3) of this section.

(2) *Conference content; parties' responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by paragraph (c) of this section; discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The representatives of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the judge within 14 days after the conference a written report outlining the plan. The judge may order the parties or representatives to attend the conference in person.

(3) *Discovery plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under paragraph (c) of this section, including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as hearing-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the judge to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed; and

(F) any other orders that the judge should issue under § 18.52 or under § 18.44.

(c) *Required disclosures.*

(1) *Initial disclosure.*

(A) *In general.* Except as exempted by paragraph (c)(1)(B) of this section or otherwise ordered by the judge, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under § 18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

(B) *Proceedings exempt from initial disclosure.* The following proceedings are exempt from initial disclosure:

(i) a proceeding under 29 CFR part 20 for review of an agency determination regarding the existence or amount of a debt, or the repayment schedule proposed by the agency;

(ii) a proceeding before the Board of Alien Labor Certification Appeals under the Immigration and Nationality Act; and

(iii) a proceeding under the regulations governing certification of H–2 non-immigrant temporary agricultural employment at 20 CFR part 655, subpart B;

(iv) a rulemaking proceeding under the Occupational Safety and Health Act of 1970; and

(v) a proceeding for civil penalty assessments under Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132.

(C) *Parties Exempt from Initial Disclosure.* The following parties are exempt from initial disclosure:

(i) in a Black Lung benefits proceeding under 30 U.S.C. 901 *et seq.,* the representative of the Office of

Workers' Compensation Programs of the Department of Labor, if an employer has been identified as the Responsible Operator and is a party to the proceeding (*see* 20 CFR 725.418(d)); and

(ii) in a proceeding under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.,* or an associated statute such as the Defense Base Act, 42 U.S.C. 1651 *et seq.,* the representative of the Office of Workers' Compensation Programs of the Department of Labor, unless the Solicitor of Labor or the Solicitor's designee has elected to participate in the proceeding under 20 CFR 702.333(b), or unless an employer or carrier has applied for relief under the special fund, as defined in 33 U.S.C. 908(f).

(D) *Time for initial disclosures—in general.* A party must make the initial disclosures required by paragraph (c)(1)(A) of this section within 21 days after an initial notice or order is entered acknowledging that the proceeding has been docketed at the OALJ unless (i) a different time is set by stipulation or a judge's order, or (ii) a party objects during the conference that initial disclosures are not appropriate in the proceeding and states the objection in the proposed discovery plan. In ruling on the objection, the judge must determine what disclosures, if any, are to be made and must set the time for disclosure.

(E) *Time for initial disclosures—for parties served or joined later.* A party that is first served or otherwise joined later in the proceeding must make the initial disclosures within 21 days after being served or joined, unless a different time is set by stipulation or the judge's order.

(F) *Basis for initial disclosure; unacceptable excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of expert testimony.*

(A) *In general.* A party must disclose to the other parties the identity of any witness who may testify at hearing, either live or by deposition. The judge should set the time for the disclosure by prehearing order.

(B) *Witnesses who must provide a written report.* Unless otherwise stipulated or ordered by the judge, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial, a hearing, or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses who do not provide a written report.* Unless otherwise stipulated or ordered by the judge that the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present expert opinion evidence; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Supplementing the disclosure.* The parties must supplement these disclosures when required under § 18.53.

(3) *Prehearing disclosures.* In addition to the disclosures required by paragraphs (c)(1) and (2) of this section, a party must provide to the other parties and promptly file the prehearing disclosures described in § 18.80.

(4) *Form of disclosures.* Unless the judge orders otherwise, all disclosures under paragraph (c) under this section must be in writing, signed, and served.

(d) *Signing disclosures and discovery requests, responses, and objections.*

(1) *Signature required; effect of signature.* Every disclosure under paragraph (c) of this section and every discovery request, response, or objection must be signed by at least one of the party's representatives in the representative's own name, or by the party personally if unrepresented, and must state the signer's address, telephone number, facsimile number, and email address, if any. By signing, a representative or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the judge must strike it unless a signature is promptly supplied after the omission is called to the representative's or party's attention.

(3) *Sanction for improper certification.* If a certification violates this section without substantial justification, the judge, on motion or on his or her own, must impose an appropriate sanction, as provided in § 18.57, on the signer, the party on whose behalf the signer was acting, or both.

§ 18.51 Discovery scope and limits.

(a) *Scope in general.* Unless otherwise limited by a judge's order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding. Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by paragraph (b)(4) of this section.

(b) *Limitations on frequency and extent.*

(1) *When permitted.* By order, the judge may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under § 18.64. The judge's order may also limit the number of requests under § 18.63.

(2) *Specific limitations on electronically stored information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not

reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of paragraph (b)(4) of this section. The judge may specify conditions for the discovery.

(3) By requesting electronically stored information, a party consents to the application of Federal Rule of Evidence 502 with regard to inadvertently disclosed privileged or protected information.

(4) *When required.* On motion or on his or her own, the judge must limit the frequency or extent of discovery otherwise allowed by these rules when:

(A) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(C) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(c) *Hearing preparation: materials.*

(1) *Documents and tangible things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for hearing by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to paragraph (d) of this section, those materials may be discovered if:

(A) they are otherwise discoverable under paragraph (a) of this section; and

(B) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(2) *Protection against disclosure.* A judge who orders discovery of those materials must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's representative concerning the litigation.

(3) *Previous statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a judge's order. A previous statement is either:

(A) a written statement that the person has signed or otherwise adopted or approved; or

(B) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(d) *Hearing preparation: experts.*

(1) *Deposition of an expert who may testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If § 18.50(c)(2)(B) requires a report from the expert the deposition may be conducted only after the report is provided, unless the parties stipulate otherwise.

(2) *Hearing-preparation protection for draft reports or disclosures.* Paragraphs (c)(1) and (2) of this section protect drafts of any report or disclosure required under § 18.50(c)(2), regardless of the form in which the draft is recorded.

(3) *Hearing-preparation protection for communications between a party's representative and expert witnesses.* Paragraphs (c)(1) and (2) under this section protect communications between the party's representative and any witness required to provide a report under § 18.50(c)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(A) relate to compensation for the expert's study or testimony;

(B) identify facts or data that the party's representative provided and that the expert considered in forming the opinions to be expressed; or

(C) identify assumptions that the party's representative provided and that the expert relied on in forming the opinions to be expressed.

(4) *Expert employed only for hearing preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for hearing and whose testimony is not anticipated to be used at the hearing. But a party may do so only:

(A) as provided in § 18.62(b); or

(B) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(e) *Claiming privilege or protecting hearing-preparation materials.*

(1) *Information withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as hearing-preparation material, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(2) *Information produced.* If information produced in discovery is subject to a claim of privilege or of protection as hearing-preparation material, the party making the claim must notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge for an *in camera* determination of the claim. The producing party must preserve the information until the claim is resolved.

§ 18.52 Protective orders.

(a) *In general.* A party or any person from whom discovery is sought may file a written motion for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without the judge's action. The judge may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) forbidding the disclosure or discovery;

(2) specifying terms, including time and place, for the disclosure or discovery;

(3) prescribing a discovery method other than the one selected by the party seeking discovery;

(4) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(5) designating the persons who may be present while the discovery is conducted;

(6) requiring that a deposition be sealed and opened only on the judge's order;

(7) requiring that a trade secret or other confidential research, development, or commercial

information not be revealed or be revealed only in a specified way; and

(8) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the judge directs.

(b) *Ordering discovery.* If a motion for a protective order is wholly or partly denied, the judge may, on just terms, order that any party or person provide or permit discovery.

§ 18.53 Supplementing disclosures and responses.

(a) *In general.* A party who has made a disclosure under § 18.50(c)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(1) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(2) as ordered by the judge.

(b) *Expert witness.* For an expert whose report must be disclosed under § 18.50(c)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's prehearing disclosures under § 18.50(c)(3) are due.

§ 18.54 Stipulations about discovery procedure.

Unless the judge orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have the judge's approval if it would interfere with the time set for completing discovery, for hearing a motion, or for hearing.

§ 18.55 Using depositions at hearings.

(a) *Using depositions.*

(1) *In general.* At a hearing, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the applicable rules of evidence if the deponent were present and testifying; and

(C) the use is allowed by paragraphs (a)(2) through (8) of this section.

(2) *Impeachment and other uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the applicable rules of evidence.

(3) *Deposition of party, agent, or designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under § 18.64(b)(6) or § 18.65(a)(4).

(4) *Deposition of expert, treating physician, or examining physician.* A party may use for any purpose the deposition of an expert witness, treating physician or examining physician.

(5) *Unavailable witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the judge finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interests of justice and with due regard to the importance of live testimony in an open hearing—to permit the deposition to be used.

(6) *Limitations on use.*

(A) *Deposition taken on short notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under § 18.52(a)(2) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable deponent; party could not obtain a representative.* A deposition taken without leave of the judge under the unavailability provision of § 18.64(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain a representative to represent it at the deposition.

(7) *Using part of a deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(8) *Deposition taken in an earlier action.* A deposition lawfully taken may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the applicable rules of evidence.

(b) *Objections to admissibility.* Subject to paragraph (d)(3) of this section, an objection may be made at a hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of presentation.* Unless the judge orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but the judge may receive the testimony in nontranscript form as well.

(d) *Waiver of objections.*

(1) *To the notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the officer's qualification.* An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the taking of the deposition.*

(A) *Objection to competence, relevance, or materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an error or irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a written question.* An objection to the form of a written question under § 18.65 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To completing and returning the deposition.* An objection to how the officer transcribed the testimony—or

prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

§ 18.56 Subpoena.

(a) *In general.*

(1) Upon written application of a party the judge may issue a subpoena authorized by statute or law that requires a witness to attend and to produce relevant papers, books, documents, or tangible things in the witness' possession or under the witness' control.

(2) *Form and contents.*

(A) *Requirements—in general.* Every subpoena must:

(i) state the title of the matter and show the case number assigned by the Office of Administrative Law Judges or the Office of Worker's Compensation Programs. In the event that the case number is an individual's Social Security number only the last four numbers may be used. *See* § 18.31(a)(1);

(ii) bear either the signature of the issuing judge or the signature of an attorney authorized to issue the subpoena under paragraph (a)(3) of this section;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of paragraphs (c) and (d) of this section.

(B) *Command to attend a deposition—notice of the recording method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition or hearing, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to produce; included obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(3) The judge may, by order in a specific proceeding, authorize an attorney representative to issue and sign a subpoena.

(b) *Service.*

(1) *By whom; tendering fees; serving a copy of certain subpoenas.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering with it the fees for 1 day's attendance and the mileage allowed by law. Service may also be made by certified mail with return receipt. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served, a notice must be served on each party.

(2) *Service in the United States.* Subject to paragraph (c)(3)(A)(ii) of this section, a subpoena may be served at any place within a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(3) *Service in a foreign country.* 28 U.S.C. 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of service.* Proving service, when necessary, requires filing with the judge a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) *Protecting a person subject to a subpoena.*

(1) *Avoiding undue burden; sanctions.* A party or representative responsible for requesting, issuing, or serving a subpoena must take reasonable steps to avoid imposing undue burden on a person subject to the subpoena. The judge must enforce this duty and impose an appropriate sanction.

(2) *Command to produce materials or permit inspection.*

(A) *Appearance not required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition or hearing.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or representative designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the judge for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or modifying a subpoena.*

(A) *When required.* On timely motion, the judge must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to paragraph (c)(3)(B)(iii) of this section, the person may be commanded to attend the formal hearing;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When permitted.* To protect a person subject to or otherwise affected by a subpoena, the judge may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend the formal hearing.

(C) *Specifying conditions as an alternative.* In the circumstances described in paragraph (c)(3)(B) of this section, the judge may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be

otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) *Duties in responding to a subpoena.*

(1) *Producing documents or electronically stored information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for producing electronically stored information not specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically stored information produced in only one form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible electronically stored information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of § 18.51(b)(4)(C). The judge may specify conditions for the discovery.

(2) *Claiming privilege or protection.*

(A) *Information withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as hearing-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as hearing-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge *in camera* for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Failure to obey.* When a person fails to obey a subpoena, the party adversely affected by the failure may, when authorized by statute or by law, apply to the appropriate district court to enforce the subpoena.

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.

(a) *Motion for an order compelling disclosure or discovery.*

(1) *In general.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without the judge's action.

(2) *Specific motions.*

(A) *To compel disclosure.* If a party fails to make a disclosure required by § 18.50(c), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To compel a discovery response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under §§ 18.64 and 18.65;

(ii) a corporation or other entity fails to make a designation under §§ 18.64(d) and 18.65(a)(4);

(iii) a party fails to answer an interrogatory submitted under § 18.60; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under § 18.61.

(C) *Related to a deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of paragraph (a) of this section, an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(b) *Failure to comply with a judge's order.*

(1) *For not obeying a discovery order.* If a party or a party's officer, director, or managing agent—or a witness designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery, including an order under § 18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following:

(A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

(B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(C) striking claims or defenses in whole or in part;

(D) staying further proceedings until the order is obeyed;

(E) dismissing the proceeding in whole or in part; or

(F) rendering a default decision and order against the disobedient party;

(2) *For not producing a person for examination.* If a party fails to comply with an order under § 18.62 requiring it to produce another person for examination, the judge may issue any of the orders listed in paragraph (b)(1) of this section, unless the disobedient party shows that it cannot produce the other person.

(c) *Failure to disclose, to supplement an earlier response, or to admit.* If a party fails to provide information or identify a witness as required by §§ 18.50(c) and 18.53, or if a party fails to admit what is requested under § 18.63(a) and the requesting party later proves a document to be genuine or the matter true, the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the judge, on motion and after giving an opportunity to be heard may impose other appropriate sanctions, including any of the orders listed in paragraph (b)(1) of this section.

(d) *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection.*

(1) *In general.*

(A) *Motion; grounds for sanctions.* The judge may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under § 18.60 or a request for inspection under § 18.61, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without the judge's action.

(2) *Unacceptable excuse for failing to act.* A failure described in paragraph (d)(1)(A) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a).

(3) *Types of sanctions.* Sanctions may include any of the orders listed in paragraph (b)(1) of this section.

(e) *Failure to provide electronically stored information.* Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) *Procedure.* A judge may impose sanctions under this section upon:

(1) a separately filed motion; or

(2) notice from the judge followed by a reasonable opportunity to be heard.

Types of Discovery

§ 18.60 Interrogatories to parties.

(a) *In general.*

(1) *Number.* Unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with § 18.51.

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under § 18.51. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the judge may order that the interrogatory need not be answered until designated discovery is complete, or until a prehearing conference or some other time.

(b) *Answers and objections.*

(1) *Responding party.* The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) *Time to respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under § 18.54 or be ordered by the judge.

(3) *Answering each interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney or non-attorney representative who objects must sign any objections.

(c) *Use.* An answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence.

(d) *Option to produce business records.* If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

§ 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

(a) *In general.* A party may serve on any other party a request within the scope of § 18.51:

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) *Procedure.*

(1) *Contents of the request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and objections.*

(A) *Time to respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under § 18.54 or be ordered by the judge.

(B) *Responding to each item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a request for production of electronically stored information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the documents or electronically stored information.* Unless otherwise stipulated or ordered by the judge, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) *Nonparties.* As provided in § 18.56, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

§ 18.62 Physical and mental examinations.

(a) *Examination by notice.*

(1) *In general.* A party may serve upon another party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitably licensed or certified examiner.

(2) *Contents of the notice.* The notice must specify:

(A) the legal basis for the examination;

(B) the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and

(C) how the reasonable transportation expenses were calculated.

(3) *Service of notice.* Unless otherwise agreed by the parties, the notice must be served no fewer than 14 days before the examination date.

(4) *Objection.* The person to be examined must serve any objection to the notice no later than 7 days after the notice is served. The objection must be stated with particularity.

(b) *Examination by motion.*

Upon objection by the person to be examined the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by paragraph (a)(2) of this section.

(c) *Examiner's report.*

(1) *Delivery of the report.* The party who initiated the examination must, deliver a complete copy of the examination report to the party examined, together with like reports of all earlier examinations of the same condition.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

§ 18.63 Requests for admission.

(a) *Scope and procedure.*

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of § 18.51 relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) *Form; copy of a document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to respond; effect of not responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under § 18.54 or be ordered by the judge.

(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing.

(6) *Motion regarding the sufficiency of an answer or objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the judge finds an objection justified, the judge must order that an answer be served. On finding that an answer does not comply with this section, the judge may order either that the matter is admitted or that an amended answer be served. The judge may defer final decision until a prehearing conference or a specified time before the hearing.

(b) *Effect of an admission; withdrawing or amending it.* A matter admitted under this section is conclusively established unless the judge, on motion, permits the admission to be withdrawn or amended. The judge may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

§ 18.64 Depositions by oral examination.

(a) *When a deposition may be taken.*

(1) *Without leave.* A party may, by oral questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under § 18.56.

(2) *With leave.* A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with § 18.51(b):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this section or § 18.65 by one of the parties;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in § 18.50(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) *Notice of the deposition; other formal requirements.*

(1) *Notice in general.* Except as stipulated or otherwise ordered by the judge, a party who wants to depose a person by oral questions must give reasonable written notice to every other party of no fewer than 14 days. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. If the notice to a party deponent is accompanied by a request for production under § 18.61, the notice must comply with the requirements of § 18.61(b).

(3) *Method of recording.*

(A) *Method stated in the notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the judge orders otherwise.

(4) *By remote means.* The parties may stipulate—or the judge may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

(5) *Officer's duties.*

(A) *Before the deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before a person having power to administer oaths. The officer must begin the deposition with an on-the-record statement that includes:

(i) The officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent;

(v) the identity of all persons present; and

(vi) the date and method of service of the notice of deposition.

(B) *Conducting the deposition; avoiding distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in paragraphs (b)(5)(A)(i)–(iii) of this section at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or subpoena directed to an organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) *Examination and cross-examination; record of the examination; objections; written questions.*

(1) *Examination and cross-examination.* The examination and cross-examination of a deponent proceed as they would at the hearing under the applicable rules of evidence. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under paragraph (b)(3)(A) of this section. The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the judge, or to present a motion under paragraph (d)(3) of this section.

(3) *Participating through written questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) *Duration; sanction; motion to terminate or limit.*

(1) *Duration.* Unless otherwise stipulated or ordered by the judge, a deposition is limited to 1 day of 7 hours. The judge must allow additional time consistent with § 18.51(b) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The judge may impose an appropriate sanction, in accordance with § 18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to terminate or limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The judge may order that the deposition be terminated or may limit its scope and manner as provided in § 18.52. If terminated, the deposition may be resumed only by the judge's order.

(e) *Review by the witness; changes.*

(1) *Review; statement of changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) To review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes indicated in the officer's certificate.* The officer must note in the certificate prescribed by paragraph (f)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) *Certification and delivery; exhibits; copies of the transcript or recording; filing.*

(1) *Certification and delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the judge orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked ''Deposition of [witness's name]'' and must promptly send it to the party or the party's representative who arranged for the transcript or recording. The party or the party's representative must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and tangible things.*

(A) *Originals and copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order regarding the originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the proceeding.

(3) *Copies of the transcript or recording.* Unless otherwise stipulated or ordered by the judge, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) *Failure to attend a deposition or serve a subpoena.* A judge may order sanctions, in accordance with § 18.57, if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to:

(1) Attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

§ 18.65 Depositions by written questions.

(a) *When a deposition may be taken.*

(1) *Without leave.* A party may, by written questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under § 18.56.

(2) *With leave.* A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with § 18.51(b):

(A) If the parties have not stipulated to the deposition and:

(i) The deposition would result in more than 10 depositions being taken under this section or § 18.64 by a party;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in § 18.50(a); or

(B) if the deponent is confined in prison.

(3) *Service; required notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions directed to an organization.* A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with § 18.64(b)(6).

(5) *Questions from other parties.* Any questions to the deponent from other parties must be served on all parties as follows: Cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The judge may, for good cause, extend or shorten these times.

(b) *Delivery to the officer; officer's duties.* Unless a different procedure is ordered by the judge, the party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in § 18.64(c), (e), and (f) to:

(1) Take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) *Notice of completion or filing.*

(1) *Completion.* The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing.* A party who files the deposition must promptly notify all other parties of the filing.

Disposition Without Hearing

§ 18.70 Motions for dispositive action.

(a) *In general.* When consistent with statute, regulation or executive order, any party may move under § 18.33 for disposition of the pending proceeding. If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter.

(b) *Motion to remand.* A party may move to remand the matter to the referring agency. A remand order must include any terms or conditions and should state the reason for the remand.

(c) *Motion to dismiss.* A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

(d) *Motion for decision on the record.* When the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

§ 18.71 Approval of settlement or consent findings.

(a) *Motion for approval of settlement agreement.* When the applicable statute or regulation requires it, the parties must submit a settlement agreement for the judge's review and approval.

(b) *Motion for consent findings and order.* Parties may file a motion to accept and adopt consent findings. Any agreement that contains consent findings and an order that disposes of all or part of a matter must include:

(1) a statement that the order has the same effect as one made after a full hearing;

(2) a statement that the order is based on a record that consists of the paper that began the proceeding (such as a complaint, order of reference, or notice of administrative determination), as it may have been amended, and the agreement;

(3) a waiver of any further procedural steps before the judge; and

(4) a waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

§ 18.72 Summary decision.

(a) *Motion for summary decision or partial summary decision.* A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

(b) *Time to file a motion.* Unless the judge orders otherwise, a party may file a motion for summary decision at any time until 30 days before the date fixed for the formal hearing.

(c) *Procedures.*

(1) *Supporting factual positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection that a fact is not supported by admissible evidence.* A

party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials not cited.* The judge need consider only the cited materials, but the judge may consider other materials in the record.

(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When facts are unavailable to the nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) *Failing to properly support or address a fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the judge may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) *Decision independent of the motion.* After giving notice and a reasonable time to respond, the judge may:

(1) grant summary decision for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to grant all the requested relief.* If the judge does not grant all the relief requested by the motion, the judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or declaration submitted in bad faith.* If satisfied that an affidavit or declaration under this section is submitted in bad faith or solely for delay, the judge—after notice and a reasonable time to respond—may order sanctions or other relief as authorized by law.

Hearing

§ 18.80 Prehearing statement.

(a) *Time for filing.* Unless the judge orders otherwise, at least 21 days before the hearing, each participating party must file a prehearing statement.

(b) *Required conference.* Before filing a prehearing statement, the party must confer with all other parties in good faith to:

(1) stipulate to the facts to the fullest extent possible; and

(2) revise exhibit lists, eliminate duplicative exhibits, prepare joint exhibits, and attempt to resolve any objections to exhibits.

(c) *Contents.* Unless ordered otherwise, the prehearing statement must state:

(1) the party's name;

(2) the issues of law to be determined with reference to the appropriate statute, regulation, or case law;

(3) a precise statement of the relief sought;

(4) the stipulated facts that require no proof;

(5) the facts disputed by the parties;

(6) a list of witnesses the party expects to call;

(7) a list of the joint exhibits;

(8) a list of the party's exhibits;

(9) an estimate of the time required for the party to present its case-in-chief; and

(10) any additional information that may aid the parties' preparation for the hearing or the disposition of the proceeding, such as the need for specialized equipment at the hearing.

(d) *Joint prehearing statement.* The judge may require the parties to file a joint prehearing statement rather than individual prehearing statements.

(e) *Signature.* The prehearing statement must be in writing and signed. By signing, an attorney, representative, or party makes the certifications described in § 18.50(d).

§ 18.81 Formal hearing.

(a) *Public.* Hearings are open to the public. But, when authorized by law and only to the minimum extent necessary, the judge may order a hearing or any part of a hearing closed to the public, including anticipated witnesses. The order closing all or part of the hearing must state findings and explain why the reasons for closure outweigh the presumption of public access. The order and any objection must be part of the record.

(b) *Taking testimony.* Unless a closure order is issued under paragraph (a) of this section, the witnesses' testimony must be taken in an open hearing. For good cause and with appropriate safeguards, the judge may permit testimony in an open hearing by contemporaneous transmission from a different location.

(c) *Party participation.* For good cause and with appropriate safeguards, the judge may permit a party to participate in an open hearing by contemporaneous transmission from a different location.

§ 18.82 Exhibits.

(a) *Identification.* All exhibits offered in evidence must be marked with a designation identifying the party offering the exhibit and must be numbered and paginated as the judge orders.

(b) *Electronic data.* By order the judge may prescribe the format for the submission of data that is in electronic form.

(c) *Exchange of exhibits.* When written exhibits are offered in evidence, one copy must be furnished to the judge and to each of the parties at the hearing, unless copies were previously furnished with the list of proposed exhibits or the judge directs otherwise. If the judge does not fix a date for the exchange of exhibits, the parties must exchange copies of exhibits at the earliest practicable time before the hearing begins.

(d) *Authenticity.* The authenticity of a document identified in a pre-hearing exhibit list is admitted unless a party files a written objection to authenticity at least 7 days before the hearing. The judge may permit a party to challenge a document's authenticity if the party establishes good cause for its failure to file a timely written objection.

(e) *Substitution of copies for original exhibits.* The judge may permit a party to withdraw original documents offered in evidence and substitute accurate copies of the originals.

(f) *Designation of parts of documents.* When only a portion of a document contains relevant matter, the offering party must exclude the irrelevant parts to the greatest extent practicable.

(g) *Records in other proceedings.* Portions of the record of other administrative proceedings, civil actions or criminal prosecutions may be received in evidence, when the offering party shows the copies are accurate.

§ 18.83 Stipulations.

(a) The parties may stipulate to any facts in writing at any stage of the proceeding or orally on the record at a deposition or at a hearing. These stipulations bind the parties unless the judge disapproves them.

(b) Every stipulation that requests or requires a judge's action must be written and signed by all affected parties or their representatives. Any stipulation to extend time must state the reason for the date change.

(c) A proposed form of order may be submitted with the stipulation; it may consist of an endorsement on the stipulation of the words, ''Pursuant to stipulation, it is so ordered,'' with spaces designated for the date and the signature of the judge.

§ 18.84 Official notice.

On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.

§ 18.85 Privileged, sensitive, or classified material.

(a) *Exclusion.* On motion of any interested person or the judge's own, the judge may limit the introduction of material into the record or issue orders to protect against undue disclosure of privileged communications, or sensitive or classified matters. The judge may admit into the record a summary or extract that omits the privileged, sensitive or classified material.

(b) *Sealing the record.*

(1) On motion of any interested person or the judge's own, the judge may order any material that is in the record to be sealed from public access. The motion must propose the fewest redactions possible that will protect the interest offered as the basis for the motion. A redacted copy or summary of any material sealed must be made part of the public record unless the necessary redactions would be so extensive that the public version would be meaningless, or making even a redacted version or summary available would defeat the reason the original is sealed.

(2) An order that seals material must state findings and explain why the reasons to seal adjudicatory records outweigh the presumption of public access. Sealed materials must be placed in a clearly marked, separate part of the record. Notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

§ 18.86 Hearing room conduct.

Participants must conduct themselves in an orderly manner. The consumption of food or beverage, and rearranging courtroom furniture are prohibited, unless specifically authorized by the judge. Electronic devices must be silenced and must not disrupt the proceedings. Parties, witnesses and spectators are prohibited from using video or audio recording devices to record hearings.

§ 18.87 Standards of conduct.

(a) *In general.* All persons appearing in proceedings must act with integrity and in an ethical manner.

(b) *Exclusion for misconduct.* During the course of a proceeding, the judge may exclude any person—including a party or a party's attorney or non-attorney representative—for contumacious conduct such as refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly or ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The judge must state the basis for the exclusion.

(c) *Review of representative's exclusion.* Any representative excluded from a proceeding may appeal to the Chief Judge for reinstatement within 7 days of the exclusion. The exclusion order is reviewed for abuse of discretion. The proceeding from which the representative was excluded will not be delayed or suspended pending review by the Chief Judge, except for a reasonable delay to enable the party to obtain another representative.

§ 18.88 Transcript of proceedings.

(a) *Hearing transcript.* All hearings must be recorded and transcribed. The parties and the public may obtain copies of the transcript from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.

(b) *Corrections to the transcript.* A party may file a motion to correct the official transcript. Motions for correction must be filed within 14 days of the receipt of the transcript unless the judge permits additional time. The judge may grant the motion in whole or part if the corrections involve substantive errors. At any time before issuing a decision and upon notice to the parties, the judge may correct errors in the transcript.

Post Hearing

§ 18.90 Closing the record; subsequent motions.

(a) *In general.* The record of a hearing closes when the hearing concludes, unless the judge directs otherwise. If any party waives a hearing, the record closes on the date the judge sets for the filing of the parties' submissions.

(b) *Motion to reopen the record.*

(1) A motion to reopen the record must be made promptly after the additional evidence is discovered. No additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed. Each new item must be designated as an exhibit under § 18.82(a) and accompanied by proof that copies have been served on all parties.

(2) If the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set.

(c) *Motions after the decision.* After the decision and order is issued, the judge retains jurisdiction to dispose of appropriate motions, such as a motion to award attorney's fees and expenses, a motion to correct the transcript, or a motion for reconsideration.

§ 18.91 Post-hearing brief.

The judge may grant a party time to file a post-hearing brief with proposed findings of fact, conclusions of law, and the specific relief sought. The brief must refer to all portions of the record and authorities relied upon in support of each assertion.

§ 18.92 Decision and order.

At the conclusion of the proceeding, the judge must issue a written decision and order.

§ 18.93 Motion for reconsideration.

A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.

§ 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.

(a) *Relief pending review.* If a timely motion is made for relief that the judge lacks authority to grant because a petition for review has been docketed and is pending, the judge may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that the judge would grant the motion if the reviewing body remands for that purpose or that the motion raises a substantial issue.

(b) *Notice to reviewing body.* The movant must promptly notify the clerk of the reviewing body if the judge states that he or she would grant the motion or that the motion raises a substantial issue.

(c) *Remand.* The judge may decide the motion if the reviewing body remands for that purpose.

§ 18.95 Review of decision.

The statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision.

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