unmitigable adverse impact on subsistence uses of these two species.

Proposed Authorization

NMFS proposes to issue an IHA to CPA for conducting seismic surveys from Milne Point to the eastern channel of the Colville River in the U.S. Beaufort Sea, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. NMFS has preliminarily determined that the proposed activity would result in the harassment of small numbers of marine mammals; would have no more than a negligible impact on the affected marine mammal stocks; and would not have an unmitigable adverse impact on the availability of species or stocks for subsistence uses.

Information Solicited

NMFS requests interested persons to submit comments and information concerning this request (see **ADDRESSES**).

Dated: February 2, 2005≤

Laurie K. Allen,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–2443 Filed 2–7–05; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

In the Matter of the New York Mercantile Exchange, Inc. Petition To Extend Interpretation Pursuant to Section 1a(12)(C) of the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: On February 4, 2003, in response to a petition from the New York Mercantile Exchange, Inc. (''NYMEX'' or ''Exchange'') the Commodity Futures Trading Commission (''Commission''), issued an order [1] pursuant to Section 1a(12)(C) of the Commodity Exchange Act (''Act''). The order provides that, subject to certain conditions, Exchange floor brokers and floor traders (collectively referred to hereafter as ''floor members'') who are registered with the Commission, when acting in a proprietary trading capacity, shall be deemed to be ''eligible contract participants'' as that term is defined in Section 1a(12) of the Act. The order (hereafter the ''original order'' or the ''ECP Order'') is effective for a two-year period and thus will expire on February 4, 2005.

On January 19, 2005, the Exchange petitioned the Commission to extend the original order for a further one-year period. Based on a review of all the relevant facts and circumstances, including its review of a report required as a condition of the original order, detailing the experiences of the Exchange, its floor members and its clearing members under that order, the Commission has determined to grant the Exchange's petition.

Accordingly, subject to certain conditions as set forth in this order, NYMEX floor members, when acting for their own accounts, are permitted to continue to enter into certain specified over-the-counter (''OTC'') transactions in exempt commodities pursuant to Section 2(h)(1) of the Act. In order to participate, the floor member must have its OTC trades guaranteed by, and cleared at NYMEX by, an Exchange clearing member that is registered with the Commission as a futures commission merchant (''FCM'') and that meets certain minimum working capital requirements. This order is effective for a one-year period commencing on the expiration date of the original order.

DATES: This order is effective on February 4, 2005.

FOR FURTHER INFORMATION CONTACT: Donald H Heitman, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581. Telephone: 202–418–5041. E-mail: *dheitman@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 1a(12) of the Act, as amended by the Commodity Futures Modernization Act of 2000 (''CFMA''), Public Law 106–554, which was signed into law on December 21, 2000, defines the term ''eligible contract participant'' (''ECP'') by listing those entities and individuals considered to be ECPs.[2] Under Sections 2(d)(1), 2(g), and 2(h)(1) of the Act, OTC transactions [3] entered into by ECPs in an ''excluded commodity'' or an ''exempt commodity,'' as those terms are defined by the Act,[4] are exempt from all but certain requirements of the Act.[5] Floor brokers and floor traders are explicitly included in the ECP definition only to the extent that the floor broker or floor trader acts ''in connection with any transaction that takes place on or through the facilities of a registered entity or an exempt board of trade, or any affiliate thereof, on which such person regularly trades.'' [6]

The Act, however, gives the Commission discretion to expand the ECP category as it deems appropriate. Specifically, Section 1a(12)(C) provides that the list of entities defined as ECPs shall include ''any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.''

II. The Original NYMEX Petition

A. Introduction

By letter dated May 23, 2002, NYMEX submitted a petition seeking a Commission interpretation pursuant to

[1] 68 FR 5621 (February 4, 2003).

[2] Included generally in Section 1a(12) as ECPs are: financial institutions; insurance companies and investment companies subject to regulation; commodity pools and employee benefit plans subject to regulation and asset requirements; other entities subject to asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; governmental entities; brokers, dealers, and FCMs subject to regulation and organized as other than natural persons or proprietorships; brokers, dealers, and FCMs subject to regulation and organized as natural persons or proprietorships subject to total asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; floor brokers or floor traders subject to regulation in connection with transactions that take place on or through the facilities of a registered entity or an exempt board of trade; individuals subject to total asset requirements; an investment adviser or commodity trading advisor acting as an investment manager or fiduciary for another ECP; and any other person that the Commission deems eligible in light of the financial or other qualifications of the person.

[3] For these purposes, OTC transactions are transactions that are not executed on a trading facility. As defined in Section 1a(33)(A) of the Act, the term ''trading facility'' generally means ''a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple participants in the facility or system.''

[4] Section 1a(14) defines the term ''exempt commodity'' to mean a commodity that is not an excluded commodity or an agricultural commodity. Section 1a(13) defines the term ''excluded commodity'' to mean, among other things, an interest rate, exchange rate, currency, credit risk or measure, debt instrument, measure of inflation, or other macroeconomic index or measure. Although the term ''agricultural commodity'' is not defined in the Act, Section 1a(4) enumerates a non-exclusive list of several agricultural-based commodities and products. The broadest types of commodities that fall into the exempt category are energy and metals products.

[5] OTC transactions in excluded commodities entered into by ECPs pursuant to Section 2(d)(1) are generally not subject to any provision of the Act. OTC transactions in exempt or excluded commodities that are individually negotiated by ECPs pursuant to Section 2(g) are also generally not subject to any provision of the Act. OTC transactions in exempt commodities entered into by ECPs pursuant to Section 2(h)(1) are generally not subject to any provision of the Act other than antimanipulation provisions and anti-fraud provisions in certain situations.

[6] Section 1a(12)(A)(x) of the Act.

Section 1a(12)(C) of the Act. Specifically, NYMEX, acting on behalf of Exchange floor members and member clearing firms, requested that the Commission make a determination pursuant to Section 1a(12)(C) of the Act that floor members, when acting in a proprietary capacity, may enter into certain specified OTC transactions in exempt commodities pursuant to Section 2(h)(1) of the Act if such floor members have obtained a financial guarantee for such transactions from an Exchange clearing member that is registered with the Commission as an FCM.[7] NYMEX suggested that the permissible OTC transactions be limited to trading in a commodity that either (1) is listed only for clearing at the Exchange,[8] or (2) is listed for trading and clearing at the Exchange and where Exchange rules provide for the exchange of futures for swaps (''EFS'') in that contract.[9] NYMEX further proposed that such transactions would be subject to additional conditions and restrictions detailed in the petition and described below.[10]

B. Arguments in Support of the Original Petition

In its original petition, NYMEX offered supporting arguments based on both public interest considerations and a detailed analysis of the Act's ECP definition. Those arguments are fully described in the **Federal Register** notice implementing the original 2003 order.[11]

C. Trading Restrictions and Exchange Oversight

In its original petition, NYMEX represented that it would have appropriate compliance systems in place to monitor OTC trading by Exchange floor members.[12] NYMEX also suggested that, consistent with the standards already applicable to floor members with respect to their trading on the Exchange, the Commission should provide that floor members' transactions in the permissible contracts that are not executed on a trading facility be executed only pursuant to the Section 2(h)(1) exemption. As indicated above, all Section 2(h)(1) transactions would be subject to the Act's antimanipulation provisions and, in certain situations, its antifraud provisions.[13] Finally, the Exchange represented that it would agree, as a condition for its members participating in the OTC markets, to limit OTC trading by floor members such that the counterparties to their trades must not be other floor members for contracts that are listed for trading on the Exchange. Thus, for example, floor members could not be counterparties in connection with an OTC natural gas swap to be exchanged for a futures position in the NYMEX Natural Gas Futures contract. NYMEX floor members could be counterparties in connection with a Chicago Basis swap that is subsequently cleared at NYMEX through EFS procedures because that contract is listed only for clearing at the Exchange.

D. The Commission's Conclusion Regarding the Original Petition

After consideration of the original NYMEX petition, the Commission determined that NYMEX floor members, subject to certain conditions and for a two-year period commencing on the date of publication of the order in the **Federal Register**, would be eligible to be ECPs as that term is defined in Section 1a(12) of the Act.[14] The floor members were required to meet the financial qualifications of an ECP by having a financial guarantee for the OTC transactions from a NYMEX clearing member that is registered as an FCM and that meets certain minimum working capital requirements.

The Commission noted that the execution and clearing of such transactions has financial implications for the clearing system.[15] Thus, the Commission added certain safeguards to the original order to limit the possibility of a trader entering into OTC transactions that could create financial difficulty for the guarantor FCM, the clearing entity or other clearing firms. First, the guarantor FCM must clear, at NYMEX, every OTC transaction for which it provides such a guarantee. Second, in order to assure that the guarantor FCM is adequately capitalized, the guarantor FCM must have and maintain at all times minimum working capital[16] of at least $20 million.[17]

The Commission determined to make the original order effective for a two-year period in order to provide the opportunity to evaluate the impact of the OTC trading on both the OTC market and on NYMEX. Thus, the Commission required that NYMEX submit a report reviewing its experiences and the experiences of its floor members and clearing members with respect to OTC trading, including: The levels of OTC trading and related clearing activity; the number of floor members and clearing members who participated in these activities; and an evaluation of whether the Commission should extend this Order and, if so, whether any modifications should be made thereto. This report was to address

[7] To qualify for the Section 2(h)(1) exemption, the transaction must: (1) Be in an exempt commodity, (2) be entered into by ECPs, and (3) not be entered into on a trading facility.

[8] By letter dated May 24, 2002, NYMEX filed rule changes implementing an initiative to provide clearing services for specified energy contracts executed in the OTC markets. NYMEX certified that the rules comply with the Act and the Commission's regulations. Under the provision, NYMEX initially listed 25 contracts that are entered into OTC and accepted for clearing by NYMEX, but are not listed for trading on the Exchange. In connection with the NYMEX initiative, on May 30, 2002, the Commission issued an order pursuant to Section 4d of the Act. The order provides that, subject to certain terms and conditions, the NYMEX Clearinghouse and FCMs clearing through the NYMEX Clearinghouse may commingle customer funds used to margin, secure, or guarantee transactions in futures contracts executed in the OTC markets and cleared by the NYMEX Clearinghouse with other funds held in segregated accounts maintained in accordance with Section 4d of the Act and Commission Regulations thereunder.

[9] EFS transactions are permitted at the Exchange pursuant to NYMEX Rule 6.21A, ''Exchange of Futures for, or in Connection with, Swap Transactions.'' The swap component of the transaction must involve the commodity underlying a related NYMEX futures contract, or a derivative, byproduct, or related product of such a commodity. In furtherance of its effort to permit OTC clearing at the Exchange, NYMEX amended the rule to include as eligible EFS transactions ''any contract executed off the Exchange that the Exchange has designated as eligible for clearing at the Exchange.'' The Division notes that, subsequent to the Commission's ECP Order responding to the Exchange's original petition, NYMEX listed on its ClearPort(sm) Trading venue a significant number of futures contracts modeled after OTC energy swap agreements. While these futures contracts are competitively traded on the ClearPort(sm) Trading market, the vast majority of positions in these contracts are established via EFS transactions that are executed non-competitively away from the Exchange and then submitted to NYMEX via its ClearPort(sm) Clearing service.

[10] NYMEX also suggested a further limitation on floor members' permissible transactions by not permitting any OTC transactions in electricity commodities.

[11] 68 FR 5621 (February 4, 2003).

[12] *Id.*

[13] *See supra* note 5.

[14] A NYMEX floor member who is determined to be an ECP based upon compliance with the provisions set forth in the Commission's original order is an ECP only for the purpose of entering into transactions executed pursuant to Section 2(h)(1) of the Act and as described in the order.

[15] The Commission noted that the guarantor FCM could restrict or otherwise condition the trading for which the guarantee is provided. The guarantor could, for instance, limit trading to certain commodities, place financial limits on overall or daily positions, or restrict trading by number or size of acceptable transactions.

[16] For the purposes of an FCM clearing member, NYMEX Rule 9.21 defines ''working capital'' to mean ''adjusted net capital'' as defined by CFTC Regulation 1.17.

[17] The original order provided a sliding scale for the two-year duration of the original order whereby a clearing member was required to have minimum working capital of $5 million during the first 12 months, $10 million during the thirteenth through eighteenth months, and $20 million thereafter. The final $20 million requirement is carried over into this order.

the first eighteen months of the two-year period, and was to be submitted to the Commission no later than 30 days after the conclusion of that eighteen month period (*i.e.*, by September 4, 2004). In fact, the report was incorporated into the Exchange's January 19, 2005 petition to extend the relief granted in the original petition and thus was not filed within the timeline set out in the original order. Nevertheless, the Commission has determined to accept this report and not to impose any sanctions on the Exchange for the late filing of the report.

III. The Petition to Extend the Relief

A. The Exchange Report

The Exchange's petition to extend the relief granted in the original order includes the required report concerning the experiences of the Exchange, its floor members and clearing members under the original order. At the outset, the report states that the Exchange adopted two new rules in connection with the original order, Rules 6.21F (''Participation by NYMEX Floor Members in Special Program for Over-the-Counter Trading with FCM Guarantee'') and Rule 9.41 (''Special Capital Provisions for Clearing Members Guaranteeing and Clearing OTC Contracts Executed by NYMEX Floor Members''). The Exchange notes that, if the Commission grants its request for an extension, it will certify to the Commission rule amendments to conform these rules to the terms of the Commission's extension.

With respect to compliance oversight, the Exchange reports that, under Rule 6.21F, floor members are required to notify the Exchange Compliance Department prior to any participation in the program authorized by the ECP Order, and to submit all executed OTC transactions to the Exchange for clearing. Beginning April 1, 2004, the Exchange also required that notification to include a specially tailored guarantee form prepared by Exchange staff. In addition, the Exchange employs a special trade type indicator to allow it to identify EFS transactions. Thus, Exchange Compliance staff is able to identify which floor members are participating in the program under the ECP Order and whether they are complying with the notification and other requirements. Currently, none of the floor members trading pursuant to the ECP Order execute orders for customers in their floor member capacities. Therefore, they would not be in a position to take advantage of customer order information when trading in a proprietary capacity under the ECP Order. In addition, the minimal amount of trading done under the ECP Order has been regularly reviewed by the Exchange's Compliance Market Surveillance staff. In addition, Compliance Market Surveillance staff monitors for the condition of the ECP Order that prohibits floor members participating in this program from engaging in EFS transactions with each other. Compliance staff monitors for compliance with this restriction by reviewing the trading activity of participating floor members to check for trades involving a CTI 1 vs. CTI 1 transaction.

With respect to actual floor member participation in the program, the Exchange notes that it has been ''relatively slight to date.'' Only 12 floor members participated in the program overall and only seven were participating at the time the extension request was filed. With respect to volume, the Exchange reports that the floor members participating in the program, during the period from March 11, 2003 through January 7, 2005, participated in cleared transactions totaling 82,855 lots on the buy side and 79,740 lots on the sell side. In general, this EFS activity was concentrated in the smaller cash-settled natural gas or natural gas basis futures contracts listed in the NYMEX ClearPort(sm) Clearing System.

By comparison, the single day volume for November 4, 2004, the busiest day experienced by NYMEX's ClearPort(sm) Clearing services during that same period was 147,153 lots. The same press release announcing that volume record noted that total 2004 cleared volume for OTC transactions, as of that date, was 10,858,906 lots. Thus, the contribution by floor members participating in the program under the Commission's ECP Order ''has been relatively modest.''

The Exchange attributed this limited participation to a number of possible factors. The Exchange noted that, over recent months, noticeable price volatility in NYMEX's core floor-traded products has provided ample trading opportunities on the Exchange's trading floors in futures products, making it less necessary for professional futures traders to look to OTC markets for trading opportunities. Also, at present, the Exchange permits EFS transactions in natural gas futures, but not crude oil, heating oil or unleaded gasoline futures, thus making the program of interest primarily only to those floor members who already regularly trade in natural gas futures. In addition, many floor traders focus on trading in the front contract month, or the first few listed months of a contract, whereas the OTC natural gas market emphasizes longer trading periods, such as quarterly or seasonal strip trading, so that a floor trader actively engaging in OTC natural gas trading would likely need to retain an additional clerk to manage the OTC activity. Finally, the requirement that the clearing FCM guaranteeing a floor member's trades under the program must maintain working capital of $20 million has restricted the number of clearing members able to participate in the program and effectively narrowed the pool of floor members willing to participate in the program, since it is difficult (though not impossible) for a floor member to use his or her regular clearing FCM for regular futures trading and another for OTC trades under this program.

B. The Extension Request

The Exchange notes that its original petition, and the Commission's original ECP Order, were based on an approach whereby an OTC energy swap would be converted, via an EFS transaction, to a futures position maintained at the Exchange's clearinghouse. Recently, however, the Exchange has begun preparation of a draft filing to register with the Commission a derivatives transaction execution facility (DTEF). As a part of that filing, the Exchange plans to request that a large number of the products currently listed on the NYMEX ClearPort(sm) Trading product slate be shifted from the DCM to the DTEF regulatory tier. As part of that same filing, the Exchange staff anticipates revisiting the manner in which off-exchange energy transactions are submitted to the Exchange for participation in the ClearPort(sm) Clearing Service. Any such revision would require corresponding revisions in the Commission's ECP Order. Therefore, the Exchange suggests that any substantive changes to the terms of the order, including the possibility of making the order permanent, should be considered in the context of the DTEF filing. In the meantime, the Exchange requests that the existing ECP Order be extended for an additional term of one year. The Exchange notes that the policy arguments in favor of the program under the original ECP Order, summarized in the **Federal Register** notice publishing the order,[18] ''remain valid and also support the continuation of this program.''

IV. Conclusion

Accordingly, the Commission has determined, consistent with the NYMEX petition of January 19, 2005, that it is

[18] 68 FR 5621 (February 4, 2003).

appropriate to issue an order pursuant to Section 1a(12)(C) of the Act extending the relief granted in its original February 4, 2003 order whereby, subject to certain conditions and for a further one-year period commencing on February 4, 2005, NYMEX floor brokers and floor traders are included within the definition of ECPs who can enter into OTC transactions pursuant to Section 2(h)(1) of the Act. Although this order applies only to NYMEX and NYMEX members, the Commission would welcome, in response to a petition so requesting, providing substantially similar relief to other designated contract markets and members of designated contract markets.

V. Cost Benefit Analysis

Section 15 of the Act, as amended by Section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, Section 15 does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, Section 15 simply requires the Commission to ''consider the costs and benefits'' of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act. The Commission undertook a detailed costs-benefits analysis in considering the original order.[19] Actual experience under that order has been consistent with the Commission's analysis.

By extending the essential provisions of the original 2003 order, this order is intended to reduce regulatory barriers by continuing to permit NYMEX members registered with the Commission as floor brokers or floor traders, when acting in a proprietary capacity, to enter into OTC transactions in exempt commodities pursuant to Section 2(h)(1) of the Act if such floor members have obtained a financial guarantee for such transactions from an Exchange clearing member that is registered with the Commission as an FCM. The Commission has considered the costs and benefits of this order in light of the specific provisions of Section 15(a) of the Act.

VI. Order

Upon due consideration, and pursuant to its authority under Section 1a(12)(C) of the Act, the Commission hereby determines that a NYMEX member who is registered with the Commission as a floor broker or a floor trader, when acting in a proprietary trading capacity, shall continue to be deemed to be an eligible contract participant and may continue to enter into Exchange-specified OTC contracts, agreements or transactions in an exempt commodity under the following conditions:

1. This Order is effective for one year, commencing on February 4, 2005.

2. The contracts, agreements or transactions must be executed pursuant to Section 2(h)(1) of the Act.

3. The floor broker or floor trader must have obtained a financial guarantee for the contracts, agreements or transactions from a NYMEX clearing member that:

(a) Is registered with the Commission as an FCM; and,

(b) Clears the OTC contracts, agreements or transactions thus guaranteed.

4. Permissible contracts, agreements or transactions must be limited to trading in a commodity that either:

(a) Is listed only for clearing at NYMEX or

(b) Is listed for trading and clearing at NYMEX and NYMEX's rules provide for exchanges of futures for swaps in that contract, and each OTC contract, agreement or transaction executed pursuant to the order must be cleared at NYMEX.

5. The floor broker or floor trader may not enter into OTC contracts, agreements or transactions with another floor broker or floor trader as the counterparty for contracts that are listed for trading on the Exchange.

6. NYMEX must have appropriate compliance systems in place to monitor the OTC contracts, agreements or transactions of its floor brokers and floor traders.

7. Clearing members that guarantee and clear OTC contracts, agreements or transactions pursuant to this order must have and maintain at all times minimum working capital of at least $20 million. A clearing member must compute its working capital in accordance with exchange rules and generally accepted accounting principles consistently applied.

8. In the event NYMEX requests a further modification or extension of the ECP Order, the request shall include a report to the Commission reviewing the experiences of the Exchange and its floor members and clearing members under the Order. The report shall include information on the levels of OTC trading and related clearing activity, the number of floor members and clearing members participating in the activity, and the Exchange's reasons supporting the further modification or extension of the Order.

This order is based upon the representations made and supporting material provided to the Commission by NYMEX. Any material changes or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its finding that the provisions set forth herein are appropriate. Further, if experience demonstrates that the continued effectiveness of this order would be contrary to the public interest, the Commission may condition, modify, suspend, terminate or otherwise restrict the provisions of this order, as appropriate, on its own motion.

Issued in Washington, DC on February 2, 2005 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 05–2368 Filed 2–7–05; 8:45 am]

BILLING CODE 6351–01–U

[19] *See* 68 FR 5621 at 5624–25 (February 4, 2003).

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Sunshine Act; Notice of Closed Meeting

AGENCY: Corporation for National and Community Service.

ACTION: Notice of closed meeting of the Board of Directors.

SUMMARY: On Thursday, February 3, 2005, a majority of the Board of Directors (Board) of the Corporation for National and Community Service (Corporation) voted, pursuant to 45 CFR 2505.4, to close public observation for a meeting on February 7, 2005. The meeting to be closed involves discussions of the draft AmeriCorps rulemaking proposal the Corporation plans to submit to the Office of Management and Budget rulemaking docket. The vote followed a determination, in accordance with the