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Presidential Documents

Title 3—

The President

Proclamation 8868 of September 21, 2012

Establishment of the Chimney Rock National Monument

By the President of the United States of America

A Proclamation

The Chimney Rock site in southwestern Colorado incorporates spiritual, historic, and scientific resources of great value and significance. A thousand years ago, the vast Chaco civilization was drawn to the site's soaring massive rock pinnacles, Chimney Rock and Companion Rock, that rise hundreds of feet from the valley floor to an elevation of 7,600 feet. High atop ancient sandstone formations, Ancestral Pueblo People built exquisite stone buildings, including the highest ceremonial ''great house'' in the Southwest.

This landscape, encompassing both Chimney Rock and Companion Rock, and known today as Chimney Rock, holds deep spiritual significance for modern Pueblo and tribal communities and was one of the largest communities of the Pueblo II era (900–1150 A.D.). The Chimney Rock site also includes nationally significant archaeology, archaeoastronomy, visual and landscape characteristics, and geological and biological features, as well as objects of deep cultural and educational value.

In 1100 A.D., the area's cultivated fields and settlements extended from the valley floors to the mesa tops. The pinnacles, Chimney Rock and Companion Rock, dominated the landscape. Today, peregrine falcons nest on the pinnacles and soar over ancient structures, the dramatic landscape, and the forested slopes of the Piedra River and Stolsteimer Creek drainages, which are all framed by the high peaks of the San Juan Mountains.

Migratory mule deer and elk herds pass through the area each fall and spring as they have for thousands of years, and live there during the critical winter months. Merriam's turkeys, river otters, bald eagles, golden eagles, mountain lions, bats, woodpeckers, and many species of migratory birds also live in the area among the Ponderosa Pine, pinon, and juniper. Several desert plants usually found farther south grow there, including a species of cholla cactus that does not occur naturally outside the Sonoran Desert and is believed to be associated with deliberate cultivation by the Ancestral Pueblo People.

The Chimney Rock site is one of the best recognized archaeoastronomical resources in North America. Virtually all building clusters have views of Chimney Rock and Companion Rock, which frame multiple astronomical alignments and illustrate the Ancestral Pueblo People's knowledge of astronomy. Hundreds of archaeological ruins and buildings from the Pueblo II period are within the boundaries of the site, including a Chaco-style communal multi-room ''great house'' built in the late eleventh century to command observations of the surrounding landscape and astronomical phenomena.

The Chimney Rock site features an isolated Chacoan settlement among a complex system of dispersed communities bound by economic, political, and religious interdependence centered in Chaco Canyon, New Mexico, about 100 miles south of Chimney Rock. Chimney Rock continues to contribute to our knowledge about the Ancestral Pueblo People and their understanding and command of their environment.

Today, descendants of the Ancestral Pueblo People return to this important place of cultural continuity to visit their ancestors and for other spiritual and traditional purposes. It is a living landscape that shapes those who visit it and brings people together across time. Since the 1920s, there has been significant archaeological interest in Chimney Rock. Because it does not appear to have been reoccupied after the early 1100s, Chimney Rock offers a valuable window into the cultural developments of the Pueblo II era and affords opportunities to understand how geology, ecology, and archaeology interrelate. Because visitors travel from areas near and far, these lands support a growing travel and tourism sector that is a source of economic opportunity for the community, especially businesses in the region. They also help to attract new residents, retirees, and businesses that will further diversify the local economy.

In 1970, Chimney Rock was listed on the National Register of Historic Places, and its spectacular landscape has been open to visitors ever since.

WHEREAS section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431) (the ''Antiquities Act''), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS it is in the public interest to preserve and protect the objects of scientific and historic interest at Chimney Rock;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 2 of the Antiquities Act, hereby proclaim, set apart, and reserve as the Chimney Rock National Monument (monument) the objects identified above and all lands and interests in lands owned or controlled by the Government of the United States within the boundaries described on the accompanying map entitled ''Chimney Rock National Monument'' and the accompanying legal description, which are attached to and form a part of this proclamation, for the purpose of protecting those objects. These reserved Federal lands and interests in lands encompass approximately 4,726 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, leasing, or other disposition under the public lands laws, including withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing. Lands and interests in lands within the monument's boundaries not owned or controlled by the United States shall be reserved as part of the monument upon acquisition of ownership or control by the United States.

The establishment of this monument is subject to valid existing rights. The Secretaries of Agriculture and the Interior shall manage development under existing oil and gas leases within the monument, subject to valid existing rights, so as not to create any new impacts that would interfere with the proper care and management of the objects protected by this proclamation.

Nothing in this proclamation shall be construed to alter the valid existing water rights of any party, including the United States.

The Secretary of Agriculture (Secretary) shall manage the monument through the Forest Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation. The Secretary shall prepare, within 3 years of the date of this proclamation, a management plan for

the monument, and shall promulgate such regulations for its management as deemed appropriate. The plan will provide for protection and interpretation of the scientific and historic objects identified above, and continued public access to those objects, consistent with their protection. The plan will protect and preserve access by tribal members for traditional cultural, spiritual, and food- and medicine-gathering purposes, consistent with the purposes of the monument, to the maximum extent permitted by law.

The Secretary shall prepare a transportation plan that addresses actions necessary to protect the objects identified in this proclamation, including road closures and travel restrictions. For the purpose of protecting the objects identified above, the Secretary shall limit all motorized and mechanized vehicle use to designated roads, except for emergency or authorized administrative purposes.

The Secretary shall, in developing any management plans and any management rules and regulations governing the monument, consult with the Secretary of the Interior. The final decision to issue any management plans and any management rules and regulations rests with the Secretary of Agriculture. Management plans or rules and regulations developed by the Secretary of the Interior governing uses within national parks or other national monuments administered by the Secretary of the Interior shall not apply within the monument.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Colorado with respect to fish and wildlife management.

Nothing in this proclamation shall be deemed to enlarge or diminish the rights of any Indian tribe.

Laws, regulations, and policies followed by the Forest Service in issuing and administering grazing permits or leases on all lands under its jurisdiction shall continue to apply with regard to the lands in the monument.

The Secretary may carry out vegetative management treatments within the monument, except that timber harvest and prescribed fire may only be used when the Secretary determines it appropriate to address the risk of wildfire, insect infestation, or disease that would endanger the monument or imperil public safety.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of the monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of September, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

Billing code 3295–F2–P

New Mexico Principal Meridian

T. 34 N., R. 4 W., South of the Ute Line,

sec. 8U, SE¼;

sec. 9U, S½;

sec. 15U, W½NW¼;

sec. 16U, N½, SW¼, N½SE¼;

sec. 17U;

sec. 18U, S½NE¼, SW¼NW¼, E½SW¼, SE¼;

sec. 19, E½, E½NW¼, the lot at the SW¼NW¼;

sec. 20;

sec. 21, W½NW¼, NW¼SW¼, S½SW¼;

sec. 28, NW¼NE¼, N½NW¼;

sec. 29, N½NE¼, E½NE¼NW¼;

sec. 30, W½NE¼NE¼, NW¼NE¼, the un-numbered lot at the NW¼NW¼, that portion of the E½NW¼ and the un-numbered lot at the SW¼NW¼ lying north of Colorado State Highway 151 as described in the Highway Easement Deed recorded in the Archuleta Clerk and Recorder's Office on June 13, 1978, at book 158, page 538.

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sec. 2U, lots 1 to 3, inclusive;

sec. 11U, NE¼NE¼;

sec. 12U, W½NW¼, SW¼;

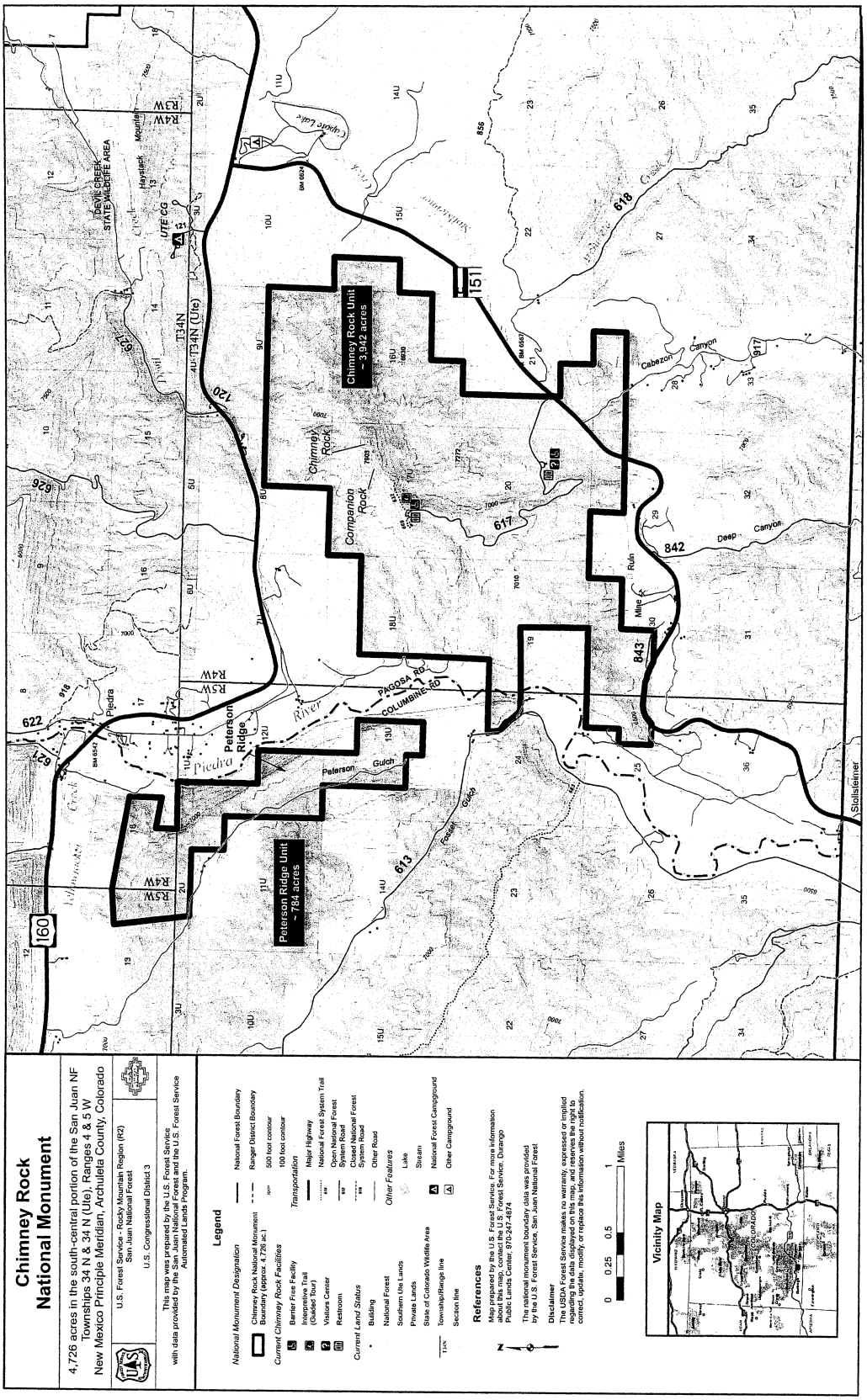
sec. 13U, SW¼NE¼, E½NW¼, N½NE¼SW¼, NW¼SE¼;

sec. 24, all that portion of the S½NE¼ lying north and east of National Forest System Road 613;

sec. 25, all that portion of the E½NE¼ lying north of Colorado State Highway 151 as described in the Highway Easement Deed recorded in the Archuleta Clerk and Recorder's Office on June 13, 1978, at book 158, page 538, E½SW¼NE¼.

T. 34 N., R. 5 W., North of the Ute Line,

sec. 13, lots 8 and 9.



[FR Doc. 2012–23863
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Presidential Documents

Proclamation 8869 of September 21, 2012

National Historically Black Colleges and Universities Week, 2012

By the President of the United States of America

A Proclamation

The founders of our Nation's first colleges and universities for African Americans shared a fundamental belief that, with the right education, all people can overcome barriers of injustice to achieve their fullest potential. These pioneers understood that education means emancipation—a path to freedom, independence, and success. More than 150 years later, America's Historically Black Colleges and Universities (HBCUs) carry forward this proud legacy, and this week, we celebrate the profound impact these places of learning have made on the life of our country.

For generations, HBCUs have provided students with access to higher education and instilled in them a sense of pride and history. Graduates of these institutions have played an extraordinary role in shaping the progress of our Union by championing equality and changing perspectives through the arts. They have strengthened our Nation by building our economy, teaching our children, healing the sick, and defending America as members of our Armed Forces. Today, HBCUs continue to help move our country forward, cultivating leaders in every area of our society. And with each new HBCU alum, we move closer to achieving our goal of having the highest proportion of college graduates in the world by 2020.

During National Historically Black Colleges and Universities Week, as we recognize the immeasurable contributions of these institutions, let us recommit to ensuring they remain cradles of opportunity for the next generation. Let us also reaffirm our belief in the power of progress through education—a belief we share with the visionary leaders who established our HBCUs so many years ago.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 23 through September 29, 2012, as National Historically Black Colleges and Universities Week. I call upon educators, public officials, professional organizations, corporations, and all Americans to observe this week with appropriate programs, ceremonies, and activities that acknowledge the countless contributions these institutions and their alumni have made to our country.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of September, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–23868
Filed 9–26–12; 8:45 am]
Billing code 3295–F2–P

Presidential Documents

Proclamation 8870 of September 21, 2012

National Hunting and Fishing Day, 2012

By the President of the United States of America

A Proclamation

From our highest peaks and most historic parks to the quiet woods and streams where generations of families have connected with the land around them, America's great outdoors have always played an important role in our national life. On National Hunting and Fishing Day, we celebrate our rich legacy of conservation, recognize sportsmen and women who have carried that legacy forward, and renew the spirit of stewardship that has moved countless Americans to help preserve our natural heritage for future generations.

As keepers of an age-old tradition, sportsmen and women share a deep and abiding bond with our environment. Generations have worked tirelessly to protect the lands and waters they cherish, and today, hunters and anglers stand among our strongest conservation advocates. This year, we also mark the 75th anniversary of the Federal Aid in Wildlife Restoration Act, which provided permanent and dependable funding for habitat conservation. This milestone recalls the many ways sportsmen and women have contributed to conservation of the public lands we all enjoy. Their legacy is all around us, and as we take time to appreciate America's natural beauty, let us give thanks to all those who have helped make our country what it is today.

Fulfilling our role as environmental stewards in the 21st century demands that we find the best ideas at the grassroots level and empower States, communities, and nonprofits with the tools they need to protect the land they love. Through the America's Great Outdoors Initiative, my Administration has striven to meet those challenges and lay the foundation for a comprehensive, community-driven conservation strategy. From hunters and anglers to tribal leaders and young people, we are engaging stakeholders of all backgrounds and beliefs—and moving forward, we will continue to find new ways to make the Federal Government a better partner in preserving our environment today and tomorrow.

As Americans, each of us has an equal share in the land and an equal responsibility to protect it. On National Hunting and Fishing Day, we pay tribute to the community of sportsmen and women who have kept faith with that fundamental principle, and who will continue to help drive our environmental progress in the years to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 22, 2012, as National Hunting and Fishing Day. I call upon all Americans to observe this day with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of September, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–23872
Filed 9–26–12; 8:45 am]
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Rules and Regulations

Federal Register
Vol. 77, No. 188
Thursday, September 27, 2012

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

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–10–0083; NOP–10–09IR]

RIN 0581–AD17

National Organic Program (NOP); Sunset Review (2012) for Nutrient Vitamins and Minerals

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule addresses a recommendation submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) on April 29, 2011. This recommendation pertains to the 2012 Sunset Review for the exemption (use) of nutrient vitamins and minerals in organic handling on U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List). On January 12, 2012, AMS published a proposed rule on the 2012 Sunset Review which proposed to continue the exemption (use) for nutrient vitamins and minerals on the National List for 5 years after its October 21, 2012 sunset date. The proposed rule also proposed to correct an inaccurate cross reference to U.S. Food and Drug Administration (FDA) regulations in the listing for vitamins and minerals on the National List. AMS continues to review the public comments on the proposed rule and assess the extent of impacts on the industry that could result from correcting the cross reference to FDA regulations. Therefore, due to the impending sunset of the allowance for nutrients vitamins and minerals from the National List on October 21, 2012, and based on the NOSB recommendation, this interim rule renews, without change, the exemption (use) for nutrient vitamins and minerals on the National List. This interim rule provides for the continued use of nutrients vitamins and minerals in organic products until the agency completes the January 12, 2012, rulemaking.

DATES: *Effective Date:* This interim rule becomes effective October 21, 2012. All comments received by December 26, 2012 will be considered prior to the issuance of a final rule.

ADDRESSES: Interested persons may submit written comments on this interim rule using the following addresses:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave. SW., Room 2646-So., Ag Stop 0268, Washington, DC 20250.

Instructions: All submissions received must include the docket number AMS–NOP–10–0083; NOP–10–09IR, and/or Regulatory Information Number (RIN) 0581–AD17 for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Comments submitted in response to this interim rule will also be available for viewing in person at USDA–AMS, National Organic Program, 1400 Independence Ave. SW., Room 2646-South Building, Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday, (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT: Melissa Bailey, Ph.D., Director, Standards Division, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

The Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522), authorizes the establishment of the National List. The National List identifies synthetic substances that are exempted (allowed) in organic production and nonsynthetic substances that are prohibited in organic crop and livestock production. The National List also identifies nonagricultural nonsynthetic, nonagricultural synthetic and nonorganic agricultural substances that may be used in organic handling. The exemptions and prohibitions granted under the OFPA are required to be reviewed every 5 years by the National Organic Standards Board (NOSB). The Secretary has authority under the OFPA to renew such exemptions and prohibitions. If the substances are not reviewed by the NOSB within 5 years of their inclusion on the National List and addressed by the Secretary, then their authorized use or prohibition expires under OFPA's sunset provision.

On March 26, 2010, the National Organic Program (NOP) published an Advance Notice of Proposed Rulemaking (ANPR) to announce the pending sunset of substances on the National List and opened the public comment process on whether existing exemptions for specified synthetic and nonsynthetic substances in organic handling should be continued (75 FR 14500).[1] The ANPR indicated that the exemption for the use of nutrient vitamins and minerals as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s))'' would expire after October 21, 2012, if the listing was not renewed. The public comment period lasted 60 days. Comments were received from organic handlers, ingredient suppliers and trade associations. Comments received supported the continued listing of nutrient vitamins and minerals in organic handling. The written comments can be retrieved at *http://www.regulations.gov* by searching for the document ID number: AMS–NOP–09–0074. The NOP provided the NOSB with these public comments to consider in their deliberations on the status of nutrient vitamins and minerals in

[1] The Sunset 2012 ANPR also pertained to the exemptions for synthetic substances and prohibitions for nonsynthetic substances used in crop and livestock production.

organic products after the 2012 sunset date.

At their April 2011 public meeting, the NOSB approved a recommendation to renew the listing for nutrient vitamins and minerals after its October 21, 2012 sunset date. Their recommendation stated that the listing should be renewed as codified at 7 CFR 205.605(b): ''Nutrient vitamins and minerals, in accordance with 21 CFR 104.20, Nutritional Quality Guidelines for Foods''.[2] In addition to the ANPR for Sunset 2012 published on March 26, 2010, the NOSB received additional public comment concerning the pending sunset of this listing in response to three **Federal Register** notices announcing meetings of the NOSB and its planned deliberations on recommendations involving Sunset 2012 substances. The notices were published in the **Federal Register** as follows: March 17, 2010 (75 FR 12723), September 20, 2010 (75 FR 57194), and March 4, 2011 (76 FR 12013). The NOSB received further written and oral testimony concerning nutrient vitamins and minerals at all three of these public business meetings which occurred in Woodland, CA on April 26–29, 2010, in Madison, WI on October 25–28, 2010, and in Seattle, WA on April 26–29, 2011. The written comments can be retrieved via *http://www.regulations.gov* by searching for the document ID numbers: AMS–NOP–10–0021 (May 2010 meeting); AMS–NOP–10–0068 (October 2010 meeting); and AMS–NOP–11–05 (April 2011 meeting). The oral comments were recorded in the meeting transcripts available on the NOP Web site, *http://www.ams.usda.gov/nop.*

During their April 2011 deliberations on the renewal of nutrients vitamins and minerals, the NOSB explained that the Food and Drug Administration (FDA) had recently provided a response to the NOP regarding the reference to 21 CFR 104.20 in the current annotation for nutrient vitamins and minerals on the National List.[3] The reference to 21 CFR 104.20 refers to the fortification policy for food under the FDA's jurisdiction. The NOP had requested the information from FDA to consider whether changes to the annotation were necessary to correct an inaccurate cross reference to FDA policy and to clarify what synthetic substances are allowed as vitamins and minerals in products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).'' The fortification policy at 21 CFR 104.20 provides for the rational addition of essential nutrients to food for human consumption. FDA considers only ''essential nutrients'' to be within the scope of its fortification policy at 21 CFR 104.20. The nutrients which FDA has determined to be essential are enumerated in 21 CFR 101.9(c)(8)(iv) with corresponding Reference Daily Intakes (RDIs), and 21 CFR 101.9(c)(9), which includes potassium and its corresponding Daily Reference Value (DRV). FDA stated that substances such as omega-3 and omega-6 fatty acids, inositol, choline, carnitine, and taurine are not essential nutrients listed under 101.9(c)(8)(iv) and are, therefore, not within the scope of FDA's fortification policy at 21 CFR 104.20. The FDA also clarified that infant formula is not within the scope of the fortification policy; the requirements in 21 CFR part 107 pertain to required and essential nutrients for infant formula and include minimum and maximum amounts for those nutrients.

Based on this information, the NOSB signaled its intent to issue another recommendation for an annotation change to the listing for nutrients vitamins and minerals at their November 2011 public meeting. However, since NOP intended to take action to amend the listing through a proposed rule, the NOSB opted to remove proposing a recommendation for an annotation change on nutrient vitamins and minerals from their November 2011 meeting agenda.

On January 12, 2012, AMS published a proposed rule on the 2012 Sunset Review for nutrient vitamins and minerals (77 FR 1980). The rule proposed to address the April 2011 NOSB recommendation and to revise the cross reference to FDA regulations to specify that only vitamins and minerals which are declared essential for food in 21 CFR 101.9 and vitamins and minerals that are required for infant formula in 21 CFR 107.10 and 107.100, may be used in organic products. As a result, under the proposal, any ingredient not specified by these cross references to FDA regulations would be excluded from use in organic products and would need to be petitioned to the NOSB for separate exemptions on the National List. Examples of affected ingredients which would need separate exemptions on the National List include docosahexanoic acid (DHA) algal oil, arachidonic acid (ARA) single-cell oil, taurine, inositol, choline, ascorbyl palmitate, synthetic beta-carotene, L-carnitine, lycopene, nucleotides, lutein, and L-methionine. Further, AMS would need to conduct separate rulemaking to codify the exemptions based on NOSB recommendations for any petitioned substances. A detailed discussion of the proposal, including further discussion of the examples of ingredients that would be affected and an initial assessment of the impacts of correcting the cross references to FDA regulations, is available in the proposed rule (77 FR 1980).

The proposed rule provided a 60 day comment period, which closed on March 12, 2012. Comments were specifically requested on: (i) The actual economic impacts of the proposed action; (ii) the adequacy of the estimated impact of the proposed action on small entities; and (iii) the length of the proposed compliance date. AMS received 26 written comments in response to the proposed rule. The written comments can be retrieved via *www.regulations.gov* by searching for the document ID number: AMS–NOP–10–0083. Persons wanting to visit the USDA South Building to view comments in response to the proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

AMS continues to assess the public comments on the proposed rule and evaluate the impact of clarifying the cross reference to FDA regulations. Given that the current allowance for nutrient vitamins and minerals is due to sunset (''expire'') from the National List on October 21, 2012, AMS is issuing this interim rule with request for comments to provide continuity to the organic industry and avoid widespread disruption that would result if the allowance for vitamins and minerals were to sunset. For example, if the current allowance for vitamins and minerals was to sunset, Vitamins A and D, used to fortify fluid milk, and B-vitamins, used in bread and cereal to replace vitamins lost during processing, could no longer be added to organic products.

AMS believes that renewing the current listing for nutrient vitamins and minerals on the National List is the most appropriate action at this time. When AMS published the proposed rule in January 2012, the agency requested comments on the adequacy of the economic analysis that was presented and the two year compliance date that was proposed. AMS received limited public comment on the impacts of correcting the cross reference to FDA regulations. The NOSB has made final recommendations to AMS on four

[2] NOSB, 2011, Formal Recommendation by the National Organic Standards Board (NOSB) to the National Organic Program (NOP), Nutrient Vitamins and Minerals Sunset, available at *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5091724.*

[3] FDA Response to NOP—Questions and Answers Regarding Nutrient Fortification of Foods. April 14, 2011. Available at *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5090415.*

petitioned substances, petitions for eight substances remain outstanding. A summary of the status of these petitions is provided in Table 1.

TABLE 1—STATUS OF NATIONAL LIST PETITIONS FOR AFFECTED INGREDIENTS [a]

Ingredient	Petition submitted to NOSB	NOSB recommendation
Docosahexanoic Acid (DHA) algal oil [b]	Yes	NOSB recommended the addition to § 205.605(a): DHA algal oil, not hexane extracted; other ingredients that are agricultural must be organic.
Arachidonic Acid (ARA) single-cell oil [b]	Yes	NOSB recommended the addition to § 205.605(a): Arachidonic Acid (ARA) from fungal oil, not hexane extracted; other ingredients that are agricultural must be organic.
Inositol	Yes	NOSB recommended the addition to § 205.605(b): CAS #87–89–8 (myo-inositol) and 6917–35–7 (non-specific isomer) for use in infant formula and medical nutritional enteral products labeled organic or made with organic (specified ingredients or food group(s)).
Choline (two separate petitions for infant formula and infant food, and all other foods).	Yes	NOSB recommended the addition to § 205.605(b): Choline chloride (CAS #67–48–1) and Choline bitartrate (CAS #87–67–2) for use in infant formula and medical nutritional enteral products labeled organic or made with organic (specified ingredients or food group(s)).
Ascorbyl Palmitate	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.[c]
Beta-carotene [d]	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
L-carnitine	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
Lycopene	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
Lutein	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
L-Methionine	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
Nucleotides	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
Taurine	Yes	NOSB Handling Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.
Amino Acids for pet food	Yes	NOSB Livestock Subcommittee proposal posted; NOSB Recommendation expected at October 2012 public meeting.

[a] Petitions are available on the NOP Web site in the petitioned substances database: *http://www.ams.usda.gov/NOPNationalList*.
[b] Some of the DHA and ARA used in organic products is derived from fish oil, currently provided for in section 205.606 of the National List, rather than algal and microbial sources.
[c] All NOSB subcommittee proposals are available online at *http://www.ams.usda.gov/NOSBCommitteeRecommendations*. Information for the October 15–18, 2012 NOSB public meeting is available online at *http://www.ams.usda.gov/NOSBMeetings*.
[d] The beta-carotene petition is for the synthetic form. Beta-carotene extract color is currently listed in section 205.606 as a nonorganically produced agricultural ingredient allowed in products labeled ''organic'' when an organic version is not commercially available.

Once the NOSB completes its review and has issued recommendations on all petitioned nutrients, the public will be able to more fully comment on the implications of correcting the FDA cross reference as proposed. For this reason, we are requesting comments through this interim rule. After consideration of comments submitted to both the proposed rule and this interim rule, AMS intends to issue a final rule that will address the proposed correction to the listing for nutrient vitamins and minerals on the National List. As previously noted, AMS would need to conduct separate rulemaking to codify the exemptions based on recommendations by the NOSB for any petitioned substance.

Therefore, consistent with the April 2011 NOSB recommendation, this interim rule continues the allowance for nutrient vitamins and minerals at section 205.605(b) as follows: ''Nutrient vitamins and minerals, in accordance with 21 CFR 104.20, Nutritional Quality Guidelines for Foods.'' This action enables the industry to continue with the status quo until additional public comments are received and a final rule is published. This action avoids the widespread disruption to the organic market that would occur if the allowance for any synthetic vitamins and minerals were to sunset (''expire'') from the National List on October 21, 2012.

II. Statutory and Regulatory Authority

The OFPA authorizes the Secretary to make amendments to the National List based on proposed amendments developed by the NOSB. Sections 6518(k)(2) and 6518(n) of OFPA authorize the NOSB to develop proposed amendments to the National List for submission to the Secretary and establish a petition process by which persons may petition the NOSB for the purpose of having substances evaluated for inclusion on or deletion from the National List. The National List petition process is implemented under section 205.607 of the NOP regulations. The current petition process (72 FR 2167, January 18, 2007) can be accessed through the NOP Web site at *http://www.ams.usda.gov.*

A. Executive Order 12866

This action has been determined not significant for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system.

This interim rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in the OFPA (7 U.S.C. 6514(b)). States are also preempted by the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to the OFPA (7 U.S.C. 6519(f)), this interim rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601–624), the Poultry Products Inspection Act (21 U.S.C. 451–471), or the Egg Products Inspection Act (21 U.S.C. 1031–1056), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301–399), nor the authority of the Administrator of EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. 136–136(y)).

The OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's final decision.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small business will not be unduly or disproportionately burdened. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). AMS has also considered the economic impact of this interim rule on small entities. The effect of this rule would be to allow the continued use of nutrients vitamins and minerals in organic handling. AMS concludes that the economic impact of continuing this allowance for nutrient vitamins and minerals in organic handling would avoid market disruption and would be beneficial to small agricultural service firms. Therefore, AMS certifies that this rule would not have a significant economic impact on a substantial number of small entities.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000 and small agricultural producers are defined as those having annual receipts of less than $750,000.

Based on USDA data from the Economic Research Service (ERS), the total acreage of certified organic land grew from 1.8 million acres in 2000 to 4.8 million acres in 2008, of which approximately 2.2 million acres was pasture and rangeland.[4] The number of certified organic producers in the U.S. has more than doubled in that time period rising from approximately 7,000 in 2000 to nearly 17,700 by the end of 2011.[5] ERS, based upon the list of certified operations maintained by the NOP, estimated the number of certified handling operations was 3,225 in 2007. AMS believes that most of these entities would be considered small entities under the criteria established by the SBA.

The increasing production capacity for organic agricultural products parallels growth trends in sales of organic products. Since implementation of the NOP, the organic industry has experienced consecutive years of growth demonstrated by increasing sales to consumers. In 2011, U.S. retail sales of organic food and beverages totaled over $29.2 billion.[6] The pace of double-digit sales growth that persisted from 2002–2008 has dipped, but the 7.7 percent growth recorded from 2009–2010, and the 9.4 percent growth recorded from 2010–2011, marked increases from previous years. The top grossing organic food categories in terms of sales for 2011 are fruits and vegetables (40.5%), dairy (14.6%) and packaged/prepared foods, which includes baby formula and baby food (13.6%). Sales of dry breakfast goods, which includes cereals, grew 6.2% in the year 2011, exceeding $1 billion. Organic frozen prepared foods account for the highest sales within the packaged/prepared foods category. Nutrient vitamins and minerals are used to fortify products in the dairy, packaged/prepared foods, and breakfast goods product categories.

In addition, USDA has 91 accredited certifying agents who provide certification services to producers and handlers. A complete list of names and addresses of accredited certifying agents may be found on the AMS NOP Web site, at *http://www.ams.usda.gov/nop.* AMS believes that most of these accredited certifying agents would be considered small entities under the criteria established by the SBA.

D. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this interim rule. Accordingly, OMB clearance is not required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, Chapter 35.

E. Executive Order 13175

This interim rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial

[4] U.S. Department of Agriculture, Economic Research Service. 2008. *U.S. Organic Agriculture, 1992–2008,* data set, available at *www.ers.usda.gov/data/organicERS.* The number of U.S. organic operations at the end of 2011 is from data compiled by the National Organic Program, *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5097523.*

[5] *Ibid.*

[6] Organic Trade Association, 2012. *2012 Organic Industry Survey.* Brattleboro, VT.

and direct effects on Tribal governments and will not have significant Tribal implications.

F. Effective Date

This interim rule reflects a recommendation submitted to the Secretary by the NOSB for the purpose of fulfilling the requirements of 7 U.S.C. 6517(e) of the OFPA. Section 7 U.S.C. 6517(e) requires the NOSB to review each substance on the National List within 5 years of its publication. Pursuant to 5 U.S.C. 553, it is found and determined upon good cause that it is impracticable and contrary to the public interest to give preliminary notice prior to putting this rule into effect in order to ensure the continued use of nutrients vitamins and minerals in organic products after October 21, 2012, and avoid widespread disruption to the organic market. Accordingly, this rule shall be effective on October 21, 2012.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

Dated: September 21, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–23748 Filed 9–26–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 307 and 381

[Docket No. FSIS–2011–0032]

RIN 0583–AD48

Additional Changes to the Schedule of Operations Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the meat and poultry product regulations pertaining to the schedule of operations. FSIS is amending these regulations to define the 8-hour workday as including time that inspection program personnel need to prepare the inspection station, if necessary, or retrieve and return lot tally sheets; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary; and the time necessary to conduct duties scheduled by FSIS, including administrative activities. The activities are integral and indispensable to inspectors' work and are part of the continuous workday as defined by the Fair Labor Standards Act. Therefore, they are activities that need to be part of the Agency's regulatory definition for the 8-hour workday.

DATES: Effective November 26, 2012.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Acting Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250–3700, telephone: (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.,* and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.,* provide for mandatory Federal inspection of livestock and poultry slaughtered at official establishments and of meat and poultry products processed at official establishments. FSIS bears the cost of mandatory inspection provided during non-overtime and non-holiday hours of operation. Official establishments pay for inspection services performed on holidays or on overtime.

On March 19, 2012, FSIS proposed to amend its regulations pertaining to the schedule of operations (77 FR 15976). FSIS proposed to amend these regulations to define the 8-hour workday as including time that inspection program personnel need to prepare the inspection station at meat slaughter establishments, if necessary, or to retrieve and return lot tally sheets at poultry slaughter establishments; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary, at meat slaughter establishments; and the time necessary to conduct duties scheduled by FSIS, including administrative activities at meat and poultry slaughter establishments. The activities are integral and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, ''Principal'' activities. Therefore, these activities need to be part of the Agency's regulatory definition for the 8-hour workday.

Response to Comments

FSIS received one comment within the scope of the rulemaking regarding the proposed rule change from an association representing the meat industry. The comment raised the following issues:

De Minimis

The commenter stated that FSIS has ignored the Office of Personnel Management (OPM) regulation 5 CFR 551.412(a) that governs the exclusion of *de minimis* actions from compensable activities. The commenter stated that the OPM rule excludes preparatory activities that last less than 10 minutes and also stated that the proposed rule identified two of three activities specified in the proposal—administrative activities and preparation for inspection—as each taking less than 10 minutes per day. Therefore, the commenter asserted that the OPM regulation precludes the need for the proposed rule.

Response

As stated in the proposed rule, FSIS considers these activities as integral and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, ''Principal'' activities. As integral and indispensable work activities under the Fair Labor Standards Act, FSIS finds that these activities should be included as part of the continuous workday when reading both 5 CFR 551.412(a) and the OPM definition of ''workday'' at 5 CFR 551.411(a), together. 5 CFR 551.412(a) cannot be properly read alone to exclude time spent on indispensable work activities during the continuous workday from compensable hours of work. Any duties scheduled by FSIS, including administrative duties, are integral and indispensable to the essential work of inspection program personnel because they enable inspection program personnel to carry out their work effectively. The preparation of the workstation is an integral and indispensable activity ensuring that inspectors have the necessary stamps used to identify condemned parts while conducting their inspection duties. Therefore, administrative duties and the preparation of the work station in cattle slaughter establishments are integral and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, ''Principal'' activities, and thus, these activities need to be part of the Agency's regulatory definition for the 8-hour workday.

Knife Sharpening

The commenter did not dispute that knife sharpening is a compensable activity but did oppose the standardized approach in the proposed rule that would give inspectors one 15-minute period for knife sharpening if they perform on-line duties in a cattle slaughter establishment 3 days or less per week or if they perform on-line duties in a swine slaughter establishment, and two 15-minute periods for knife sharpening if they perform on-line duties in a cattle slaughter establishment 4 or more days per week. The commenter stated that plants should be permitted to conduct individualized assessments of the time it takes inspectors to sharpen their knives.

Response

The time estimates FSIS developed in the proposed rule for knife sharpening were based on an Agency CD–ROM training video, ''Knife-Safety and Sharpening Skills,'' and the numbers of times per week for knife sharpening were based on a variety of factors, including the species being inspected (i.e., cattle or swine) and the number of carcasses inspected. The time allocations that FSIS is finalizing are necessary to ensure the safe and proper use of knives during inspection. The Agency cannot ensure the safety of its inspectors and that proper knife sharpening occurs if each establishment determines for itself how long it should take inspectors to sharpen a knife because each establishment will have a financial incentive to reduce this amount of time. Therefore, when FSIS implements this rule, it will ensure inspection program personnel have an appropriate amount of time to sharpen their knives.

Inaccurate Inspector Time Records

The commenter stated that because inspectors bill in 15-minute increments, all slaughter facilities already pay inspectors for time during which inspection work is not being done. The commenter stated that a facility should be permitted to review inspectors' time records and offer corrections supported by reports and stamped surveillance footage, if necessary, before inspectors submit their time records. The commenter also stated that during interruptions for line stoppages or equipment failures, inspectors should make use of the time that they are not on the line for activities such as knife sharpening. The commenter also stated that if inspectors choose not to use such time, establishments should not have to pay overtime for the activity.

Response

FSIS supervisors assign work to inspection program personnel. FSIS will ensure that its supervisory personnel instruct inspection program personnel to complete the activities addressed in this final rule during any time remaining in a 15-minute increment of overtime or during work times when they are not on the line. However, FSIS does not agree that establishments should implement a formal monitoring program, such as video surveillance of FSIS employees or checking inspector time sheets. FSIS supervisors ensure that employees accurately record the time that they work. Establishment management should discuss any concerns about the time worked by FSIS inspectors with FSIS supervisors.

Line Time

Lastly, the commenter stated that any additional time inspectors need to be compensated for under the proposed rule should not count against the 10-hour-per-day limit of actual inspector time permitted by FSIS.

Response

FSIS ensures that the maximum time an employee may work on the slaughter line is ten (10) hours per work day. While knife sharpening, station preparation, and administrative duties are integral to the work and conducted during the continuous workday, they are activities not done on the slaughter line itself. Therefore, these activities are not subject to the 10 hour per day limit of slaughter line activity.

Amendment to 9 CFR 307.4(c) and 381.37(c)

After consideration of the comments received and for the reasons discussed above, FSIS is adopting the proposed rule as a final without revision and is amending the meat regulations to provide that the 8 hours of inspection service provided to establishments free of charge will include activities necessary to fully carry out an inspection program, including time for inspection program personnel to prepare the work station; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary; and the time necessary to conduct duties scheduled by FSIS, including administrative duties. When the rule goes into effect, FSIS will direct its supervisory personnel at livestock slaughter establishments to conduct a new time measurement that measures the amount of time it takes to don required gear, walk to a work station, prepare the work station, and doff required gear. If establishments do not provide a knife sharpening service, the establishment will also need to incorporate the times and frequencies discussed above in response to comments on knife sharpening into the 8 hours of inspection or request that knife sharpening be done in an overtime period.

FSIS is amending the poultry products regulations to provide that the 8 hours of inspection service provided to establishments free of charge will include activities necessary to fully carry out an inspection program, including time for inspection program personnel to retrieve and return lot tally sheets and the time necessary to conduct duties scheduled by FSIS, including administrative duties. Inspection program personnel in poultry products establishments do not use knives when conducting inspection activities and do not need to prepare the work station. When this rule goes into effect, FSIS will direct its supervisory personnel in poultry slaughter establishments to conduct a new time measurement that measures the amount of time it takes inspection program personnel to don required gear, pick up a lot tally sheet, and doff required gear.

In addition, when this rule goes into effect, slaughter establishments will need to provide inspection program personnel 1 minute every day to complete time and attendance activities.

As with the provisions for donning, doffing, and the associated walk time, establishments will need to either incorporate the time for inspection program personnel performing on-line inspection duties to conduct knife sharpening, to complete the time and attendance reporting, and to prepare for inspection into their hours of operation or request overtime charges. The regulations provide that FSIS will bill overtime in 15-minute increments (9 CFR 307.6 and 381.39). Therefore, in situations where establishments have requested overtime, FSIS, when possible, will instruct inspection program personnel performing on-line inspection duties to do the activities addressed in this rule during any time that remains within 15-minutes of requested overtime.

Executive Order 12866 and the Regulatory Flexibility Act

This rule has been designated non-significant under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

Cost to the Industry

Under this final rule, the most direct cost to the industry will be the overtime fee that the Agency will need to charge slaughter establishments for the time inspection program personnel spend in three groups of activities: (1) Sharpening knives, (2) completing administrative activities, and (3) preparing for inspection. As we explained in the cost analysis of the Final Rule on Changes to the Schedule of Operations Regulations (76 FR page 33979), if meat and poultry slaughter establishments want to maintain their normal shift length of operating for 8 hours, they would incur some overtime fees.[1] Although the choice is voluntary, the Agency expects that most meat and poultry slaughter establishments will choose to maintain their current shift-time, as shortening the shift-time will decrease production and revenue while idling existing capacity. However, FSIS does not expect the overtime fee from these three groups of activities to be significant because (1) the establishments have options, as we will discuss later, besides paying overtime for some of these activities, and (2) the time for carrying out administrative activities and preparing for inspection (including preparing an inspection station and picking up and dropping off lot tally sheets) is small—one minute or two per day—and will probably not push the overtime over the 15-minute threshold to incur more overtime charge than are currently assessed for donning and doffing activities.

Similar to donning and doffing, the actual time FSIS inspection program personnel will take to perform these activities will vary in each meat and poultry slaughter establishment depending on plant-specific variables. FSIS developed estimates on the amount of time it takes for inspection program personnel to perform these activities and requested public comments. FSIS did not receive any comments on the estimates, so FSIS's estimates remain the same in this final rule.

Knife-sharpening:

a. Two 15-minute periods per week for inspection program personnel who perform on-line inspection duties in beef slaughter operations for 4 or more days per week.

b. One 15-minute period per week for inspection program personnel on the beef slaughter line for 3 days or less per week or in a swine slaughter establishment.

- One minute per day to complete administrative activities.
- Two minutes or less for preparing for inspection.

Agency personnel data[2] show that there are 3,053 inspection program personnel performing on-line inspection duties in poultry and meat slaughter establishments—2,037 in poultry, 1,000 in meat, and 16 in establishments that slaughter both meat and poultry. Data from an Agency survey[3] indicates that among the meat slaughtering inspectors, 56 percent work in beef establishments that operate 4 or 5 days per week, 4 percent work in beef establishments that operate less than 4 days per week, 36 percent work in swine establishments, and 4 percent work in lamb, sheep, and goat establishments. Because lamb, sheep, and goat establishments are small or very small establishments, inspection program personnel would be able to complete the activities addressed in this final rule within the 8-hour day, and, therefore, there are no related cost calculations for these establishments in this final rule. Applying the percentages to the total of 1,016 meat slaughter inspectors,[4] we have 573 inspection program personnel working in beef establishments that operate 4 or 5 days per week, and 409 working in either beef establishments that operate less than 4 days per week or swine establishments. The overtime fee that the Agency charges for each 15-minute interval is $17.08 for FY 2012. Multiplying this number by the Agency-estimated knife-sharpening time, we estimated the annual cost for knife sharpening time to be about $1,776.3 ($17.08 per quarter-hour × 2 knife-sharpening periods per week × 52 weeks per year) per inspection program personnel in beef slaughter establishments that operate 4 days or more a week, and $888.2 ($17.08 per quarter-hour × 52 weeks per year) per inspection program personnel in beef slaughter establishments that operate 3 days or less or in swine establishments. If the industry had to pay all the meat slaughter inspectors to sharpen their knives, the total cost to the industry would be about $1.38 million ($1776.3 × 573) + ($888.2 × 409). However, the actual impact would be much less because the industry can offer knife-sharpening services to Agency inspection program personnel instead of paying overtime for it.

If an establishment provides a knife-sharpening service, FSIS will instruct inspection program personnel to use that service. An Agency query[5] found that the majority of the meat-slaughter establishments are offering knife sharpening to their employees, and about 91% of those also offer the service to Agency inspection program personnel. We expect that many other establishments will start offering the service to avoid paying overtime charges when this rule becomes effective.

As for the other two groups of activities, the time they take is minimal. According to the Agency's estimates mentioned above, these activities combined will be at most 3 minutes per day. In addition, FSIS will permit the establishment to take on the responsibility of preparing the inspection station for inspection program personnel in livestock slaughter establishments. Given that the Agency charges overtime in 15-minute increments, and that it believes the donning, doffing, and walking time to be usually less than 15-minutes, time for these additional activities can be absorbed in the overtime period for donning, doffing, and walking time in most cases, thus not causing any additional overtime. In the unlikely, worst-case scenario where these activities push the daily overtime beyond the first 15-minute interval, the establishments would pay each inspection program personnel another $4,441 ($17.08 per inspector × 5 days per week × 52 weeks per year) annually. However, the Agency believes this scenario would apply to only a very small percentage of the inspection program personnel.

Comparing the cost to the annual revenue of the meat slaughtering industry alone, which is about $67.2 billion,[6] the costs of this rule to the industry will not be significant.

Cost to the Consumer

The industry is likely to pass the increased costs on to consumers because of the inelastic nature of the consumer demand for meat and poultry products. However, given that the total volume of meat and poultry slaughtered under Federal inspection in 2010 was about 92

[1] This regulatory change should not impact the schedule of operations for meat and poultry processing establishments and egg product plants because those establishments can begin operations without FSIS inspection program personnel being at an on-line inspection work station.

[2] As of November 2011.

[3] Survey date is March 2011.

[4] We count the inspection program personnel in combined meat and poultry as meat inspectors so not to underestimate the cost, as poultry slaughter inspectors do not currently have to sharpen knives.

[5] OFO conducted the query in November 2011.

[6] Summary of the *Animal (except Poultry) Slaughtering Industry in the U.S. and its International Trade [2010 edition,]* Supplier Relations US, LLC. *http://www.htrends.com/report-2700858-Animal_except_Poultry_Slaughtering_Industry_in_the_U_S_and_its_International_Trade_Edition.html,* as of 11/16/2011.

billion pounds,[7] the increased cost per pound due to the overtime fee will be less than $0.0001 on average.

Benefits of the Rule

This final rule will include integral and indispensible work activities (as defined by the Fair Labor Standards Act) into the defined inspector ''workday.'' Therefore, this rule will help ensure compliance with the law and the improved use of Agency resources.

Regulatory Flexibility Analysis

The FSIS Administrator has made a determination that this final rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). There are 263 small and 566 very small meat and poultry slaughter establishments (by Small Business Administration standard). In small and very small establishments, inspection program personnel typically have adequate time during their tour of duty to sharpen their knives as well as conduct the other activities under this final rule, because they do not have to be on-line for 8 hours. Therefore, the impact will not be significant.

Paperwork Reduction Act

This final rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or recordkeeping requirements.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, or audiotape) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

FSIS will announce this final rule online through the FSIS Web page located at: *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

List of Subjects

9 CFR Part 307

Government employees, Meat inspection.

9 CFR Part 381

Government employees, Poultry products inspection.

For the reasons discussed in the preamble, FSIS is amending 9 CFR Chapter III as follows:

PART 307—FACILITIES FOR INSPECTION

■ 1. The authority citation for part 307 continues to read as follows:

Authority: 7 U.S.C. 394; 21 U.S.C. 601–695; 7 CFR 2.17, 2.55.

■ 2. In § 307.4(c), remove the second sentence and add two sentences in its place to read as follows:

§ 307.4 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear and to walk to a work station; to prepare the work station; to return from a work station and remove required gear; to sharpen knives, if necessary; and to conduct duties scheduled by FSIS, including administrative duties. * * *

* * * * *

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

■ 3. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451–470; 7 CFR 2.7, 2.18, 2.53.

■ 4. In § 381.37(c), remove the second sentence and add two sentences in its place to read as follows:

§ 381.37 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear, pick up required forms and walk to a work station; and the time for FSIS inspection program personnel to return from a work station, drop off required forms, and remove required gear; and to conduct duties scheduled by FSIS, including administrative duties. * * *

* * * * *

Done at Washington, DC, on: September 21, 2012.

Alfred V. Almanza,

Administrator.

[FR Doc. 2012–23682 Filed 9–26–12; 8:45 am]

BILLING CODE 3410–DM–P

[7] *Livestock, Dairy, & Poultry Outlook*/LDP–M–209/November 16, 2011; Economic Research Service, USDA.

FEDERAL TRADE COMMISSION

16 CFR Parts 2 and 4

Rules of Practice

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Final rule.

SUMMARY: The FTC is adopting revised rules governing the process of its investigations and attorney discipline. These rules, located in the Commission's Rules of Practice, are intended to promote fairness, transparency, and efficiency in all FTC investigations; and to provide additional guidance about appropriate standards of conduct for attorneys practicing before the FTC.

DATES: *Effective date:* November 9, 2012.

Compliance date: The amendments to Rule 4.1(e) (16 CFR 4.1(e)) will govern attorney misconduct alleged to have occurred on or after November 9, 2012.

FOR FURTHER INFORMATION CONTACT: Lisa M. Harrison, Assistant General Counsel for Legal Counsel, (202) 326–3204, or W. Ashley Gum, Attorney, (202) 326–3006, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington DC 20580. For information on the proposed revisions to the rule governing attorney discipline, contact Peter J. Levitas, Deputy Director, Bureau of Competition, (202) 326–2030, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: This discussion contains the following sections:

I. Overview of Rule Revisions and Comments Received
A. Part 2 Rules Governing Investigations
B. Rule 4.1(e) Governing Attorney Discipline
II. Section-by-Section Analysis of Final Rule Revisions
III. Final Rule Revisions

I. Overview of Rule Revisions and Comments Received

The purpose of these final rules is to update and improve the Commission's Part 2 [1] investigation process by accounting for and incorporating modern discovery methods, facilitating the enforcement of Commission compulsory process, and generally increasing efficiency and cooperation. The adopted revisions to Rule 4.1 [2] are designed to provide additional guidance regarding appropriate standards of conduct, and procedures for addressing alleged violations of those standards. The revisions to Part 2 will take effect on November 9, 2012 unless the Commission or a Commission official identified in Rule 2.7(l) determines that application of an amended rule in an investigation pending as of November 9, 2012 would not be feasible or would create an injustice. Revised Rule 4.1(e) will govern attorney conduct alleged to have occurred on or after November 9, 2012.

A. Part 2 Rules Governing Investigations

In its January 23, 2012 Notice of Proposed Rulemaking (''NPRM''),[3] the Commission invited public comment on proposed amendments to its Rules of Practice governing its nonadjudicative procedures in investigative proceedings (''Part 2 investigations''). The public comment period closed on March 23, 2012.[4] The Commission stated in the NPRM that it has periodically examined and revised its Rules of Practice for the sake of clarity and to make the Commission's procedures more efficient and less burdensome for all parties. The Commission observed that its review of the Part 2 investigation process was especially appropriate in light of growing reliance upon and use of electronic media in Part 2 investigations.

The proposed amendments announced in the NPRM were the culmination of a broad and systematic internal review to improve the Commission's investigative procedures and reflect the development of Part 2 investigative practice in recent years. The Commission undertook this effort in order to improve the Part 2 investigation process through a comprehensive review, rather than piecemeal modifications of a limited number of rules, to ensure that the rules are internally consistent and that they are workable in practice.

With the NPRM, the Commission endeavored to modernize some of the Part 2 rules by proposing regulations that included: (1) A rule that sets out specifications for privilege logs; (2) a rule that conditions any extensions of time to comply with Commission process on a party's continued progress in achieving compliance; (3) a rule that conditions the filing of any petition to quash or limit Commission process on a party having engaged in meaningful ''meet and confer'' sessions with Commission staff; (4) a rule that eliminates the two-step process for resolving petitions to quash; and (5) rules that establish tighter deadlines for the Commission to rule on petitions. Other proposed changes updated the rules by including express references to electronically stored information (''ESI'') and consolidated related provisions that were dispersed throughout Part 2.

Apart from modernizing the Part 2 rules, the NPRM also sought to turn well-accepted agency best practices into formal components of the Part 2 investigation process. Such rules included: (1) A rule affirming that staff may disclose the existence of an investigation to certain third parties; (2) a rule codifying staff's practice of responding internally to petitions to limit or quash compulsory process; and (3) the Commission's announcement of its general policy that all parties engage in meaningful discussions with staff to prevent confusion or misunderstandings about information sought during an investigation.

The Commission received comments on the proposed Part 2 revisions from five individuals or entities: the Section of Antitrust Law of the American Bar Association (''Section''); Crowell & Moring, LLP (''Crowell & Moring''); Kelley, Drye & Warren, LLP (''Kelley Drye''); James Butler of Metropolitan Bank Group; and Joe Boggs, an individual consumer.[5] Most commenters endorsed the objectives of the Commission's proposed amendments. Mr. Butler opined that ''the proposed revisions will streamline the rules and add structure to the agency's investigatory process by consolidating related provisions that are currently scattered and/or may be outdated.'' The Section commented that it was generally supportive of the Commission's efforts ''to review its investigatory procedures with an eye toward fairness, efficiency, and openness.'' [6] The Crowell & Moring and Kelley Drye comments likewise endorsed the Commission's proposed changes, ''particularly as they relate to electronic media in document discovery.'' [7] The Crowell & Moring

[1] 16 CFR part 2.

[2] 16 CFR 4.1(e).

[3] 77 FR 3191 (Jan. 23, 2012).

[4] The public comments are available at *http://www.ftc.gov/os/comments/part2and4.1rules/*. As stated in the NPRM, the Commission sought public comment although the proposed rule revisions relate solely to agency practice and procedure, and thus are not subject to the notice and comment requirements of the Administrative Procedure Act (''APA''). *See* 5 U.S.C. 553(b)(3)(A). The American Financial Services Association (''AFSA'') argues that the proposed revisions to the Commission's attorney discipline rules ''are substantive in nature and not merely procedural,'' and therefore should not be exempt from notice and comment. AFSA Comment at 2 & n.2. The Commission regards the rule revisions as concerning agency practice and procedure but notes that AFSA's concerns are not relevant in this instance because the Commission has afforded the public notice and an opportunity to comment on the proposed changes. Accordingly, the Commission has fully complied with the APA.

[5] The Commission also received comments from one entity and one individual that limited their focus to an analysis of the agency's proposed revisions to 16 CFR 4.1. These are discussed in Section I.B. below.

[6] Comment from the Section of Antitrust Law of the American Bar Association (''Section Comment'') at 1.

[7] Comment from Kelley Drye & Warren LLP (''Kelley Drye Comment'') at 1.

comment also observed that the rules should ''help the Commission execute its enforcement mandate while minimizing unnecessary cost and burden on parties and bringing investigations to a speedier conclusion.'' [8]

But these commenters also offered several substantive criticisms of the proposed rules. As a threshold matter, the Commission addresses the Section's general observation that ''although it is apparent that the Commission has serious concerns about how the investigative process is working, it is not entirely clear from the proposed amendments what those problems are, why the Commission's existing authority is inadequate to remedy particular issues * * * or how the proposals would remedy any such problems or omissions.'' [9] In conjunction with this comment, the Section also proposed that the Commission convene a joint task force comprised of members of the private bar ''to review whether there are indeed problems with the investigative or disciplinary processes, and, if so, the types of targeted remedies that might be appropriate.'' [10] The Commission notes in response that each of the rule revisions is a product of the Commission's own considerable expertise and investigative experience. As noted above, some of the problems that the Commission has identified stem from a lack of a clear, well-recognized policy setting out what is expected of respondents in certain circumstances. One example the Section identifies pertains to proposed Rule 2.11(c), discussed below. Compulsory process respondents occasionally produce documents with material redacted for reasons apart from its protected status. However, redaction of, for example, allegedly confidential, but non-privileged, business material, is improper.[11] The proposed rule clarifies the obligations of recipients of compulsory process.[12]

These commenters also offered more specific criticisms addressed in detail below in the section-by-section analysis. The announced privilege log specifications were among the new modernizing rules that garnered significant comments. Many commenters urged the Commission to relax these specifications to align them with the Commission's procedures for privilege logs submitted during discovery for administrative adjudications (''Part 3'') and Hart-Scott-Rodino second requests (''second requests''). Commenters also criticized the Commission's adaptation of the Federal Rules of Civil Procedure (''FRCP'') to account for ESI and provide for the sampling and testing of documents.

The commenters also offered analysis of the rule revisions intended to codify existing practices. This subset of comments included the Section's and Kelley Drye's view that staff replies to petitions to limit or quash should be served on the petitioner. Those same commenters also argued against the provision in Rule 2.6 stating that Commission staff may disclose the existence of an investigation to potential witnesses.

Upon consideration of the various comments and its own review of the existing and proposed rules, the Commission agrees that some of the proposed rules can be modified to better reduce the burdens of the Part 2 process without sacrificing the quality of an investigation. After all, the proposed rules were intended to improve, rather than diminish, the FTC's ability to conduct fair and efficient investigations. The Part 2 investigative process works most effectively and efficiently when staff and outside counsel and their clients engage in meaningful communication and work in a cooperative and professional manner.

Accordingly, the Commission is adopting the proposed rules and issuing some further modifications, including: (1) A revision of the privilege log specifications to decrease the burden on respondents, while still accounting for staff's need to effectively evaluate privilege claims; (2) extending the deadline for the first meet and confer to decrease the burden on recipients of process and their counsel; and (3) implementing a ''safety valve'' provision allowing parties showing good cause to file a petition to limit or quash before any meet and confer has taken place.

The comments and the Commission's revisions to Part 2 are addressed in more detail in the section-by-section analysis of the final rule revisions.[13]

B. Rule 4.1(e) Governing Attorney Discipline

The Commission also sought comment on proposed changes to its rule governing attorney discipline, Rule 4.1(e). As the Commission explained in the NPRM,[14] the proposed rule was designed to provide additional clarity regarding appropriate standards of conduct for attorneys practicing before the Commission and procedures for the evaluation of allegations of attorney misconduct. The proposed rule clarified that attorneys may be subject to discipline for violating such standards, including engaging in conduct designed merely to delay or obstruct Commission proceedings or providing false or misleading information to the Commission or its staff. The proposed rule also provided that a supervising attorney may be responsible for another attorney's violation of these standards of conduct if he or she orders or ratifies the attorney's misconduct.

In addition, the proposed rule instituted appropriate procedural safeguards to govern the Commission's consideration of allegations of attorney misconduct, which is discussed further in the section-by-section analysis. To that end, the proposed rule established a framework for evaluating and adjudicating allegations of misconduct by attorneys practicing before the Commission.

The Commission received three comments addressing the proposed revisions to Rule 4.1(e) from the Section, the American Financial Services Association (''AFSA''), and a law student.[15] These commenters offered several substantive criticisms of the proposed rule, which are addressed below. The Commission, upon consideration of these comments and its own review of the existing and proposed rules, issues several modifications to the proposed rules, including: (1) A revision to clarify the scope of potential imputed responsibility under the rule for supervisory or managerial attorneys; and (2) revisions to provide for the Commission to issue an order to show cause before issuance of an attorney reprimand in all cases and to provide an opportunity for a hearing prior to imposition of any sanction where there are disputed issues of material fact to be resolved.

[8] Comment from Crowell & Moring, LLP (''Crowell & Moring Comment'') at 1.

[9] Section Comment at 1–2.

[10] *Id.* at 2.

[11] *See FTC* v. *Church & Dwight Co.,* 665 F.3d 1312 (DC Cir. 2011).

[12] The need for revisions to other rules, including Rule 4.1(e) governing attorney discipline, is discussed further in the section-by-section analysis below.

[13] The Commission is also making a number of technical, non-substantive changes to the proposed rules.

[14] 77 FR at 3194.

[15] Kristen Sweet Comment.

II. Section-by-Section Analysis of Final Rule Revisions

Section 2.2: Complaint and Request for Commission Action

The Commission proposed revisions to this rule that would account for more modern methods of submitting complaints and requests for agency action, and to avoid repetition of certain provisions in current Rule 2.1. That rule identifies how, and by whom, any Commission inquiry or investigation may be initiated. In contrast, Rule 2.2 describes the procedures that apply when members of the public or other parties outside of the agency request Commission action. No comments were received, and the Commission adopts the revised procedures with some minor modifications intended to simplify the proposed rule text.

Section 2.4: Investigational Policy

The Commission proposed revising Rule 2.4 to underscore the importance of cooperation between FTC staff and compulsory process recipients, especially when confronted with issues related to compliance with CIDs and subpoenas. The proposed rule affirmed the Commission's endorsement of voluntary cooperation in all investigations, but explained that cooperation should be viewed as a complement, rather than a mutually exclusive alternative, to compulsory process. This proposed revision was meant to more accurately account for the complexity and scope of modern discovery practices.

The proposed revision was not intended to herald a groundbreaking approach to investigations. The Commission proposed the revised rule as an affirmation of—and not a significant departure from—current Commission policy regarding compulsory process. Contrary to the Section's interpretation, the revised rule does not ''announc[e] a preference for compulsory process over voluntary production.'' [16] The Commission will continue to use whatever means of obtaining information is appropriate, and notes that compulsory process is more likely to be necessary in complex cases. In a substantial number of investigations, voluntary methods are used.

The Section also observed that ''the 'meaningful discussions' expected under the proposed rule could be read as an obligation imposed only on the parties receiving process.'' [17] The Commission believes that such a reading is misguided because staff are necessarily participants in the discussions. Indeed, Crowell & Moring commented that the proposed rule will often encourage ''trust and cooperation and reduce[] possible confusion regarding mutual expectations.'' [18] The Commission adopts the proposed rule.

Section 2.6: Notification of Purpose

The Commission proposed amending this rule to clarify staff's ability to disclose the existence of an investigation to witnesses or other third parties. As noted in the NPRM, the proposed revision would restate longstanding agency policy and practice recognizing that, at times, staff may need to disclose the existence of an otherwise non-public investigation, or the identity of a proposed respondent, to potential witnesses, informants, or other non-law-enforcement groups. The Commission's ability to disclose this information to third parties, to the extent that disclosure would further an investigation, is well established,[19] and the practice plainly facilitates the efficient and effective conduct of investigations. Nevertheless, the Section remarked that ''it is unclear why a change in the current policy is necessary, or indeed what specific changes the Commission intends.'' [20] The proposed rule was intended merely to reflect existing practice. As the Section further noted, the Commission ''historically has been properly mindful of the importance of confidentiality of its investigations, taking into consideration the various federal statutes that protect the confidential nature of non-public investigations.'' [21] Under its current policy, the Commission does not ordinarily make blanket disclosure to the public of the identity of persons (including corporations) under investigation prior to the time that a complaint issues.[22] The Commission is not departing from its current policy in this regard.

Similarly, the Commission finds it unnecessary to require, as Kelley Drye suggested, a certification from ''all third parties with access to nonpublic information'' that ''the material will be maintained in confidence and used only for official law enforcement purposes.'' [23] The statutory basis for Kelley Drye's comment applies only to disclosure to law enforcement agencies of ''documentary material, results of inspections of tangible things, written reports or answers to questions, and transcripts of oral testimony.'' [24] The revisions to Rule 2.6 do not expand staff's authority to share such material with third parties, but merely acknowledge staff's ability, in limited circumstances, to disclose the existence of an investigation. Appropriate safeguards against improper use of confidential materials are already in place.

The Section expressed an additional concern that the rule's proposed new language, specifying that ''[a] copy of the Commission resolution * * * shall be sufficient to give * * * notice of the purpose of the investigation,'' diminishes the Commission's obligation to notify targets about the scope of investigations. Specifically, the Section commented that ''Commission resolutions prescribed under 2.7(a) often are stated in broad general terms and, as such, do not provide sufficient detail to investigation targets of the objectives of a particular investigation.'' [25] However, it is well established that ''in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case. Accordingly, the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation.'' [26] Further, the Commission observes that questions about the investigation may be discussed during the meet and confer process prescribed by Rule 2.7(k), or raised in a petition to limit or quash, as described in Rule 2.10. Thus, Rule 2.6 is adopted as proposed.

Section 2.7: Compulsory Process in Investigations

The proposed revisions to this rule consolidated the compulsory process provisions previously found in Rules 2.8, 2.10, 2.11, and 2.12. As explained in the NPRM, the proposed rule would substantially expedite its investigations by: (1) Articulating staff's authority to inspect, copy, or sample documentary material—including electronic media—to ensure that parties are employing viable search and compliance methods; (2) requiring parties to ''meet and confer'' with staff soon after compulsory process is received to discuss compliance with compulsory process and to address and attempt to resolve potential problems relating to document production; and (3) conditioning any extension of time to comply on a party

[16] Section Comment at 2.

[17] *Id.* at 3.

[18] Crowell & Moring Comment at 2–3.

[19] *See* FTC Operating Manual, Ch. 16.9.3.4.

[20] Section Comment at 3.

[21] *Id.*

[22] *See* FTC Operating Manual, Ch. 3.1.2.3.

[23] Kelley Drye Comment at 4.

[24] 15 U.S.C. 57B–2(b)(6).

[25] Section Comment at 3.

[26] *FTC* v. *Texaco, Inc.,* 555 F.2d 862, 874 (D.C. Cir. 1977).

demonstrating its progress in achieving compliance.

Proposed paragraph (a) describes the general procedures for compulsory process under Sections 9 and 20 of the Federal Trade Commission Act.[27] In its comments, Kelley Drye requested that the Commission explain ''whether metadata will be included in the definition of ESI and consistently apply that definition to all investigative proceedings.'' [28] The Commission believes that the rule requires no further clarification because, on its terms, the definition of ESI encompasses ''other data or data compilations stored in any electronic medium,'' which clearly includes metadata. This definition also comports with the broad meaning of ''electronically stored information'' in the FRCP.[29] In a particular case, the instructions accompanying compulsory process may provide variations in the definition of ESI attributable to the particular circumstances of the investigation.

Kelley Drye also recommended that the Commission revise the definition of ESI ''to limit application of the translation requirement to instances when reasonably necessary to further the FTC's investigation.'' [30] Here again, the Commission observes that, as with the FRCP, the definition on its terms calls for translation of data ''if necessary.'' Moreover, even after compulsory process has issued, the meet and confer process described at paragraph (k), in conjunction with paragraph (*l*)'s delegation of authority to certain Commission officials to modify the terms of compliance with compulsory process, provides an adequate means to depart from this standard requirement when necessary. If the issue is unresolved after discussions with staff, the Commission is available to consider a petition to limit or quash compulsory process.

The Commission received no further comments on paragraph (a) and it has been adopted as modified. Likewise, revised paragraphs (b)–(h), which described the Commission's additional compulsory process authority, did not elicit substantive comments and they have been adopted with some minor modifications intended to simplify the proposed rule text.[31]

Proposed paragraph (i) articulates staff's authority to inspect, copy, or sample documentary material, including electronic media. The proposal elicited extensive comment from Crowell & Moring. First, the firm expressed a concern that the Commission could employ this method through ''mere'' compulsory process because it ''does not require the procedural safeguard of obtaining a Commission order.'' [32] Crowell & Moring also expressed concerns about the scope of this provision, arguing that it could be read to ''allow the Commission to issue a subpoena or CID requiring the production of, e.g., servers, hard drives, or backup tapes, so that the Commission staff can 'inspect' the ESI to see if there is anything of interest contained thereupon.'' [33] The firm further argued that ''the proposed rule appears to give staff essentially unfettered access to any source of ESI,'' and thus ''staff could conceivably obtain access to an enterprise-wide email system and review large volumes of business information beyond the scope of the purported investigation.'' [34] Finally, Crowell & Moring observed that the proposed rule raises privilege issues because ''conducting a privilege review, redaction, and then compiling the required privilege log'' attendant to such an inspection ''would in some cases present an enormous burden, since the privilege review would necessarily have to be conducted across the entire contents of the electronic media.'' [35]

The proposed rule is authorized by Sections 9 and 20 of the FTC Act.[36] Section 9 provides for access to documentary evidence in investigations other than those pertaining to unfair or deceptive practices, and Section 20 allows the Commission to require that ''tangible things'' relevant to the investigation be submitted. The proposed rule is modeled after Fed. R. Civ. P. 34(a)(1), which expressly permits parties to test, sample, inspect or copy requested material. The methods contemplated by this paragraph are limited to ''inspection, copying, testing, or sampling,'' and are not meant to sidestep, but only to supplement, the other tools of compulsory process available to the Commission. Any testing method would be specifically tailored to the needs of the investigation. Thus, the Commission anticipates that, as with all forms of compulsory process, an inspection or sampling demand would be bounded by the nature and scope of the investigation, as articulated in the Commission resolution and compulsory process.

Furthermore, the Commission acknowledges Crowell & Moring's concerns about privileged material, and notes that parties may raise such concerns with staff during meet and confer sessions and discuss whether methods may be employed to allay any burden attendant to the production of privileged material. Such methods may include the implementation of an independent ''taint team,'' to segregate privileged material obtained under this rule in a manner that is duly respectful of the protected status of any material sought. If a respondent finds these means ultimately to be unavailing, the Commission believes that a petition to limit or quash compulsory process is a sufficient remedy. Accordingly, paragraph (i) is adopted as proposed.

Proposed paragraph (j) sets out the manner and form in which respondents must provide ESI. Regarding this provision, Kelley Drye noted that, because producing a document in native electronic format often ''precludes the ability to protect privileged or sensitive information in that document,'' the Commission should ''exclude from production privileged information contained in native electronic format, provided that non-privileged information is produced in another format.'' [37] The Commission notes that while staff would of course be open to discussing such concerns at a meet and confer session, it is the respondent's responsibility to produce all material in a usable format, and some materials (such as Microsoft Excel spreadsheets) are not usable unless produced in native

[27] 15 U.S.C. 49, 57b–1.

[28] Kelley Drye Comment at 6.

[29] *See* Fed. R. Civ. P. 34 note (2006) (Notes of Advisory Committee on 2006 amendments) (''The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically.'').

[30] Kelley Drye Comment at 7.

[31] As noted in the NPRM, these provisions consolidate provisions found in Rules 2.8, 2.10, 2.11, and 2.12. In addition, the revisions update and streamline the process for taking oral testimony by requiring corporate entities to designate a witness to testify on their behalf, as provided in FRCP Rule 30(b)(6), and by allowing testimony to be videotaped or recorded by means other than stenograph.

[32] Crowell & Moring Comment at 5.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 6.

[36] *See* 15 U.S.C. 49 (''the Commission * * * shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against * * *''); 15 U.S.C. 57b–1(c)(1) (''Whenever the Commission has reason to believe that any person may be in possession * * * of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices * * * or to antitrust violations * * * the Commission may * * * issue in writing * * * a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, [or] to submit such tangible things.'').

[37] Kelley Drye Comment at 20.

format. Thus, while it is advisable to bring these concerns to staff's attention, the blanket rule that Kelley Drye proposes would be unworkable in practice. Finally, the Commission acknowledges Kelley Drye's request that production requirements be narrowly tailored ''particularly as they relate to metadata and duplicative electronic formats,'' [38] and notes that revised paragraph (j) specifically provides authority for a Commission official to modify production requirements as they relate to ESI. Accordingly, revised paragraph (j) is adopted as proposed.

Proposed paragraph (k) required parties to meet and confer with staff within ten days after compulsory process is received to discuss compliance with compulsory process and to address and attempt to resolve potential problems relating to document production. Several commenters objected to the ten-day timeline. For example, the Section commented that the ten-day requirement ''would impose a significant burden on outside counsel and responding parties.'' [39] In response to these concerns, the Commission revises the rule to extend the meet and confer timeline to 14 days. The revised rule also provides that the deadline for the first conference may be further extended to up to 30 days by any Commission official identified in paragraph (*l*). The revised rule provides further that the Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process. The Commission observes that the meet and confer procedure is intended to be an iterative process. The rule only prescribes a timeline for the first meeting with staff, not the last. The rule does not preclude, and indeed the Commission strongly encourages, additional discussions of other issues as they arise. Revised paragraph (k) is therefore adopted as modified.

Finally, proposed paragraph (*l*) stipulates that certain Commission officials may modify the terms of compliance with compulsory process. Kelley Drye requested that the Commission revise this rule to allow for time extensions based on a respondent's ''written acknowledgment that it is taking steps to comply with the FTC's request,'' [40] rather than an actual demonstration of satisfactory progress toward compliance. This paragraph is intended to improve the overall speed and efficiency of investigations, like many other revisions to the rules. Conditioning extensions merely upon unsupported assurances that parties intend to comply with compulsory process would not adequately serve this purpose. Although the Commission recognizes that counsel ordinarily deal in good faith, it is the Commission's experience that assurances are often not met. Therefore, paragraph (*l*) is adopted as proposed.

Section 2.9: Rights of Witnesses in Investigations

Proposed Rule 2.9 specified the rights of witnesses in Commission investigations, including witnesses compelled to appear in person at an investigational hearing or deposition. Paragraph (a) of the proposed rule continued to provide that a witness has a right to a transcript of the proceeding and copies of any documents used. This provision kept in place an exception—established in the preceding Rule 2.9—for some nonpublic proceedings. In those circumstances, the witness may inspect a transcript of the proceedings, but, for good cause, may not keep a copy. Although the proposed paragraph (a) did not revise that exception, the Section commented that ''any witness should be entitled to retain or procure a copy of any submitted document or recorded testimony, as the Commission recognized several years ago in its merger process reforms.'' [41] The rule continues to provide that in general, staff should make such transcripts and documents available to witnesses. However, in certain circumstances, it is appropriate to withhold a transcript until the Commission pursues litigation. The Commission has long recognized the need for a good cause exception, even in the context of merger investigations.[42] This provision is thus consistent both with established agency policy pursuant to Section 20(c)(14)(G) of the FTC Act and the Administrative Procedure Act.[43] Paragraph (a) is therefore adopted as proposed.

Proposed Rule 2.9(b)(1) was intended to prevent counsel from improperly engaging in obstructionist tactics during an investigational hearing or deposition conducted pursuant to Section 9 of the FTC Act by prohibiting consultation except with respect to issues of privilege. As the Section noted in its comments, Section 9 of the FTC Act [44] grants the Commission broader authority than Section 20 [45] to prohibit such conduct in matters not involving unfair or deceptive acts or practices. The proposed revision is necessary to prevent obstructionist conduct and is supported by federal court decisions and court rules prohibiting consultation in depositions while a question is pending.[46] Thus, the Commission is statutorily authorized to regulate this aspect of investigational hearings and depositions conducted pursuant to Section 9, and it has elected to do so.

The other proposed changes to Rule 2.9, such as paragraph 2.9(b)(2)'s limitations on objections, and the process for resolving privilege objections set out in revised paragraph 2.9(b)(3), generated no comments and are adopted with minor modifications intended to simplify the proposed rule text.

Section 2.10: Petitions To Limit or Quash Commission Compulsory Process

In the NPRM, the Commission proposed to consolidate and clarify the provisions governing petitions to limit or quash into a re-designated Rule 2.10. In paragraph (a)(1), the Commission proposed a 3,750 word limit for all petitions to limit or quash. Both Kelley Drye and the Section objected to this word limit, and Kelley Drye suggested that the Commission increase the word

[38] *Id.* Compulsory process requests do not typically call for material to be provided in duplicative formats. However, where the documents are produced in a form that is not searchable, the documents may need to be accompanied by an extracted text file to render them searchable.

[39] Section Comment at 4; *see also* Kelley Drye Comment at 11–13.

[40] Kelley Drye Comment at 11.

[41] Section Comment at 5.

[42] *See* Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations (December 11, 2002) (*http://www.ftc.gov/os/2002/12/bcguidelines021211.htm*).

[43] *See* 15 U.S.C. 57b–1(c)(14)(G); 5 U.S.C. 555(c) (''in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony'').

[44] 15 U.S.C. 49.

[45] 15 U.S.C. 57b–1.

[46] *See, e.g., Hall* v. *Clifton Precision,* 150 F.R.D. 525, 528 (E.D. Pa. 1993) (such coaching ''tend[s], at the very least, to give the appearance of obstructing the truth.''); *see also* Fed. R. Civ. P. 30 advisory committee's note (1993 Amendments) (observing that ''[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may * * * be made during a deposition, they ordinarily should be limited to * * * objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer * * *. Directions to a deponent not to answer a question can be even more disruptive than objections.''); D. Col. L. Civ. R. 30.3(A) (Sanctions for Abusive Deposition Conduct); S.D. Ind. LR 30.1(b) (Private Conference with Deponent), E.D.N.Y. L. Civ. R. 30.6 (Conferences Between Deponent and Defending Attorney); S.D.N.Y. L. Civ. R. 30.6 (Conferences Between Deponent and Defending Attorney); M.D.N.C., LR 204(b); (Differentiated Case Management and Discovery); N.D. Ohio LR 30.1(b); D. Or. LR 30–5; D. Wyo. LR 30 (Depositions Upon Oral Examination).

count to 5,000 words. The Commission agrees that a 5,000 word limit would still promote an efficient process for petitions to limit or quash while providing a party ample opportunity to address the issues raised in its petition. The Commission therefore incorporates this suggestion.

Proposed paragraph (a)(3) establishes a procedure in instances where the hearing official elects to recess and reconvene an investigational hearing to continue a line of questioning that was interrupted by a witness's privilege objection. The provisions of paragraph 2.10(a)(3) expressly allow the hearing official to recess the hearing and give the witness an opportunity to challenge the reconvening of the hearing by filing a petition to limit or quash the Commission's compulsory process directing his or her initial appearance. Kelley Drye suggested that the Commission replace the five-day deadline for filing a petition with the more inexact phrase ''within a reasonable time.'' [47] Proposed paragraph (a)(3), however, provides more clarity, and will further promote efficiency in Part 2 investigations by foreclosing protracted discussions about what constitutes ''a reasonable time'' to address protected status issues raised during depositions or investigational hearings. Finally, the Commission notes, in reply to another comment from Kelley Drye, that the five-day deadline is computed by counting only business days, in accordance with Commission Rule 4.3(a).[48] This paragraph is adopted as modified.

Proposed paragraph (a)(4) clarified that Commission staff may provide the Commission with a response to the petition to limit or quash without serving the petitioner. The Section and Kelley Drye each commented that any response by staff should be served on the petitioner. The proposed revision was intended only to articulate the Commission's long-established procedure for collecting staff's input on petitions to quash. Staff recommendations regarding petitions, like other staff recommendations, are privileged, deliberative communications and often reveal details about the matter, the premature disclosure of which could reasonably be expected to interfere with the investigation. Contrary to Kelley Drye's suggestion, the President's and the Commission's transparency policy do not call for the disclosure of this information.

The Section also suggested that the Commission reevaluate Rule 2.10(d), which makes public all petitions to limit or quash and the related Commission decisions. Specifically, the Section commented that ''there is no compelling reason to reveal the identity of the respondent and the nature of the investigation during the pendency of the Part 2 investigation.'' [49] But the Commission has previously determined that redaction of information that reveals the identity of the subject of a nonpublic investigation would ''impair the public's ability to assess and understand these important rulings.'' [50] The Commission continues to believe that publication of past proceedings will guide future petitioners and provide predictability to the determination process. Therefore, the Commission has a compelling reason to continue its well-established practice of making petitions to limit or quash generally available unless a particularized showing is made that confidentiality should be granted pursuant to Rule 4.9(c). Accordingly, the Commission declines to adopt the Section's suggested changes.

The other proposed changes to Rule 2.10 established a time limit for disposition for review of petitions by the entire Commission, and stay the time for compliance with compulsory process. The Commission did not receive comments on the former proposal, but notes by way of clarification that any failure to meet the deadline imposed by Rule 2.10(c) will result in neither the automatic grant, nor the automatic denial, of a petition. No comments were received on the latter proposal, and both proposals are adopted with some revisions intended to clarify the proposed rule text. [51]

Section 2.11: Withholding Requested Material

The Commission proposed Rule 2.11 to set out the specific information required in privilege logs submitted in Part 2 investigations.[52] The objective of the proposed specifications, and those in the further revised rule, adopted in this notice, is to encourage parties to withhold only materials that qualify for a protected status, as that term is defined at Rule 2.7(a)(4),[53] and to provide a basis for staff to analyze whether documents withheld on privilege grounds do, in fact, satisfy the legal requirements for the applicable privilege.

Several commenters suggested generally that the Commission adopt the more flexible privilege log rules that it has implemented for administrative adjudications conducted under Part 3, which are modeled on the FRCP, or the procedures that it has implemented for HSR second requests.[54] However, there are factors specific to Part 2 proceedings that often make protected status claims difficult to assess and resolve efficiently. As explained in the NPRM, the Part 2 rule must contain more specific requirements than the rules applicable to Part 3 because there is no neutral Administrative Law Judge available in Part 2 proceedings to analyze the sufficiency of the log. At present, the Commission's sole recourse in a Part 2 investigation is to file an enforcement action in federal court. Similarly, the nature of HSR second requests and attendant statutory deadlines create an environment where staff and respondents can more readily address and resolve issues of protected status.

Nevertheless, upon consideration of the various comments about these specifications, the Commission has modified proposed paragraph (a) to reduce the burdens placed on process recipients without sacrificing the quality of the privilege logs submitted. For example, although the Commission is modifying the proposed rule to require that the log be submitted in searchable electronic format, the proposed rule has also been amended to permit respondents to append a legend to the log enabling them to more conveniently identify the titles, addresses, and affiliations of authors, recipients, and persons copied on the material. The legend can be used in lieu of providing that information for each document. The paragraph also allows respondents to more conveniently identify authors or recipients acting in their capacity as attorneys by identifying them with an asterisk in the privilege log.

Furthermore, the Commission acknowledges the suggestion from commenters such as Kelley Drye [55] that providing the number of pages or bytes of a withheld document would be too burdensome. At the same time, the

[47] Kelley Drye Comment at 14.

[48] Rule 4.3(a) provides that time periods of seven days or less exclude weekends and holidays.

[49] Section Comment at 6.

[50] 42 FR 64135 (1977).

[51] The Commission is also updating the cross-references in Rules 4.2 and 4.9 to reflect the new numbering of the petition to quash rule.

[52] The previous requirements for privilege logs were in Rule 2.8A.

[53] '''Protected status' refers to information or material that may be withheld from production or disclosure on the grounds of any privilege, work product protection, or statutory exemption.'' 16 CFR 2.7(a)(4).

[54] *See, e.g.,* Crowell Comment at 8–10; Kelley Drye Comment at 20; Section Comment at 6.

[55] *See* Kelley Drye Comment at 17.

Commission likewise recognizes that a privilege log must also contain control numbers in order for the parties to clearly and efficiently communicate with one another about the privilege claims asserted (including at the meet-and-confer session). Without control numbers, it would be difficult or infeasible to identify the precise documents under discussion. Thus, the Commission has determined to require document control numbers for withheld material, but will not require parties to provide document size information in a privilege log.

The Commission further modified paragraph (a) to require that respondents include document names in the privilege log. This codification of standard practice will allow staff to quickly identify the nature and source of the document. Finally, the modified paragraph includes a requirement that privilege logs contain the email address, if any, from which and to which documents were sent. This will enable staff to determine whether, and to what extent, authors, recipients, and persons copied on the material used non-secure email systems to access allegedly protected material.

Parties should bear in mind that, as provided in paragraph (b), staff may relax or modify the specifications of paragraph (a), in appropriate situations, and as the result of any agreement reached during the meet and confer session. Under certain circumstances, less detailed requirements (for example, allowing documents to be described by category) may suffice to assess claims of protected status. This revision is designed to encourage cooperation and discussion among parties and staff regarding privilege claims. Consistent with existing practices, the Commission also codified in this rule its existing authority to provide that failure to comply with the rule shall constitute noncompliance subject to Rule 2.13(a). Paragraph (b) elicited no comments and is adopted as modified.

Paragraph (c) of the proposed rule addresses an issue that has arisen in some investigations wherein targets of Part 2 investigations, in contravention of the instructions accompanying process, redacted numerous documents that were not claimed to qualify for any protected status. Paragraph (c) codifies the Commission's routine instructions by explicitly providing that responsive material for which no protected status claim has been asserted must be produced without redaction. The Commission has modified the proposed paragraph to replace the term ''privilege or protection'' with the more general term ''protected status'' to comport with the revised definition of ''protected status'' in Rule 2.7(a)(4), and to better account for all categories of protected status claims available to respondents.[56] No comments were received, and the paragraph is adopted with one modification intended to clarify the proposed rule text.

Proposed paragraph (d) follows recent changes in the Commission's Part 3 Rules and Fed. R. Evid. 502 regarding the return or destruction of inadvertently disclosed material, and the standard for subject matter waiver. Crowell & Moring supported this proposal, commenting that ''the non-waiver provisions reduce risk to recipients of compulsory process, and greatly facilitate the ability of recipients to take advantage of advanced technologies that can significantly reduce the overall costs of compliance.'' [57] The Commission received no other comments about this paragraph and it is adopted with one non-substantive modification.

Section 2.13: Noncompliance With Compulsory Process

Proposed paragraph (b)(3) expedited the Commission's Hart-Scott-Rodino second request enforcement process by delegating to the General Counsel the authority to initiate enforcement proceedings for noncompliance with a second request under 15 U.S.C. 18a(g)(2) (''(g)(2) actions''). This change would enable the General Counsel to file (g)(2) actions quickly and without the need for a formal recommendation by staff to the Commission, and a subsequent Commission vote. Proposed Rule 2.13(b) also authorized the General Counsel to initiate an enforcement action in connection with noncompliance of a Commission order requiring access. In addition, the proposed rule clarified that the General Counsel is authorized to initiate compulsory process enforcement proceedings when he or she deems enforcement proceedings to be the appropriate course of action.

Kelley Drye and the Section both offered criticism of this proposed rearticulation of the General Counsel's authority. Specifically, the Section wrote that ''[t]he decision to initiate litigation should not, in the Section's view, be subject to an advance delegation but should be the result of Commission consideration of specific facts and other circumstances in each particular case.'' [58] In response, the Commission notes that Rule 2.13(b) does not establish a firewall or otherwise discourage communication between the Commission, Bureau staff conducting the investigation, and the General Counsel. As with many of the rules adopted today, this provision simply reflects longstanding agency procedure. The Commission notes that neither the Commission nor the General Counsel works in a vacuum regarding these matters. To underscore this point, the Commission has modified paragraph (b)(3) to provide that the General Counsel shall provide the Commission with at least two days' notice before initiating an action under that paragraph. The rule is adopted with that modification and a revision to paragraph (b)(1), which clarifies the General Counsel's authority to enforce compulsory process against a party that breaches any modification.

Section 2.14: Disposition

The Commission proposed to revise Rule 2.14 to relieve the subjects of FTC investigations and third parties of any obligation to preserve documents after one year passes with no written communication from the Commission or staff.[59] The Commission proposed this revision in response to recipients of compulsory process who reported that they often did not know when they were relieved of any obligation to retain information or materials for which neither the agency nor they have any use. Such recipients were not inclined to inquire about the status of an investigation for fear of renewed agency attention. The proposed revision relieves compulsory process recipients of any obligation to preserve documents if twelve months pass with no written communication from the Commission or staff. However, the revision does not lift any obligation that parties may have to preserve documents for investigations by other government agencies, or for litigation.

Commenters were generally supportive of these proposed revisions, although the Section and Kelley Drye asked that the Commission consider providing for a formal presumption that a matter has closed after the one-year period has passed. While the Commission recognizes that parties may, in certain circumstances, be reluctant to contact staff to inquire

[56] The modifications to Rule 2.7(a)(4) and Rule 2.11(c) are representative of several technical revisions that the Commission has made to the proposed rules. Another example is the modification of Rules 2.7 and 2.9 to replace the term ''Commission Investigator,'' which has a separate meaning under Rule 2.5, with the term ''hearing official.''

[57] Crowell & Moring Comment at 3.

[58] Section Comment at 7.

[59] In the final Rule, the Commission is also extending this relief to recipients of a preservation demand.

about the status of a seemingly dormant investigation, it is unclear how such a ''formal presumption'' that a matter has closed would work in practice. Furthermore, the release of document preservation obligations strikes the appropriate balance between fairness to compulsory process recipients and staff's ability to conduct long-term investigations. Finally, Crowell & Moring urged the Commission to affirmatively notify targets of compulsory process when an investigation is closed. The Commission notes that, like each of the foregoing proposed rules, Rule 2.14 is not intended to discourage interaction and transparency during the Part 2 investigatory process. Consequently, wherever feasible, staff will continue to keep open lines of communication in all stages of an investigation. The rule is adopted with some modifications intended to clarify the proposed language.

Section 4.1: Reprimand, Suspension, or Disbarment of Attorneys

The proposed rule provided additional clarity regarding standards of conduct for attorneys practicing before the Commission. In addition, the proposed rule established a framework for evaluating allegations of misconduct by attorneys practicing before the Commission. Under the proposed rule, allegations of misconduct would be submitted on a confidential basis to designated officers within the Bureaus of Competition or Consumer Protection who would assess the allegations to determine if they warranted further review by the Commission. After completing its review and evaluation of the Bureau Officer's assessment, the proposed rule provided for the Commission to initiate proceedings for disciplinary action where warranted. If the Commission determined that a full administrative disciplinary proceeding would be warranted to consider potential sanctions including reprimand, suspension, or disbarment, the Commission would serve an order to show cause on the respondent and assign the matter to an Administrative Law Judge.[60] The proposed rule also granted the Administrative Law Judge the necessary powers to oversee fair and expeditious attorney disciplinary proceedings.

The Commission also proposed a process for issuance of attorney reprimands without a hearing in appropriate circumstances. After affording a respondent attorney notice and an opportunity to respond to allegations of misconduct during the Bureau Officer's investigation, the Commission could issue a public reprimand if it determined on the basis of the evidence in the record and the attorney's response that the attorney had engaged in professional misconduct warranting a reprimand. The proposed rule also established expedited procedures to allow the Commission to suspend an attorney temporarily after receiving official notice from a state bar that the attorney has been suspended or disbarred by that authority, pending a full disciplinary proceeding to assess the need for permanent disbarment from practice before the Commission.

As noted previously, the Commission received three comments addressing the proposed revisions to Rule 4.1(e) from the Section, AFSA, and an individual commenter. Upon consideration of these comments and its own review of the existing and proposed rules, the Commission is announcing several modifications to the proposed rules, which are addressed in detail below.

A. Need for Revisions

The Section questioned the need for revisions to Rule 4.1(e), noting that the Commission already has the power to sanction attorneys under Rule 4.1(e) or refer charges of attorney misconduct to local bar authorities.[61] Rather than adopting the proposed changes to this rule, the Section suggested that the Commission should convene a working group of stakeholders to consider more limited changes to the rule.[62] AFSA also suggested that the Commission's current rules are sufficient to address attorney discipline.[63] In contrast, an individual commenter applauded the Commission for proposing a rule that provides greater clarity regarding the procedures that will be employed to investigate and adjudicate allegations of attorney misconduct.[64]

After reviewing these comments, the Commission has determined that the proposed rule revisions are warranted in order to address what have sometimes appeared to be dilatory and obstructionist practices by attorneys that have undermined the efficiency and efficacy of Commission investigations. Counsel for witnesses have sometimes taken advantage of the rule's lack of clarity during investigational hearings and depositions by repeating objections, excessively consulting with their clients during the proceedings, and otherwise employing arguably obstructionist tactics.[65] In addition, the complexity of producing ESI may create an incentive for parties to engage in obstructionist or dilatory conduct that could interfere with the appropriate resolution of Commission investigations.[66] In some cases, such conduct by an attorney could violate prevailing standards of professional conduct, as discussed below.[67]

In addition, the Commission has concluded that the proposed revisions will benefit attorneys practicing before the Commission by providing clearer guidance regarding appropriate standards of conduct. Although Rule 4.1(e) previously contained a general proscription against conduct that violates the standards of professional responsibility adopted by state bars or other conduct warranting disciplinary action, the revised rule more clearly describes the type of misconduct that may result in disciplinary action. The revised rule also provides greater transparency regarding the procedures that the Commission will use to adjudicate allegations of attorney misconduct.[68] This increased transparency furthers due process in the adjudication of allegations of misconduct.[69]

B. Prohibition of ''Obstructionist, Contemptuous, or Unprofessional'' Conduct

The Commission proposed paragraph 4.1(e)(1)(iii) to clarify that attorneys who engage in conduct that is ''obstructionist, contemptuous, or unprofessional,'' may be subject to discipline under the rule. The Section suggests that this provision ''presents potential due process concerns and leaves the Commission with essentially unfettered discretion to reprimand, suspend, or disbar attorneys.''[70]

The Commission has determined to retain this provision, which provides

[60] In the alternative, the proposed rule provided for the Commission to preside over the matter in the first instance or assign one or more members of the Commission to sit as Administrative Law Judges in a matter.

[61] Section Comment at 1, 7.

[62] *Id.* at 7–8.

[63] AFSA Comment at 1.

[64] Kristen Sweet Comment at 2.

[65] *See e.g.*, 77 FR at 3192–94.

[66] *See, e.g.*, Dan H. Willoughby, Jr. *et al., Sanctions for E-Discovery Violations: By the Numbers,* 60 Duke L.J. 789 (2010).

[67] *See, e.g.*, Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery,* 60 *Mercer L.Rev.* 983 (2009).

[68] The revised rule also clarifies that investigations and show cause proceedings under the rule will be nonpublic until the Commission orders otherwise or schedules an administrative hearing. Administrative hearings on an order to show cause, and any oral argument on appeal of the Administrative Law Judge's decision, will be public unless otherwise ordered by the Commission or an Administrative Law Judge. *See* Rule 4.1(e)(5)(vii).

[69] *See infra* Section II.D.

[70] Section Comment at 7; *see also* AFSA Comments at 4; Kristen Sweet Comment at 2.

enhanced guidance to practicing attorneys regarding the type of conduct that may warrant sanctions under the rule. Previously, Rule 4.1(e) defined attorney misconduct by reference to state bar professional responsibility standards, providing that ''attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.'' 16 CFR 4.1(e). In addition, the rule authorized the Commission to discipline attorneys in other cases if it determined an attorney was ''otherwise guilty of misconduct warranting disciplinary action.'' *Id.*

The revised rule's prohibition of contemptuous, obstructionist, or unprofessional conduct provides clearer guidance and is consistent with standards of conduct already adopted by federal agencies including the Commission. The Commission's rules governing investigations and adjudications already prohibit such conduct during Commission proceedings. Prior to the current revisions, the Commission's Part 2 rules explicitly prohibited ''dilatory, obstructionist, or contumacious conduct'' and ''contemptuous language'' during Commission investigations.[71] As a part of this revision, the Commission's Part 2 rules have been revised to clarify that hearing officials have authority to prevent or restrain disorderly or obstructionist conduct during investigations.[72] Similarly, the Commission's rules governing adjudicative proceedings prohibit such conduct during administrative adjudications.[73] Accordingly, revised Rule 4.1(e)'s prohibition against ''contemptuous, obstructionist, and unprofessional conduct'' reaffirms the existing proscription against such conduct in the Commission's rules.

In addition, the rules of practice of other federal agencies explicitly provide that contemptuous, obstructionist, and unprofessional conduct may be grounds for attorney sanctions.[74] Likewise, such conduct is prohibited by the model rules of attorney professional conduct and corresponding rules that have been adopted in jurisdictions across the country:

- *Obstructionist conduct:* The ABA Model Rules of Professional Conduct prohibit attorneys from engaging in obstructionist conduct. For example, these rules prohibit attorneys from seeking to ''unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value'' or to ''fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.'' [75] The ABA Model Rules also define misconduct to include ''engag[ing] in conduct that is prejudicial to the administration of justice.'' [76] Comments on the DC Bar's Rule 8.4 explain that such conduct may include ''failure to cooperate with Bar Counsel'' investigating allegations of misconduct; ''failure to respond to Bar Counsel's inquiries or subpoenas''; ''failure to abide by agreements made with Bar Counsel''; ''failure to obey court orders''; and similar behavior.[77]
- *Contemptuous conduct:* The rules of professional conduct also prohibit conduct that is contemptuous and designed to disrupt discovery or adjudicatory processes. ABA Model Rule 3.5 prohibits attorneys from ''engag[ing] in conduct intended to disrupt a tribunal.'' [78] The Comments on the Model Rule note that ''[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.'' [79]
- *Unprofessional conduct:* As the Commission explained in the NPRM, the revised rule prohibits conduct that violates appropriate standards of professional conduct and the Commission's rules.[80] For example, the Model Rules of Professional Conduct provide that attorneys have dual obligations to competently represent their clients, while expediting and protecting the integrity of the adjudicative process. To that end, attorneys must display candor when practicing before a tribunal and avoid conduct that undermines the integrity of the adjudicative process.[81] In addition, the Model Rules prohibit conduct that is merely designed to delay or burden another party.[82]

Accordingly, the revised rule clarifies attorneys' existing obligations to refrain from obstructionist, contemptuous, and unprofessional conduct when practicing before the Commission. As a result, the revised rule is consistent with the Commission's existing rules of practice as well as the rules of attorney professional conduct and the practice of other federal agencies.

C. Imputed Responsibility for Attorney Supervisors and Managers

Proposed paragraph 4.1(e)(1) provided for imputed responsibility for supervisory or managerial attorneys who direct or ratify a subordinate attorney's misconduct. The Section expressed concern with this provision, suggesting that the proposed rule could be read to provide that ''*any* 'partner' or person with 'comparable management authority' 'in the law firm in which the [violating] attorney practices' may be held responsible for the violating attorney's actions.'' [83] The Section argued that such liability would be overbroad and recommended that the proposed rule be amended to make clear that only parties who knew of the misconduct and failed to take reasonable remedial action should be held responsible for another attorney's prohibited conduct.[84]

The proposed rule is similar to the rules of professional conduct adopted by many state bars, which provide for imputed responsibility for supervisory or managerial attorneys who order or, with knowledge, ratify misconduct by their subordinates.[85] To provide greater clarity concerning the rule's scope, however, the Commission is adopting the proposed rule with modifications to make clear that the rule provides for imputed responsibility only when a supervisor or managerial attorney orders or, with knowledge, ratifies another

[71] Previous Rule 2.9.

[72] Revised Rule 2.9(b)(5).

[73] *See* 16 CFR 3.42(d) (prohibiting ''dilatory, obstructionist, or contumacious conduct'' and ''contemptuous language'' during Commission adjudications).

[74] *See, e.g.,* Federal Deposit Insurance Corporation, 12 CFR 263.94 (prohibiting *contemptuous* conduct in administrative proceedings); Department of Justice, Foreign Claims Settlement Commission of the United States, 24 CFR 1720.135 (same); Department of Housing and Urban Development, 24 CFR 1720.135 (same); Comptroller of the Currency, Department of the Treasury, 12 CFR 112.6 (providing that *obstructionist* conduct that interferes with an agency investigation or administrative proceeding may subject an attorney to sanction); Consumer Financial Protection Bureau, 12 CFR 1080.9 (same); Federal Energy Regulatory Commission, 18 CFR 1b.16 (same); Commodity Futures Trading Commission, 8 CFR 1003.104 (providing that CFTC may sanction attorneys practicing before the agency for *unethical or unprofessional c*onduct); Occupational Safety and Health Review Commission, 29 CFR 2200.104 (same); Department of the Interior, 43 CFR 1.6 (same).

[75] *Model Rules of Prof'l Conduct* R. 3.4(a), (d).

[76] *Model Rules of Prof'l Conduct* R. 8.4(d). Similarly, DC Rule of Professional Conduct 8.4(d) defines ''misconduct'' to include ''engag[ing] in conduct that seriously interferes with the administration of justice.'' *District of Columbia Bar Ass'n Rules of Prof'l Conduct* R. 8.4(d).

[77] *See District of Columbia Bar Ass'n Rules of Prof'l Conduct* R. 8.4 cmt [3]–[4].

[78] *Model Rules of Prof'l Conduct* R. 3.5(d).

[79] *Model Rules of Prof'l Conduct* R. 3.5 cmt [5]; *see also* District of Columbia Bar Association Rules of Professional Conduct, Rule 3.5(d) (''Impartiality and Decorum of Tribunal'').

[80] 77 FR at 3194.

[81] *Model Rules of Prof'l Conduct* R. 3.3.

[82] *Model Rules of Prof'l Conduct* R. 4.4(a).

[83] Section Comment at 7; AFSA Comment at 3.

[84] Section Comment at 7–8.

[85] *See, e.g., Model Rules of Prof'l Conduct R. 5.1; District of Columbia Bar Ass'n Rules of Prof'l Conduct* R. 5.1; *New York State Bar Ass'n Rules of Prof'l Conduct* R. 5.1.

attorney's conduct. For purposes of the revised rule, a lawyer with direct supervisory authority is a lawyer who has an actual supervisory role with respect to directing the conduct of other lawyers in a particular representation.

D. Due Process

Some commenters expressed concern regarding the due process protections afforded by the proposed rule.[86] The Commission finds, however, that the rule as proposed provided appropriate procedural protections to ensure a full and fair evaluation of allegations of attorney misconduct. First, the proposed rule provided for a Bureau Officer to perform an initial assessment to determine whether allegations of attorney misconduct merit further review by the Commission.[87] Second, after the Bureau Officer has completed this assessment, the Commission would review the record and make its own determination as to whether further action is warranted.[88] And, ultimately, the rule provided for a determination of the merits of the allegations by the Commission or an Administrative Law Judge.[89] Accordingly, the proposed rule provided several layers of procedural safeguards to ensure that allegations of misconduct are fully vetted and that respondent attorneys receive adequate process.

Nonetheless, the Section and AFSA expressed concern with the proposed rule's procedures for attorney reprimand without a hearing in certain circumstances. Under the rule, the Commission could issue a public reprimand if, after providing a respondent attorney notice and an opportunity to respond to allegations of misconduct during the Bureau Officer's review of the allegations, the Commission determined on the basis of the evidence in the record and the attorney's response that the attorney had engaged in professional misconduct warranting a reprimand. The Section asserted that ''even a public reprimand can have serious repercussions for a practicing attorney'' [90] and, therefore, recommended that the Commission delete this provision.[91]

Based on these concerns and its own further consideration, the Commission adopts the proposed rule with modifications. Revised paragraph (e)(5) provides for the Commission to issue an order to show cause following its examination of the results of the Bureau Officer's review when considering any disciplinary sanctions, including reprimand, suspension, or disbarment.[92] If, based on an attorney's response to the order and other evidence in the record, the Commission determines that the material facts, as to which there is no genuine dispute, show that an attorney has engaged in professional misconduct, the Commission may issue a disciplinary sanction without further process.

The opportunity for a respondent attorney to explain why disciplinary action is unwarranted in response to the order to show cause addresses the due process concerns raised by the commenters. While an attorney facing disciplinary sanctions is entitled to fair notice of the charges at issue and an opportunity to explain why he or she should not be sanctioned,[93] courts have made clear that a full evidentiary hearing is not necessary before the imposition of attorney sanctions in all cases.[94] As a result, the revised rule's procedures for affording attorneys with an opportunity to be heard in response to an order to show cause provides appropriate procedural protections. The order to show cause shall be accompanied by all declarations, deposition transcripts, or other evidence the staff wishes the Commission to consider in support of the allegations of misconduct. The rule also directs respondent attorneys to include all materials the Commission should consider relating to the allegations of misconduct along with his or her response to the order to show cause.

Where the attorney's response raises a genuine dispute of material fact or the Commission determines otherwise that a hearing is warranted, the revised rule provides for the Commission to order further proceedings to be presided over by the Commission, an Administrative Law Judge, or by one or more Commissioners sitting as Administrative Law Judges before imposition of any sanction. Any such disciplinary proceeding shall afford an attorney respondent with due opportunity to be heard in his or her own defense, but does not necessarily invoke the full procedures of Part 3 of the Commission's rules. The Commission will specify the nature and scope of any such hearing consistent with the Commission's interest in an expeditious proceeding and fairness to the attorney respondent. An attorney respondent may be represented by counsel during the proceeding.

AFSA also criticized the role of the ''Bureau Officer'' to investigate allegations of misconduct and refer charges to the Commission for further action where warranted.[95] AFSA expressed concern that designation of officers in the Bureaus to assess allegations of misconduct will not ensure an impartial and unbiased review of those allegations.[96] However, the revised rule provides appropriate procedural safeguards to ensure that allegations of attorney misconduct are evaluated by the Commission in an unbiased manner.

The rule provides for the Commission to make an independent assessment to determine whether further action on allegations of misconduct is warranted based on the results of the Bureau Officer's assessment. Following this review, the Commission will determine whether to institute administrative disciplinary proceedings by issuing an order to show cause to the respondent attorney or take other action, such as referral to a state bar, under the rule. Accordingly, the decision as to whether an attorney's conduct warrants discipline under the rule ultimately rests with the Commission, an Administrative Law Judge, or one or more Commissioners sitting as Administrative Law Judges, who will evaluate allegations of attorney misconduct.[97] It is well-established that

[86] Section Comment at 7; AFSA Comment at 2–3.

[87] Proposed Rule 4.1(e)(3).

[88] Proposed Rule 4.1(e)(5).

[89] Proposed Rule 4.1(e)(5).

[90] Section Comment at 8.

[91] *See* Section Comment at 8. AFSA suggests that the proposed rule could be read to provide that ''the Commission may issue a public reprimand, sua sponte based solely on the Bureau Officer's recommendation with no notice to or opportunity for the subject of the complaint to be heard.'' AFSA Comment at 4.

[92] Rule 4.1(e)(5).

[93] *See, e.g.*, *In re Ruffalo,* 390 U.S. 544, 550 (1968); *Theard* v. *United States,* 354 U.S. 278, 282 (1957).

[94] *Muset* v. *Ishimaru,* 783 F.Supp.2d 360, 371 (E.D.N.Y. 2011) (In context of EEOC's issuance of an attorney reprimand, '' '[a]n opportunity to be heard' does not necessarily entail a formal hearing or the ability to cross-examine witnesses. A court contemplating sanctions 'need only ensure that an attorney who is potentially subject to a sanctions order has an opportunity to respond in writing to the allegations.' ''); *see also Pacific Harbor Capital, Inc.* v. *Carnival Air Lines, Inc.,* 210 F.3d 1112, 1118 (9th Cir. 2000) (upholding district court's imposition of attorney discipline without a prior hearing and finding that ''an opportunity to be heard does not require an oral or evidentiary hearing on the issue'').

[95] AFSA Comment at 4.

[96] *Id.*

[97] AFSA also criticizes the proposed rule because, it claims, ''there is no requirement that an administrative law judge will hear'' disciplinary cases. AFSA Comments at 4. However, the revised rule maintains the Commission's longstanding practice that administrative adjudications may be tried in the first instance before either an Administrative Law Judge, the Commission, or Commissioners sitting as Administrative Law Judges. *See* Rule 4.1(e)(5)(ii); *see also, e.g.,* 16 CFR 3.42(a) (''Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative

a system in which agency staff perform investigative functions, but the function of adjudication is vested in the agency head or another impartial decisionmaker, does not raise due process concerns.[98]

Finally, AFSA argued that it is unfair that allegations of misconduct by Commission employees are handled pursuant to the Commission's procedures for employee discipline or through investigations by the Office of the Inspector General.[99] However, the Commission's procedures for addressing employee misconduct, coupled with the authority of the Commission's Inspector General to investigate misconduct, provide the most appropriate means to address allegations of misconduct by Commission attorneys acting in the scope of their duties on behalf of the Commission. Employees who engage in misconduct in the course of their employment face serious potential consequences and adverse employment action, including reprimand, suspension, or dismissal, as well as investigations by the Inspector General to address administrative, civil, and criminal violations of laws and regulations. In addition, the Commission may refer employees who have engaged in misconduct to state bar authorities for further action, including reprimand or disbarment. As a result, AFSA's claim that ''the potential for unwarranted disciplinary action against attorneys practicing before the Commission would be significantly higher than those for attorneys employed by the Commission,'' *id.,* is incorrect.

III. Final Rule Revisions

List of Subjects in 16 CFR Parts 2 and 4

Administrative practice and procedure.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter 1, Subchapter A of the Code of Federal Regulations, parts 2 and 4, as follows:

PART 2—NONADJUDICATIVE PROCEDURES

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 15 U.S.C. 46, unless otherwise noted.

■ 2. Revise § 2.2 to read as follows:

§ 2.2 Complaint or request for Commission action.

(a) A complaint or request for Commission action may be submitted via the Commission's web-based complaint site (*https://www.ftccomplaintassistant.gov/*); by a telephone call to 1–877–FTC–HELP (1–877–382–4357); or by a signed statement setting forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of, filed with the Office of the Secretary in conformity with § 4.2(d) of this chapter. No forms or formal procedures are required.

(b) The person making the complaint or request is not regarded as a party to any proceeding that might result from the investigation.

(c) Where the complainant's identity is not otherwise made public, the Commission's policy is not to publish or divulge the name of a complainant except as authorized by law or by the Commission's rules. Complaints or requests submitted to the Commission may, however, be lodged in a database and made available to federal, state, local, and foreign law enforcement agencies that commit to maintain the privacy and security of the information provided. Further, where a complaint is by a consumer or consumer representative concerning a specific consumer product or service, the Commission in the course of a referral of the complaint or request, or in furtherance of an investigation, may disclose the identity of the complainant. In referring any such consumer complaint, the Commission specifically retains its right to take such action as it deems appropriate in the public interest and under any of the statutes it administers.

■ 3. Revise § 2.4 to read as follows:

§ 2.4 Investigational policy.

Consistent with obtaining the information it needs for investigations, including documentary material, the Commission encourages the just and speedy resolution of investigations. The Commission will therefore employ compulsory process when in the public interest. The Commission encourages cooperation in its investigations. In all matters, whether involving compulsory process or voluntary requests for documents and information, the Commission expects all parties to engage in meaningful discussions with staff to prevent confusion or misunderstandings regarding the nature and scope of the information and material being sought, in light of the inherent value of genuinely cooperative discovery.

■ 4. Revise § 2.6 to read as follows:

§ 2.6 Notification of purpose.

Any person, partnership, or corporation under investigation compelled or requested to furnish information or documentary material shall be advised of the purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law. A copy of a Commission resolution, as prescribed under § 2.7(a), shall be sufficient to give persons, partnerships, or corporations notice of the purpose of the investigation. While investigations are generally nonpublic, Commission staff may disclose the existence of an investigation to potential witnesses or other third parties to the extent necessary to advance the investigation.

■ 5. Revise § 2.7 to read as follows:

§ 2.7 Compulsory process in investigations.

(a) *In general.* When the public interest warrants, the Commission may issue a resolution authorizing the use of compulsory process. The Commission or any Commissioner may, pursuant to a Commission resolution, issue a subpoena, or a civil investigative demand, directing the recipient named therein to appear before a designated representative at a specified time and place to testify or to produce documentary material, or both, and in the case of a civil investigative demand, to provide a written report or answers to questions, relating to any matter under investigation by the Commission. For the purposes of this subpart, the term:

(1) Electronically stored information (''ESI'') means any writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

(2) ''Documentary material'' includes all documents, materials, and information, including ESI, within the

Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges.''). Moreover, under the APA, the Commission or its members have the authority to preside over a hearing. *See* 5 U.S.C. 556(b). Accordingly, the revised rule affords appropriate procedural protections and provides for an impartial decisionmaker to adjudicate any allegations of misconduct.

[98] *Withrow* v. *Larkin,* 421 U.S. 35, 47–48 (1975); *see also FTC* v. *Cement Institute,* 333 U.S. 683, 701 (1948).

[99] *See* AFSA Comment at 3.

meaning of the Federal Rules of Civil Procedure.

(3) ''Compulsory process'' means any subpoena, CID, access order, or order for a report issued by the Commission.

(4) ''Protected status'' refers to information or material that may be withheld from production or disclosure on the grounds of any privilege, work product protection, or statutory exemption.

(b) *Civil Investigative Demands.* Civil Investigative Demands (''CIDs'') shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices under section 5(a)(1) of the Federal Trade Commission Act (hereinafter referred to as ''unfair or deceptive acts or practices'').

(1) CIDs for the production of documentary material, including ESI, shall describe each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified, prescribe a return date providing a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the Commission's custodian to whom such material shall be made available. Documentary material, including ESI, for which a CID has been issued shall be made available as prescribed in the CID. Such productions shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(2) CIDs for tangible things, including electronic media, shall describe each class of tangible thing to be produced with sufficient definiteness and certainty as to permit each such thing to be fairly identified, prescribe a return date providing a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the Commission's custodian to whom such things shall be submitted. Submission of tangible things in response to a CID shall be made in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(3) CIDs for written reports or answers to questions shall propound with sufficient definiteness and certainty the reports to be produced or the questions to be answered, prescribe a return date, and identify the Commission's custodian to whom such reports or answers to questions shall be submitted. The submission of written reports or answers to questions in response to a CID shall be made in accordance with the procedures prescribed by section 20(c)(13) of the Federal Trade Commission Act.

(4) CIDs for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall commence, and identify the hearing official and the Commission custodian. Oral testimony in response to a CID shall be taken in accordance with the procedures set forth in section 20(c)(14) of the Federal Trade Commission Act.

(c) *Subpoenas.* Except in investigations with respect to unfair or deceptive acts or practices, the Commission may require by subpoena the attendance and testimony of witnesses and the production of documentary material relating to any matter under investigation. Subpoenas for the production of documentary material, including ESI, shall describe each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified, prescribe a return date providing a reasonable period of time for production, and identify the Commission's custodian to whom such material shall be made available. A subpoena may require the attendance of the witness or the production of documentary material at any place in the United States.

(d) *Special reports.* Except in investigations regarding unfair or deceptive acts or practices, the Commission may issue an order requiring a person, partnership, or corporation to file a written report or answers to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(e) *Commission orders requiring access.* Except in investigations regarding unfair or deceptive acts or practices, the Commission may issue an order requiring any person, partnership, or corporation under investigation to grant access to their files, including electronic media, for the purpose of examination and to make copies.

(f) *Investigational hearings.* (1) Investigational hearings may be conducted in the course of any investigation undertaken by the Commission, including rulemaking proceedings under subpart B of part 1 of this chapter, inquiries initiated for the purpose of determining whether a respondent is complying with an order of the Commission or to monitor performance under, and compliance with, a decree entered in suits brought by the United States under the antitrust laws, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Webb-Pomerene (Export Trade) Act.

(2) Investigational hearings shall be conducted by one or more Commission employees designated for the purpose of hearing the testimony of witnesses (the ''hearing official'') and receiving documents and information relating to any subject under investigation. Such hearings shall be under oath or affirmation, stenographically recorded, and the transcript made a part of the record of the investigation. The Commission may, in addition, employ other means to record the hearing.

(3) Unless otherwise ordered by the Commission, investigational hearings shall not be public. For investigational hearings conducted pursuant to a CID for the giving of oral testimony, the hearing official shall exclude from the hearing room all persons other than the person being examined, counsel for the person being examined, Commission staff, and any stenographer or other person recording such testimony. A copy of the transcript shall promptly be forwarded by the hearing official to the Commission custodian designated under § 2.16 of this part. At the discretion of the hearing official, and with the consent of the person being examined (or, in the case of an entity, its counsel), persons other than Commission staff, court reporters, and the hearing official may be present in the hearing room.

(g) *Depositions.* Except in investigations with respect to unfair or deceptive acts or practices, the Commission may order by subpoena a deposition pursuant to section 9 of the Federal Trade Commission Act, of any person, partnership, or corporation, at any stage of an investigation. The deposition shall take place upon notice to the subjects of the investigation, and the examination and cross-examination may proceed as they would at trial. Depositions shall be conducted by a hearing official, for the purpose of hearing the testimony of witnesses and receiving documents and information relating to any subject under investigation. Depositions shall be under oath or affirmation, stenographically recorded, and the transcript made a part of the record of the investigation. The Commission may, in addition, employ other means to record the deposition.

(h) *Testimony from an entity.* Where Commission compulsory process requires oral testimony from an entity, the compulsory process shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other

persons who consent, to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate in advance and in writing the matters on which each designee will testify. The persons designated must testify about information known or reasonably available to the entity and their testimony shall be binding upon the entity.

(i) *Inspection, copying, testing, and sampling of documentary material, including electronic media.* The Commission, through compulsory process, may require the production of documentary material, or electronic media or other tangible things, for inspection, copying, testing, or sampling.

(j) *Manner and form of production of ESI.* When Commission compulsory process requires the production of ESI, it shall be produced in accordance with the instructions provided by Commission staff regarding the manner and form of production. All instructions shall be followed by the recipient of the process absent written permission to the contrary from a Commission official identified in paragraph (l) of this section. Absent any instructions as to the form for producing ESI, ESI must be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form.

(k) *Mandatory pre-petition meet and confer process.* Unless excused in writing or granted an extension of no more than 30 days by a Commission official identified in paragraph (l) of this section, a recipient of Commission compulsory process shall meet and confer with Commission staff within 14 days after receipt of process or before the deadline for filing a petition to quash, whichever is first, to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted. The initial meet and confer session and all subsequent meet and confer sessions may be in person or by telephone. The recipient must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with compulsory process. Such personnel could include individuals knowledgeable about the recipient's information or records management systems, individuals knowledgeable about other relevant materials such as organizational charts, and persons knowledgeable about samples of material required to be produced. If any issues relate to ESI, the recipient shall have a person familiar with its ESI systems and methods of retrieval participate in the meeting. The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.

(l) *Delegations regarding CIDs and subpoenas.* The Directors of the Bureau of Competition, Consumer Protection, or Economics, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are all authorized to modify and, in writing, approve the terms of compliance with all compulsory process, including subpoenas, CIDs, reporting programs, orders requiring reports, answers to questions, and orders requiring access. If a recipient of compulsory process has demonstrated satisfactory progress toward compliance, a Commission official identified in this paragraph may, at his or her discretion, extend the time for compliance with Commission compulsory process. The subpoena power conferred by section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) and section 5 of the Webb-Pomerene (Export Trade) Act (15 U.S.C. 65) are specifically included within this delegation of authority.

§ 2.8 [Removed and Reserved]

■ 6. Remove and reserve § 2.8.

§ 2.8A [Removed]

■ 7. Remove § 2.8A.

■ 8. Revise § 2.9 to read as follows:

§ 2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in a deposition or investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted, and of any testimony as stenographically recorded, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of the testimony. Upon completion of transcription of the testimony, the witness shall be offered an opportunity to read the transcript. Any changes by the witness shall be entered and identified upon the transcript by the hearing official, together with a statement of the reasons given by the witness for requesting such changes. After the changes are entered, the transcript shall be signed by the witness unless the witness cannot be found, is ill and unavailable, waives in writing his or her right to sign, or refuses to sign. If the transcript is not signed by the witness within 30 days of having been afforded a reasonable opportunity to review it, the hearing official shall sign the transcript and state on the hearing record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign, as prescribed by section 20(c)(14)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in a deposition or investigational hearing may be accompanied, represented, and advised by counsel, as follows:

(1) In depositions or investigational hearings conducted pursuant to section 9 of the Federal Trade Commission Act, counsel may not consult with the witness while a question directed to a witness is pending, except with respect to issues involving protected status.

(2) Any objection during a deposition or investigational hearing shall be stated concisely on the hearing record in a nonargumentative and nonsuggestive manner. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of protected status. Counsel may instruct a witness not to answer only when necessary to preserve a claim of protected status.

(3) The hearing official may elect to recess the deposition or investigational hearing and reconvene the deposition or hearing at a later date to continue a course of inquiry interrupted by any objection made under paragraph (b)(1) or (2) of this section. The hearing official shall provide written notice of the date of the reconvened deposition or hearing to the witness, which may be in the form of an email or facsimile. Failure to reappear or to file a petition to limit or quash in accordance with § 2.10 of this part shall constitute noncompliance with Commission compulsory process for the purposes of a Commission enforcement action under § 2.13 of this part.

(4) In depositions or investigational hearings, immediately following the examination of a witness by the hearing official, the witness or his or her counsel may on the hearing record request that the hearing official permit the witness to clarify any answers. The grant or denial of such request shall be within the discretion of the hearing official and would ordinarily be granted

except for good cause stated and explained on the hearing record, and with an opportunity for counsel to undertake to correct the expressed concerns of the hearing official or otherwise to reply.

(5) The hearing official shall conduct the deposition or investigational hearing in a manner that avoids unnecessary delay, and prevents and restrains disorderly or obstructionist conduct. The hearing official shall, where appropriate, report pursuant to § 4.1(e) of this chapter any instance where an attorney, in the course of the deposition or hearing, has allegedly refused to comply with his or her directions, or has allegedly engaged in conduct addressed in § 4.1(e). The Commission may take any action as circumstances may warrant under § 4.1(e) of this chapter.

■ 9. Revise § 2.10 to read as follows:

§ 2.10 Petitions to limit or quash Commission compulsory process.

(a) *In general.* (1) *Petitions.* Any petition to limit or quash any compulsory process shall be filed with the Secretary within 20 days after service of the Commission compulsory process or, if the return date is less than 20 days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the Commission compulsory process, including all appropriate arguments, affidavits, and other supporting documentation. Such petition shall not exceed 5,000 words, including all headings, footnotes, and quotations, but excluding the cover, table of contents, table of authorities, glossaries, copies of the compulsory process order or excerpts thereof, appendices containing only sections of statutes or regulations, the statement required by paragraph (a)(2) of this section, and affidavits and other supporting documentation. Petitions to limit or quash that fail to comply with these provisions shall be rejected by the Secretary pursuant to § 4.2(g) of this chapter.

(2) *Statement.* Each petition filed pursuant to paragraph (a)(1) of this section shall be accompanied by a signed separate statement representing that counsel for the petitioner has conferred with Commission staff pursuant to § 2.7(k) of this part in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the issues in controversy have been resolved by agreement, the statement shall, in a nonargumentative manner, specify the issues so resolved and the issues remaining unresolved. The statement shall recite the date, time, and place of each conference between counsel, and the names of all parties participating in each such conference. Failure to include the required statement may result in a denial of the petition.

(3) *Reconvened investigational hearings or depositions.* If the hearing official elects pursuant to § 2.9(b)(3) of this part to recess the investigational hearing or deposition and reconvene it at a later date, the witness compelled to reappear may challenge the reconvening by filing with the Secretary a petition to limit or quash the reconvening of the hearing or deposition. Such petition shall be filed within 5 days after receiving written notice of the reconvened hearing; shall set forth all assertions of protected status or other factual and legal objections to the reconvening of the hearing or deposition, including all appropriate arguments, affidavits, and other supporting documentation; and shall be subject to the word count limit in paragraph (a)(1) of this section. Except for good cause shown, the Commission will not consider issues presented and ruled upon in any earlier petition filed by or on behalf of the witness.

(4) *Staff reply.* Commission staff may, without serving the petitioner, provide the Commission a statement that shall set forth any factual and legal response to the petition to limit or quash.

(5) *Extensions of time.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file petitions to limit or quash Commission compulsory process.

(b) *Stay of compliance period.* The timely filing of a petition to limit or quash any Commission compulsory process shall stay the remaining amount of time permitted for compliance as to the portion or portions of the challenged specifications or provisions. If the petition is denied in whole or in part, the ruling by the Commission shall specify new terms for compliance, including a new return date, for the Commission's compulsory process.

(c) *Disposition and review.* The Commission will issue an order ruling on a petition to limit or quash within 30 days after the petition is filed with the Secretary. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice to the petitioner of the order.

(d) *Public disclosure.* All petitions to limit or quash Commission compulsory process and all Commission orders in response to those petitions shall become part of the public records of the Commission, except for information granted confidential treatment under § 4.9(c) of this chapter.

■ 10. Revise § 2.11 to read as follows:

§ 2.11 Withholding requested material.

(a)(1) Any person withholding information or material responsive to an investigational subpoena, CID, access order, or order to file a report issued pursuant to § 2.7 of this part, or any other request for production of material issued under this part, shall assert a claim of protected status, as that term is defined in § 2.7(a)(4), not later than the date set for the production of the material. The claim of protected status shall include a detailed log of the items withheld, which shall be attested by the lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim. A document, including all attachments, may be withheld or redacted only to the extent necessary to preserve any claim of protected status. The information provided in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. The failure to provide information sufficient to support a claim of protected status may result in a denial of the claim. Absent an instruction as to the form and content of the log, the log shall be submitted in a searchable electronic format, and shall, for each document, including attachments, provide:

(i) Document control number(s);

(ii) The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);

(iii) A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;

(iv) The date the material was created;

(v) The date the material was sent to each recipient (if different from the date the material was created);

(vi) The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;

(vii) The names, titles, business addresses, email addresses or other

electronic contact information, and relevant affiliations of all authors;

(viii) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;

(ix) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;

(x) The factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and

(xi) Any other pertinent information necessary to support the assertion of protected status by operation of law.

(2) Each attorney who is an author, recipient, or person copied on the material shall be identified in the log by an asterisk. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, the information required by paragraph (a)(1)(vi) of this section shall be provided in the log.

(b) A person withholding responsive material solely for the reasons described in paragraph (a) of this section shall meet and confer with Commission staff pursuant to § 2.7(k) of this part to discuss and attempt to resolve any issues associated with the manner and form in which privilege or protection claims will be asserted. The participants in the meet and confer session may agree to modify the logging requirements set forth in paragraph (a) of this section. The failure to comply with paragraph (a) shall constitute noncompliance subject to judicial enforcement under § 2.13(a) of this part.

(c) Unless otherwise provided in the instructions accompanying the compulsory process, and except for information or material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

(d)(1)(i) The disclosure of material protected by the attorney-client privilege or as work product shall not operate as a waiver if:

(A) The disclosure is inadvertent;

(B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) The holder promptly took reasonable steps to rectify the error, including notifying Commission staff of the claim and the basis for it.

(ii) After being so notified, Commission staff must:

(A) Promptly return or destroy the specified material and any copies, not use or disclose the material until any dispute as to the validity of the claim is resolved; and take reasonable measures to retrieve the material from all persons to whom it was disclosed before being notified; or

(B) Sequester such material until such time as an Administrative Law Judge or court may rule on the merits of the claim of privilege or protection in a proceeding or action resulting from the investigation.

(iii) The producing party must preserve the material until the claim of privilege or protection is resolved, the investigation is closed, or any enforcement proceeding is concluded.

(2) When a disclosure is made that waives attorney-client privilege or work product, the waiver extends to an undisclosed communication or information only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or material concern the same subject matter; and

(iii) They ought in fairness to be considered together.

§ 2.12 [Removed and Reserved]

■ 11. Remove and reserve § 2.12.

■ 12. Revise § 2.13 to read as follows:

§ 2.13 Noncompliance with compulsory processes.

(a) In cases of failure to comply with Commission compulsory processes, appropriate action may be initiated by the Commission or the Attorney General, including actions for enforcement, forfeiture, civil penalties, or criminal sanctions. The Commission may also take any action as the circumstances may warrant under § 4.1(e) of this chapter.

(b) The General Counsel, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized, when he or she deems appropriate:

(1) To initiate, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a recipient to comply with, or to obey, a subpoena, a CID, or an access order, if the return date or any extension thereof has passed, or if the recipient breaches any modification regarding compliance;

(2) To approve and have prepared and issued, in the name of the Commission, a notice of default in connection with the failure of a recipient of an order to file a report pursuant to section 6(b) of the Federal Trade Commission Act to timely file that report, if the return date or any extension thereof has passed; to initiate, on behalf of the Commission, an enforcement proceeding; or to request to the Attorney General, on behalf of the Commission, to initiate a civil action in connection with the failure of such recipient to timely file a report, when the return date or any extension thereof has passed;

(3) To initiate, on behalf of the Commission, an enforcement proceeding under section 7A(g)(2) of the Clayton Act (15 U.S.C. 18a(g)(2)) in connection with the failure to substantially comply with any request for the submission of additional information or documentary material under section 7A(e)(1) of the Clayton Act (15 U.S.C. 18a(e)(1)), provided that the General Counsel shall provide notice to the Commission at least 2 days before initiating such action; and

(4) To seek an order of civil contempt in cases where a court order enforcing compulsory process has been violated.

■ 13. Revise § 2.14 to read as follows:

§ 2.14 Disposition.

(a) When an investigation indicates that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to subpart C of this part, the Commission may initiate further proceedings.

(b) When corrective action is not necessary or warranted in the public interest, the investigation shall be closed. The matter may nevertheless be further investigated at any time if circumstances so warrant.

(c) In matters in which a recipient of a preservation demand, an access letter, or Commission compulsory process has not been notified that an investigation has been closed or otherwise concluded, after a period of twelve months following the last written communication from the Commission staff to the recipient or the recipient's counsel, the recipient is relieved of any obligation to continue preserving information, documentary material, or evidence, for purposes of responding to the Commission's process or the staff's access letter. The ''written communication'' may be in the form of a letter, an email, or a facsimile.

(d) The Commission has delegated to the Directors of the Bureaus of Competition and Consumer Protection, their Deputy Directors, the Assistant Directors of the Bureau of Competition, the Associate Directors of the Bureau of Consumer Protection, and the Regional Directors, without power of redelegation, limited authority to close investigations.

PART 4—MISCELLANEOUS RULES

■ 14. The authority citation for part 4 continues to read as follows:

Authority: 15 U.S.C. 46, unless otherwise noted.

■ 15. Amend § 4.1 by revising paragraph (e) to read as follows:

§ 4.1 Appearances.

* * * * *

(e) *Reprimand, suspension, or disbarment of attorneys.* (1)(i) The following provisions govern the evaluation of allegations of misconduct by attorneys practicing before the Commission who are not employed by the Commission.[1] The Commission may publicly reprimand, suspend, or disbar from practice before the Commission any such person who has practiced, is practicing, or holds himself or herself out as entitled to practice before the Commission if it finds that such person:

(A) Does not possess the qualifications required by § 4.1(a);

(B) Has failed to act in a manner consistent with the rules of professional conduct of the attorney's state(s) of licensure;

(C) Has engaged in obstructionist, contemptuous, or unprofessional conduct during the course of any Commission proceeding or investigation; or

(D) Has knowingly or recklessly given false or misleading information, or has knowingly or recklessly participated in the giving of false information to the Commission or any officer or employee of the Commission.[2]

(ii) An attorney may be responsible for another attorney's violation of this paragraph (e) if the attorney orders, or with knowledge of the specific conduct, ratifies the conduct involved. In addition, an attorney who has direct supervisory authority over another attorney may be responsible for that attorney's violation of this paragraph (e) if the supervisory attorney knew of the conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action.

(2) Allegations of attorney misconduct in violation of paragraph (e)(1) of this section may be proffered by any person possessing information concerning the alleged misconduct. Any such allegations may be submitted orally or in writing to a Bureau Officer who will evaluate the sufficiency of the allegations in the first instance to determine whether further action by the Commission is warranted. The Director of the Bureau or office responsible for the matter about which the allegations are made, or the Director's designee, shall serve as the Bureau Officer.

(3) After review and evaluation of the allegations, any supporting materials, and any additional information that the Bureau Officer may acquire, the Bureau Officer, if he or she determines that further action is warranted, shall in writing notify the subject of the complaint of the underlying allegations and potential sanctions available to the Commission under this section, and provide him or her an opportunity to respond to the allegations and provide additional relevant information and material. The Bureau Officer may request that the Commission issue a resolution authorizing the use of compulsory process, and may thereafter initiate the service of compulsory process, to assist in obtaining information for the purpose of making a recommendation to the Commission whether further action may be warranted.

(4) If the Bureau Officer, after review and evaluation of the allegations, supporting material, response by the subject of the allegations, if any, and all additional available information and material, determines that no further action is warranted, he or she may close the matter if the Commission has not issued a resolution authorizing the use of compulsory process. In the event the Bureau Officer determines that further Commission action may be warranted, or if the Commission has issued a resolution authorizing the use of compulsory process, he or she shall make a recommendation to the Commission. The recommendation shall include all relevant information and material as to whether further Commission action, or any other disposition of the matter, may be warranted.

(5) If the Commission has reason to believe, after review of the Bureau Officer's recommendation, that an attorney has engaged in professional misconduct of the type described in paragraph (e)(1) of this section, the Commission may institute administrative disciplinary proceedings proposing public reprimand, suspension, or disbarment of the attorney from practice before the Commission. Except as provided in paragraph (e)(7) of this section, administrative disciplinary proceedings shall be handled in accordance with the following procedures:

(i) The Commission shall serve the respondent attorney with an order to show cause why the Commission should not impose sanctions against the attorney. The order to show cause shall specify the alleged misconduct at issue and the possible sanctions. The order to show cause shall be accompanied by all declarations, deposition transcripts, or other evidence the staff wishes the Commission to consider in support of the allegations of misconduct.

(ii) Within 14 days of service of the order to show cause, the respondent may file a response to the allegations of misconduct. If the response disputes any of the allegations of misconduct, it shall do so with specificity and include all materials the respondent wishes the Commission to consider relating to the allegations. If no response is filed, the allegations shall be deemed admitted.

(iii) If, upon considering the written submissions of the respondent, the Commission determines that there remains a genuine dispute as to any material fact, the Commission may order further proceedings to be presided over by an Administrative Law Judge or by one or more Commissioners sitting as Administrative Law Judges (hereinafter referred to collectively as the Administrative Law Judge), or by the Commission. The Commission order shall specify the nature and scope of any proceeding, including whether live testimony will be heard and whether any pre-hearing discovery will be allowed and if so to what extent. The attorney respondent shall be granted due opportunity to be heard in his or her own defense and may be represented by counsel. If the written submissions of the respondent raise no genuine dispute of material fact, the Commission may issue immediately any or all of the sanctions enumerated in the order to show cause provided for in paragraph (e)(5)(i) of this section.

(iv) Commission counsel shall be appointed by the Bureau Officer to prosecute the allegations of misconduct in any administrative disciplinary proceedings instituted pursuant to this rule.

(v) If the Commission assigns the matter to an Administrative Law Judge, the Commission will establish a deadline for an initial decision. The deadline shall not be modified by the Administrative Law Judge except that it may be amended by leave of the Commission.

(vi) Based on the entirety of the record of administrative proceedings, the

[1] The standards of conduct and disciplinary procedures under this § 4.1(e) apply only to outside attorneys practicing before the Commission and not to Commission staff. Allegations of misconduct by Commission employees will be handled pursuant to procedures for employee discipline or pursuant to investigations by the Office of Inspector General.

[2] For purposes of this rule, knowingly giving false or misleading information includes knowingly omitting material facts necessary to make any oral or written statements not misleading in light of the circumstances under which they were made.

Administrative Law Judge or the Commission if it reviews the matter in the first instance, shall issue a decision either dismissing the allegations or, if it is determined that the allegations are supported by a preponderance of the evidence, specify an appropriate sanction. An Administrative Law Judge's decision may be appealed to the Commission by either party within 30 days. If the Administrative Law Judge's decision is appealed, the Commission will thereafter issue a scheduling order governing the appeal.

(vii) Investigations and administrative proceedings prior to the hearing on the order to show cause will be nonpublic unless otherwise ordered by the Commission. Any administrative hearing on the order to show cause, and any oral argument on appeal, shall be open to the public unless otherwise ordered for good cause by the Commission or the Administrative Law Judge.

(6) Regardless of any action or determination the Commission may or may not make, the Commission may direct the General Counsel to refer the allegations of misconduct to the appropriate state, territory, or District of Columbia bar or any other appropriate authority for further action.

(7) Upon receipt of notification from any authority having power to suspend or disbar an attorney from the practice of law within any state, territory, or the District of Columbia, demonstrating that an attorney practicing before the Commission is subject to an order of final suspension (not merely temporary suspension pending further action) or disbarment by such authority, the Commission may, without resort to any of the procedures described in this section, enter an order temporarily suspending the attorney from practice before it and directing the attorney to show cause within 30 days from the date of said order why the Commission should not impose further discipline against the attorney. If no response is filed, the attorney will be deemed to have acceded to such further discipline as the Commission deems appropriate. If a response is received, the Commission may take action or initiate proceedings consistent with paragraph (e)(5) of this section before making a determination whether, and to what extent, to impose further discipline against the attorney.

(8) The disciplinary process described in this section is in addition to, and does not supersede, the authority of the Commission or an Administrative Law Judge to discipline attorneys participating in part 3 proceedings pursuant to §§ 3.24(b)(2) or 3.42(d).

§ 4.2 [Amended]

■ 16. In § 4.2, amend paragraphs (d)(2) and (d)(4), by removing the phrase ''§ 2.7(d), § 2.7(f)'' and adding in its place ''§ 2.10(a)''.

§ 4.9 [Amended]

■ 17. Amend § 4.9, by removing the phrase ''(16 CFR 2.7)'' from paragraph (b)(4) heading and the phrase '', requests for review by the full Commission of those rulings, and Commission rulings on such requests'' from paragraph (b)(4)(i).

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,

Secretary.

The following will not appear in the Code of Federal Regulations.

Statement of Chairman Jon Leibowitz Regarding Revisions to the Commission's Part 2 Rules and Rule 4.1(e)

September 19, 2012

Today the Commission issued final changes to Parts 2 and 4 of the agency's Rules of Practice. The revised Rules streamline and update the procedures for Commission investigations, and clarify the agency's procedures for evaluating allegations of misconduct by attorneys practicing before the Commission, making us a more effective agency.

All of the Commission generally supports the revisions. A legitimate question has been raised, however, that the revisions to the Part 2 Rules should have gone further. One issue involves the occasional use of ''access letters,'' rather than compulsory process, to conduct Commission competition investigations. Over the past few years, the Commission has moved decisively toward greater use of compulsory process in these investigations. Compulsory process results in faster, more efficient investigations, especially in anticompetitive conduct matters where the recipients may not have strong incentives to cooperate quickly with Commission staff. Our experience has shown that, all too often, the recipients of voluntary access letters slow walk compliance. Nevertheless, while most competition investigations warrant compulsory process, and its use is strongly encouraged, it makes sense to provide staff with at least some flexibility in choosing which method to deploy in at least some investigations.

Another question that has been raised is whether the Rules should require staff to submit regular status reports to all Commissioners on pending investigations. Our staff already meets regularly with individual Commissioners and responds to any inquiries about particular matters. Moreover, our current practice is for staff to submit regular status updates to the Commission at six-month intervals. This best practice, however, is a matter of internal management that does not necessarily need to be enshrined in the Rules of Practice.

[FR Doc. 2012–23691 Filed 9–26–12; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF EDUCATION

34 CFR Parts 668, 674, 682, and 685

Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Updated waivers and modifications of statutory and regulatory provisions.

SUMMARY: The Secretary is issuing updated waivers and modifications of statutory and regulatory provisions governing the Federal student financial aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act requires the Secretary to publish, in a notice in the **Federal Register**, the waivers or modifications of statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA), to assist individuals who are performing qualifying military service, and individuals who are affected by a disaster, war or other military operation or national emergency, as described in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Effective September 27, 2012. The waivers and modifications in this document expire on September 30, 2017.

FOR FURTHER INFORMATION CONTACT: For provisions related to the title IV loan programs (Federal Perkins Loan Program, Federal Family Education Loan (FFEL) Program, and Federal Direct Loan (Direct Loan) Program): Gail McLarnon, U.S. Department of Education, 1990 K Street NW., Room 8026, Washington, DC 20006–8510. Telephone: (202) 219–7048 or by email: *Gail.McLarnon@ed.gov.* For other

provisions: Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006–8510. Telephone: (202) 502–7526 or by email: *Wendy.Macias@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., Braille, large print, audiotape, or compact disc) by contacting Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006–8510. Telephone: (202) 502–7526 or by email: *Wendy.Macias@ed.gov.*

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** on December 12, 2003 (68 FR 69312), the Secretary exercised the authority under the HEROES Act (Pub. L. 108–76, 20 U.S.C. 1098bb(b)) and announced waivers and modifications of statutory and regulatory provisions designed to assist ''affected individuals.'' Under 20 U.S.C. 1098ee(2), the term ''affected individual'' means an individual who:

- Is serving on active duty during a war or other military operation or national emergency;
- Is performing qualifying National Guard duty during a war or other military operation or national emergency;
- Resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
- Suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

Under the HEROES Act, the Secretary's authority to provide the waivers and modifications would have expired on September 30, 2005. On September 30, 2005, Public Law 109–78 extended the expiration date of the Secretary's authority to September 30, 2007. Accordingly, in a notice in the **Federal Register** published on October 20, 2005 (70 FR 61037), the Secretary extended the expiration of the waivers and modifications published on December 12, 2003, to September 30, 2007.

On September 30, 2007, the President signed into law Public Law 110–93, which eliminated the September 30, 2007, expiration date of the HEROES Act, thereby making permanent the Secretary's authority to issue waivers and modifications of statutory and regulatory provisions.

On December 26, 2007, the Secretary published a notice in the **Federal Register** (72 FR 72947) extending the waivers and modifications published on December 12, 2003, to September 30, 2012. In that notice, the Secretary also indicated an intent to review the waivers and modifications published on December 12, 2003, in light of statutory and regulatory changes and to consider whether to change some or all of the published waivers and modifications.

We are now updating the waivers and modifications to reflect the results of that review. With limited exceptions, the waivers and modifications in this notice reflect the same waivers and modifications originally published in the December 12, 2003, **Federal Register** notice. However, they have been updated to reflect statutory and regulatory changes that have occurred since the original publication. In addition, a waiver has been added to assist affected individuals in regard to the annual reevaluation requirements for borrowers who are repaying loans made under the Federal Family Education Loan (FFEL) Program or Federal Direct Loan (Direct Loan) Program under the Income-Based Repayment (IBR) or Income-Contingent Repayment (ICR) plans.

The waiver and modifications related to military deferments were eliminated because the time-limited military service deferment under section 455(f)(4) of the HEA to which they applied (commonly referred to as the Armed Forces deferment) has been replaced by the military service deferment authorized in sections 428(b)(1)(M)(iii), 455(f)(2)(C), and 464(c)(2)(A)(iii) of the HEA, which is available to all borrowers, regardless of when they received their loans, for any period during which a borrower is serving on active duty during a war or other military operation or national emergency, or is performing qualifying National Guard duty during a war or other military operation or national emergency.

In addition, the Secretary has decided not to retain the modification to the amount of unearned funds an institution must return under the Return of Title IV Funds requirements in section 484(b)(1) of the HEA and 34 CFR 668.22(g) because the Secretary has determined that it is not in the best interest of affected individuals. The removal of institutional charges that the institution is required to cover, and has covered, with non-title IV sources of aid generally results in the institution returning less unearned title IV, HEA program funds and the student returning more, often leaving the student with a larger title IV, HEA program loan debt.

The Secretary is issuing these waivers and modifications under the authority of the HEROES Act, 20 U.S.C. 1098bb(a). In accordance with the HEROES Act, the Secretary is providing the waivers and modifications of statutory and regulatory provisions applicable to the student financial assistance programs under title IV of the HEA that the Secretary believes are appropriate to ensure that:

- Affected individuals who are recipients of student financial assistance under title IV are not placed in a worse position financially in relation to that financial assistance because they are affected individuals;
- Affected individuals who are recipients of student financial assistance are not unduly subject to administrative burden or inadvertent, technical violations or defaults;
- Affected individuals are not penalized when a determination of need for student financial assistance is calculated;
- Affected individuals are not required to return or repay an overpayment of grant funds based on the HEA's Return of title IV Funds provision; and
- Entities that participate in the student financial assistance programs under title IV of the HEA and that are located in areas that are declared disaster areas by any Federal, State, or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, receive temporary relief from administrative requirements.

In 20 U.S.C. 1098bb(b)(1), the HEROES Act further provides that section 437 of the General Education Provisions Act (20 U.S.C. 1232) and section 553 of the Administrative Procedure Act (5 U.S.C. 553) do not apply to the contents of this notice.

In 20 U.S.C. 1098ee, the HEROES Act defines the following terms used in this notice:

Active duty has the meaning given that term in 10 U.S.C. 101(d)(1), but does not include active duty for training or attendance at a service school (e.g., the U.S. Military Academy or U.S. Naval Academy).

Military operation means a contingency operation as that term is defined in 10 U.S.C. 101(a)(13).

National emergency means a national emergency declared by the President of the United States.

Serving on active duty during a war or other military operation or national emergency includes service by an individual who is—

(A) a Reserve member of an Armed Force ordered to active duty under 10 U.S.C. 12301(a), 12301(g), 12302, 12304, or 12306, or any retired member of an Armed Force ordered to active duty under 10 U.S.C. 688, for service in connection with a war or other military operation or national emergency, regardless of the location at which that active duty service is performed; and

(B) any other member of an Armed Force on active duty in connection with any war, operation, or emergency or subsequent actions or conditions who has been assigned to a duty station at a location other than the location at which the member is normally assigned.

Qualifying National Guard duty during a war or other military operation or national emergency means service as a member of the National Guard on full-time National Guard duty (as defined in 10 U.S.C. 101(d)(5)) under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 U.S.C. 502(f), in connection with a war, another military operation, or a national emergency declared by the President and supported by Federal funds.

The following waivers and modifications are grouped into four categories, according to the affected individuals to whom they apply.

Category 1: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for ALL affected individuals as specified in the **SUPPLEMENTARY INFORMATION** *section of this notice:*

Need Analysis

Section 480 of the HEA provides that, in the calculation of an applicant's expected family contribution (EFC), the term ''total income,'' which is used in the determination of ''annual adjusted family income'' and ''available income,'' is equal to adjusted gross income plus untaxed income and benefits for the preceding tax year minus excludable income. The HEROES Act allows an institution to substitute adjusted gross income plus untaxed income and benefits received in the first calendar year of the award year for which such determination is made for any affected individual, and for his or her spouse and dependents, if applicable, in order to reflect more accurately the financial condition of an affected individual and his or her family. The Secretary has determined that an institution has the option of using the applicant's original EFC or the EFC based on the data from the first calendar year of the award year.

If an institution chooses to use the alternate EFC, it should use the administrative professional judgment procedures established by the Secretary as discussed in the following section on ''Professional Judgment.''

Professional Judgment

Section 479A of the HEA specifically gives the financial aid administrator (FAA) the authority to use professional judgment to make case-by-case adjustments to the cost of attendance or to the values of the items used in calculating the EFC to reflect a student's special circumstances. The Secretary is modifying this provision by removing the requirement that adjustments be made case by case for affected individuals. The use of professional judgment in Federal need analysis is discussed in the Federal Student Aid Handbook available at *www.ifap.ed.gov.*

The Secretary encourages FAAs to use professional judgment in order to reflect more accurately the financial need of affected individuals. To that end, the Secretary encourages institutions to determine an affected individual's need using the method listed below that is the most beneficial to the affected individual:

- By using the adjusted gross income (AGI) plus untaxed income and benefits received in the first calendar year of the award year;
- By using professional judgment; or
- By making no modifications. (For example, in some cases, an individual's income will increase as a result of serving on active duty or performing qualifying National Guard duty.)

The FAA must clearly document the reasons for any adjustment and the facts supporting the decision. In almost all cases, the FAA should have documentation from a third party with knowledge of the student's unusual circumstances. As usual, any professional judgment decisions made by an FAA that affect a student's eligibility for a subsidized student financial assistance program must be reported to the Central Processing System.

Return of Title IV Funds—Grant Overpayments Owed by the Student

Section 484B(b)(2) of the HEA and 34 CFR 668.22(h)(3)(ii) require a student to return or repay, as appropriate, unearned grant funds for which the student is responsible under the Return of Title IV Funds calculation. For a student who withdraws from an institution because of his or her status as an affected individual, the Secretary is waiving these statutory and regulatory requirements so that a student is not required to return or repay any overpayment of grant funds based on the Return of Title IV Funds provisions.

For these students, the Secretary also waives 34 CFR 668.22(h)(4), which:

- Requires an institution to notify a student of a grant overpayment and the actions the student must take to resolve the overpayment;
- Denies eligibility to a student who owes a grant overpayment and does not take an action to resolve the overpayment; and
- Requires an institution to refer a grant overpayment to the Secretary under certain conditions.

Therefore, an institution is not required to contact the student, notify the National Student Loan Data System, or refer the overpayment to the Secretary. However, the institution must document in the student's file the amount of any overpayment as part of the documentation of the application of this waiver.

The student is not required to return or repay an overpayment of grant funds based on the Return of Title IV Funds provision. Therefore, an institution must not apply any title IV credit balance to the grant overpayment prior to: using a credit balance to pay authorized charges; paying any amount of the title IV credit balance to the student or parent, in the case of a parent PLUS loan; or using the credit balance to reduce the student's title IV loan debt (with the student's authorization) as provided in Dear Colleague Letter GEN–04–03 (February 2004; revised November 2004).

Verification of AGI and U.S. Income Tax Paid

Pursuant to 34 CFR 668.57(a)(3)(ii), for an individual who is required to file a U.S. income tax return and has been granted a filing extension by the Internal Revenue Service (IRS), an institution must accept, in lieu of an income tax return for verification of AGI or income tax paid:

- A copy of IRS Form 4868, ''Application for Automatic Extension of Time to File U.S. Individual Income Tax Return,'' that the individual filed with the IRS for the specified year, or a copy of the IRS's approval of an extension beyond the automatic six-month extension if the individual requested an additional extension of the filing time; and
- A copy of each IRS Form W–2 that the individual received for the specified year or, for a self-employed individual, a statement signed by the individual certifying the amount of AGI for the specified year.

The Secretary is modifying this provision so that the submission of a

copy of IRS Form 4868 or a copy of the IRS extension approval is not required if an affected individual has not filed an income tax return by the filing deadline.

For these individuals, an institution must accept, in lieu of an income tax return for verification of AGI and taxes paid:

- A signed statement from the individual certifying that he or she has not filed an income tax return or a request for a filing extension because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency; and
- A copy of each W–2 received for the specified year or, for a self-employed individual, a statement signed by the individual certifying the amount of AGI for the specified year.

An institution may request that an individual granted a filing extension submit tax information using the IRS Data Retrieval Tool, or by obtaining a tax return transcript from the IRS that lists tax account information for the specified year after the income tax return is filed. If an institution receives the tax information, it must verify the income information of the tax filer(s).

Category 2: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty, performing qualifying National Guard duty during a war or other military operation or national emergency, or who reside or are employed in a disaster area as described in the **SUPPLEMENTARY INFORMATION** *section of this notice.*

Return of Title IV Funds—Post-Withdrawal Disbursements of Loan Funds

Under 34 CFR 668.22(a)(6)(iii)(A)(*5*) and (a)(6)(iii)(D), a student (or parent for a parent PLUS loan) must be provided a post-withdrawal disbursement of a title IV loan if the student (or parent) responds to an institution's notification of the post-withdrawal disbursement within 14 days of the date that the institution sent the notice, or a later deadline set by the institution. If a student or parent submits a late response, an institution may, but is not required to, make the post-withdrawal disbursement.

The Secretary is modifying this requirement so that, for a student who withdraws because of his or her status as an affected individual in this category and who is eligible for a post-withdrawal disbursement, the 14-day time period in which the student (or parent) must normally respond to the offer of the post-withdrawal disbursement is extended to 45 days, or to a later deadline set by the institution. If the student or parent submits a response after the designated period, the institution may, but is not required to, make the post-withdrawal disbursement. As required under the current regulations, if the student or parent submits the timely response instructing the institution to make all or a portion of the post-withdrawal disbursement, or the institution chooses to make a post-withdrawal disbursement based on receipt of a late response, the institution must disburse the funds within 180 days of the date of the institution's determination that the student withdrew.

Leaves of Absence

Under 34 CFR 668.22(d)(3)(iii)(B), a student is required to provide a written, signed, and dated request, which includes the reason for that request, for an approved leave of absence prior to the leave of absence. However, if unforeseen circumstances prevent a student from providing a prior written request, the institution may grant the student's request for a leave of absence if the institution documents its decision and collects the written request at a later date. It may be appropriate in certain limited cases for an institution to provide an approved leave of absence to a student who must interrupt his or her enrollment because he or she is an affected individual in this category. Therefore, the Secretary is waiving the requirement that the student provide a written request for affected individuals who have difficulty providing a written request as a result of being an affected individual in this category. The institution's documentation of its decision to grant the leave of absence must include, in addition to the reason for the leave of absence, the reason for waiving the requirement that the leave of absence be requested in writing.

Treatment of Title IV Credit Balances When a Student Withdraws

Under 34 CFR 668.164(e), an institution must pay any title IV credit balance to the student, or parent in the case of a parent PLUS loan, within 14 days after the balance occurred. However, under 34 CFR 668.165(b)(i), if a student (or parent) has provided authorization, an institution may use a title IV credit balance to reduce the borrower's total title IV loan debt, not just the title IV loan debt for the period for which the Return of Title IV Funds calculation is performed.

Therefore, for students who withdraw because they are affected individuals in this category, the Secretary is modifying 34 CFR 668.164(e) to consider that the institution has met the 14-day requirement if, within that timeframe, the institution attempts to contact the student (or parent) to suggest that the institution be authorized to return the credit balance to the loan program(s).

Based upon the instructions of the student (or parent), the institution must promptly return the funds to the title IV loan programs or pay the credit balance to the student (or parent).

In addition, if an institution chooses to attempt to contact the student (or parent) for authorization to apply the credit balance to reduce the student's title IV loan debt, it must allow the student (or parent) 45 days to respond. If there is no response within 45 days, the institution must promptly pay the credit balance to the student (or parent) or return the funds to the title IV programs if the student or parent cannot be located.

Consistent with the guidance provided in Dear Colleague Letter GEN–04–03 (February 2004; revised November 2004), the institution may also choose to pay the credit balance to the student (or parent) without first requesting permission to apply the credit balance to reduce the student's title IV loan debt.

Cash Management—Borrower Request for Loan Cancellation

Under 34 CFR 668.165(a)(4)(ii), an institution must return loan proceeds or cancel the loan, or both, if the institution receives a loan cancellation request from a borrower within 14 days after the date of the institution's notice to the borrower of his or her right to cancel all or a portion of a loan, or by the first day of the payment period if the institution sends the notice more than 14 days before the first day of the payment period. Under 34 CFR 668.165(a)(4)(iii), if an institution receives a late loan cancellation request from a borrower, the institution may, but is not required to, comply with the request. For a borrower who is an affected individual in this category, the Secretary is modifying this provision to require an institution to allow at least 60 days, rather than at least 14 days, for the borrower to request the cancellation of all or a portion of a loan for which proceeds have been credited to the account at the institution. If an institution receives a loan cancellation request from a borrower after the 60-day period, the institution may, but is not required to, comply with the request.

Cash Management—Student and Parent Authorizations

Under 34 CFR 668.164(c)(3)(i), an institution must obtain affirmative consent from a student or parent, as applicable, to disburse title IV funds to a bank account designated by the student or parent. In addition, 34 CFR 668.165(b)(1) provides that an institution must obtain a written authorization from a student or parent, as applicable, to:

- Use title IV funds to pay for educationally related charges incurred by the student at the institution other than charges for tuition and fees and, as applicable, room and board; and
- Hold on behalf of the student or parent any title IV funds that would otherwise be paid directly to the student or parent.

The Secretary is modifying these provisions to permit an institution to accept affirmative consent and any authorization provided by a student (or parent for a parent PLUS loan) orally, rather than in writing, if the student or parent is prevented from providing a written affirmative consent or authorization because of his or her status as an affected individual in this category. The institution must document the oral consent or authorization.

Satisfactory Academic Progress

Institutions may, in cases where a student failed to meet the institution's satisfactory academic progress standards as a direct result of being an affected individual in this category, apply the exception provision of ''other special circumstances'' contained in 34 CFR 668.34(a)(9)(ii).

Borrowers in a Grace Period

Sections 428(b)(7)(D) and 464(c)(7) of the HEA and 34 CFR 674.31(b)(2)(i)(C), 682.209(a)(5), and 685.207(b)(2)(ii) and (c)(2)(ii) exclude from a Federal Perkins Loan, FFEL, or Direct Loan borrower's (title IV borrower's) initial grace period any period during which a borrower who is a member of an Armed Forces reserve component is called or ordered to active duty for a period of more than 30 days. The statutory and regulatory provisions further require that any single excluded period may not exceed three years and must include the time necessary for the borrower to resume enrollment at the next available regular enrollment period. Lastly, any borrower who is in a grace period when called or ordered to active duty is entitled to another six- or nine-month grace period, as applicable, upon completion of the excluded period of service.

The Secretary is modifying these statutory and regulatory provisions to exclude from a title IV borrower's initial grace period, any period, not to exceed three years, during which a borrower is an affected individual in this category. Any excluded period must include the time necessary for an affected individual in this category to resume enrollment at the next available enrollment period.

Borrowers in an ''In-School'' Period

A title IV borrower is considered to be in an ''in-school'' status and is not required to make payments on a title IV loan that has not entered repayment as long as the borrower is enrolled at an eligible institution on at least a half-time basis. Under sections 428(b)(7) and 464(c)(1)(A) of the HEA and 34 CFR 674.31(b)(2), 682.209(a), and 685.207(b), (c), and (e)(2) and (3), when a title IV borrower ceases to be enrolled at an eligible institution on at least a half-time basis, the borrower is obligated to begin repayment of the loan after a six- or nine-month grace period, depending on the title IV loan program and the terms of the borrower's promissory note. The Secretary is modifying the statutory and regulatory provisions that obligate an ''in-school'' borrower who has dropped below half-time status to begin repayment if the borrower is an affected individual in this category, by requiring the holder of the loan to maintain the loan in an ''in-school'' status for a period not to exceed three years, including the time necessary for the borrower to resume enrollment in the next regular enrollment period, if the borrower is planning to go back to school. The Secretary will pay interest that accrues on a subsidized Stafford Loan as a result of the extension of a borrower's in-school status under this modification.

Borrowers in an In-School or Graduate Fellowship Deferment

Under sections 427(a)(2)(C)(i), 428(b)(1)(M)(i), 428B(a)(2) and (d)(1), 428C(b)(4)(C), 455(f)(2)(A), and 464(c)(2)(A)(i) of the HEA and 34 CFR 674.34(b)(1), 682.210(b)(1)(i) and (ii), 682.210(s)(2)and(3), and 685.204(b)(1)(i)(A) and (B), a title IV borrower is eligible for a deferment on the loan during periods after the commencement or resumption of the repayment period on the loan when the borrower is enrolled and in attendance as a regular student on at least a half-time basis (or full-time, if required by the terms of the borrower's promissory note) at an eligible institution; enrolled and in attendance as a regular student in a course of study that is part of a graduate fellowship program; or engaged in graduate or post-graduate fellowship-supported study outside the United States. The borrower's deferment period ends when the borrower no longer meets one of the above conditions.

The Secretary is waiving the statutory and regulatory eligibility requirements for this deferment for title IV borrowers who were required to interrupt a graduate fellowship deferment, or who were in an in-school deferment but who left school, because of their status as an affected individual in this category. The holder of the loan is required to maintain the loan in the graduate fellowship deferment or in-school deferment status for a period not to exceed three years during which the borrower is an affected individual in this category. This period includes the time necessary for the borrower to resume his or her graduate fellowship program or resume enrollment in the next regular enrollment period if the borrower returns to school. The Secretary will pay interest that accrues on a subsidized Stafford Loan as a result of extending a borrower's eligibility for deferment under this waiver.

Forbearance

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2), there is a three-year cumulative limit on the length of forbearances that a Federal Perkins Loan borrower can receive. To assist Federal Perkins Loan borrowers who are affected individuals in this category, the Secretary is waiving these statutory and regulatory requirements so that any forbearance based on a borrower's status as an affected individual in this category is excluded from the three-year cumulative limit.

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2) and (3), a school must receive a request and supporting documentation from a Federal Perkins Loan borrower before granting the borrower a forbearance, the terms of which must be in the form of a written agreement. The Secretary is waiving these statutory and regulatory provisions to require an institution to grant forbearance based on the borrower's status as an affected individual in this category for a one-year period, including a three-month ''transition period'' immediately following, without supporting documentation or a written agreement, based on the written or oral request of the borrower, a member of the borrower's family, or another reliable source. The purpose of the three-month transition period is to assist borrowers so that they will not be required to

reenter repayment immediately after they are no longer affected individuals in this category. In order to grant the borrower forbearance beyond the initial twelve- to fifteen-month period, supporting documentation from the borrower, a member of the borrower's family, or another reliable source is required.

Under 34 CFR 682.211(i)(1), a FFEL borrower who requests forbearance because of a military mobilization must provide the loan holder with documentation showing that he or she is subject to a military mobilization. The Secretary is waiving this requirement to allow a borrower who is not otherwise eligible for the military service deferment under 34 CFR 682.210(t)(9), 685.204(e)(7), and 674.34(h)(7) to receive forbearance at the request of the borrower, a member of the borrower's family, or another reliable source for a one-year period, including a three-month transition period that immediately follows immediately following, without providing the loan holder with documentation. In order to grant the borrower forbearance beyond this period, documentation supporting the borrower's military mobilization must be submitted to the holder of the loan.

The Secretary will apply the forbearance waivers and modifications in this section to loans held by the Department of Education.

Collection of Defaulted Loans

In accordance with 34 CFR part 674, subpart C—Due Diligence, and 682.410(b)(6), schools and guaranty agencies must attempt to recover amounts owed from defaulted Federal Perkins and FFEL borrowers, respectively. The Secretary is waiving the regulatory provisions that require schools and guaranty agencies to attempt collection on defaulted loans for the time period during which the borrower is an affected individual in this category and for a three-month transition period. The school or guaranty agency may stop collection activities upon notification by the borrower, a member of the borrower's family, or another reliable source that the borrower is an affected individual in this category. Collection activities must resume after the borrower has notified the school or guaranty agency that he or she is no longer an affected individual and the three-month transition period has expired. The loan holder must document in the loan file why it has suspended collection activities on the loan, and the loan holder is not required to obtain evidence of the borrower's status while collection activities have been suspended. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Loan Cancellation

Depending on the loan program, borrowers may qualify for loan cancellation if they are employed fulltime in specified occupations, such as teaching, as a civil legal assistance attorney, or in law enforcement, pursuant to Sections 428J, 428L, 460(b)(1), and 465(a)(2)(A)–(M) and (a)(3) of the HEA, and 34 CFR 674.53, 674.55, 674.55(b), 674.56, 674.57, 674.58, 674.60, 682.216, and 685.217. Generally, to qualify for loan cancellation, borrowers must perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as five consecutive years.

For borrowers who are affected individuals in this category, the Secretary is waiving the requirements that apply to the various loan cancellations that such periods of service be uninterrupted or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual in this category. Therefore, the service period required for the borrower to receive or retain a loan cancellation for which he or she is otherwise eligible will not be considered interrupted by any period during which the borrower is an affected individual in this category, including the three-month transition period. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Rehabilitation of Defaulted Loans

A borrower of a Direct Loan or FFEL Loan must make nine on-time, monthly payments over ten consecutive months to rehabilitate a defaulted loan in accordance with section 428F(a) of the HEA and 34 CFR 682.405 and 685.211(f). Federal Perkins Loan borrowers must make nine consecutive, on-time monthly payments to rehabilitate a defaulted Federal Perkins Loan in accordance with section 464(h)(1)(A) of the HEA. To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving the statutory and regulatory requirements that payments made to rehabilitate a loan must be consecutive or made over no more than ten consecutive months. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category, or the three-month transition period, as an interruption in the number of monthly, on-time payments required to be made consecutively, or the number of consecutive months in which payment is required to be made, for loan rehabilitation. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer considered to be an affected individual in this category, and the three-month transition period has expired, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Reinstatement of Title IV Eligibility

Under sections 428F(b) and 464(h)(2) of the HEA and under the definition of ''satisfactory repayment arrangement'' in 34 CFR 668.35(a)(2), 674.2(b), 682.200(b), and 685.102(b), a defaulted title IV borrower may make six consecutive, monthly, on-time payments to reestablish eligibility for title IV student financial assistance. To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving statutory and regulatory provisions that require the borrower to make consecutive payments in order to reestablish eligibility for title IV student financial assistance. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the six consecutive, monthly, on-time payments required for reestablishing title IV eligibility. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer considered to be an affected individual or in the three-month transition period for purposes of this notice, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Consolidation of Defaulted Loans

Under the definition of ''satisfactory repayment arrangement'' in 34 CFR

685.102(b), a defaulted FFEL or Direct Loan borrower may establish eligibility to consolidate a defaulted loan in the Direct Consolidation Loan Program by making three consecutive, monthly, on-time payments on the loan. The Secretary is waiving the regulatory requirement that such payments be consecutive. FFEL loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the three consecutive, monthly, on-time payments required for establishing eligibility to consolidate a defaulted loan in the Direct Consolidation Loan Program. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer considered to be an affected individual in this category or in the three-month transition period, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status as an affected individual. The Secretary will apply the waivers described in this paragraph to Direct and FFEL loans held by the Department of Education and to commercially held FFEL loans.

Annual Reevaluation Requirements for Direct Loan and FFEL Borrowers Under the Income-Based Repayment (IBR) and Income-Contingent Repayment (ICR) Plans

Section 493C(c) of the HEA requires the Secretary to establish procedures for annually determining a borrower's eligibility for income-based repayment, including verification of a borrower's annual income and the annual amount due on the total amount of the borrower's loans. Section 493C(b)(6) of the HEA provides that if a borrower no longer has a partial financial hardship, the maximum monthly payment amount the borrower will be required to pay is an amount that does not exceed the monthly amount paid under the standard repayment plan based on a ten-year repayment period. Under 34 CFR 682.215(e), 682.221(e), and 685.209, borrowers repaying under the IBR or ICR plan must be evaluated annually to determine if the borrower continues to have a partial financial hardship, if applicable, and whether the borrower's monthly payment amount under the IBR or ICR plan should be recalculated based on changes in the borrower's income or family size. Borrowers are required to provide information about their annual income and family size to the loan holder each year by the deadline specified by the holder. A borrower who fails to provide the required information would have his or her monthly payment amount adjusted to the amount the borrower would pay under the ten-year standard payment plan.

The Secretary is waiving these statutory and regulatory provisions to require loan holders to maintain an affected borrower's payment at the most recently calculated IBR or ICR monthly payment amount for up to a three-year period, including a three-month transition period immediately following, if the borrower's status as an affected individual in this category has prevented the borrower from providing documentation of updated income and family size by the specified deadline for the holder's receipt of that information.

Category 3: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency as described in the **SUPPLEMENTARY INFORMATION** *section of this notice.*

Institutional Charges and Refunds

The HEROES Act encourages institutions to provide a full refund of tuition, fees, and other institutional charges for the portion of a period of instruction that a student was unable to complete, or for which the student did not receive academic credit, because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency. Alternatively, the Secretary encourages institutions to provide a credit in a comparable amount against future charges.

The HEROES Act also recommends that institutions consider providing easy and flexible reenrollment options to students who are affected individuals in this category. At a minimum, an institution must comply with the requirements of 34 CFR 668.18, which addresses the readmission requirements for service members under certain conditions.

Of course, an institution may provide such treatment to affected individuals other than those who are called up to active duty or for qualifying National Guard duty during a war or other military operation or national emergency.

Before an institution makes a refund of institutional charges, it must perform the required Return of Title IV Funds calculations based upon the originally assessed institutional charges. After determining the amount that the institution must return to the title IV Federal student aid programs, any reduction of institutional charges may take into account the funds that the institution is required to return. In other words, we do not expect that an institution would both return funds to the Federal programs and also provide a refund of those same funds to the student.

Category 4: The Secretary is waiving or modifying the following provisions of the HEA and the Department's regulations for dependents and spouses of affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency as described in the **SUPPLEMENTARY INFORMATION** *section of this notice.*

Verification Signature Requirements

Regulations in 34 CFR 668.57(b) and (c) require signatures to verify the number of family members in the household and the number of family members enrolled in postsecondary institutions. The Secretary is waiving the requirement that a dependent student submit a statement signed by one of the applicant's parents when no responsible parent can provide the required signature because of the parent's status as an affected individual in this category.

Required Signatures on the Free Application for Federal Student Aid (FAFSA), Student Aid Report (SAR), and Institutional Student Information Record (ISIR)

Generally, when a dependent applicant for title IV aid submits the FAFSA or submits corrections to a previously submitted FAFSA, at least one parental signature is required on the FAFSA, SAR, or ISIR. The Secretary is waiving this requirement so that an applicant need not provide a parent's signature when there is no responsible parent who can provide the required signature because of the parent's status as an affected individual in this category. In these situations, a student's high school counselor or the FAA may sign on behalf of the parent as long as the applicant provides adequate documentation concerning the parent's inability to provide a signature due to the parent's status as an affected individual in this category.

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(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Education Loan Program; 84.032 Federal PLUS Program; 84.033 Federal Work Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; and 84.268 William D. Ford Federal Direct Loan Program.)

Program Authority: 20 U.S.C. 1071, 1082, 1087a, 1087aa, Part F–1.

Dated: September 24, 2012.

David A. Bergeron,

Acting Assistant Secretary for Postsecondary Education.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 51

RIN 2900–AO36

Removal of 30-Day Residency Requirement for Per Diem Payments

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking direct final action to amend its regulations concerning per diem payments to State homes for the provision of nursing home care to veterans. Specifically, this rule removes the requirement that a veteran must have resided in a State home for 30 consecutive days before VA will pay per diem for that veteran when there is no overnight stay. The intended effect of this direct final rule is to permit per diem payments to State homes for veterans who do not stay overnight, regardless of how long the veterans have resided at the State homes, so that the State homes will hold the veterans' beds until the veterans return.

DATES: *Effective:* This rule is effective on November 26, 2012, without further notice, unless VA receives a significant adverse comment by October 29, 2012. If significant adverse comment is received, VA will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AO36, Removal of 30-Day Residency Requirement for Per Diem Payments.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Harold Bailey, Program Management Officer (Director of Administration), VA Health Administration Center, Purchased Care (10NB3), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (303) 331–7551. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This rule amends part 51 of title 38, Code of Federal Regulations, to remove the requirement that a veteran receiving nursing home care in a State home must have resided in the State home for at least 30 consecutive days before VA will pay per diem when that veteran does not stay in the State home overnight. VA pays per diem to State homes for veterans who stay elsewhere overnight to create a ''bed hold,'' so that the State home reserves the veteran's bed until the veteran returns from a temporary absence. Typically, these temporary absences arise from a veteran's acute need for a higher level of care, such as a period of hospitalization. Temporary absences also arise for reasons other than hospital care, such as when a veteran travels to visit family members.

This rule also clarifies in 38 CFR 51.43(c) that VA calculates occupancy rate ''by dividing the total number of patients in the nursing home or domiciliary by the total recognized nursing home or domiciliary beds in that facility.'' This is consistent with current practice, and will help ensure that State homes understand our methodology.

The 30-day residency requirement for bed hold per diem payments was established in 2009 in 38 CFR 51.43(c), which stated: ''Per diem will be paid under §§ 51.40 and 51.41 for each day that the veteran is receiving care and has an overnight stay. Per diem also will be paid when there is no overnight stay if the veteran has resided in the facility for 30 consecutive days (including overnight stays) and the facility has an occupancy rate of 90 percent or greater. However, these payments will be made only for the first 10 consecutive days during which the veteran is admitted as a patient for any stay in a VA or other hospital (a hospital stay could occur more than once in a calendar year) and only for the first 12 days in a calendar year during which the veteran is absent for purposes other than receiving hospital care.'' *See* 74 FR 19433.

In the proposed rule that preceded the addition of § 51.43, we stated that the basis for the 30-day residency requirement was that ''State homes should receive per diem payments to hold beds only for permanent residents and only if the State home would likely fill the bed without such payments. Allowing payments for bed holds only after a veteran has been in a nursing home for at least 30 consecutive days (including overnight stays) appears to be sufficient to establish permanent residency.'' 73 FR 72402. In addition, the 2009 final rule confirmed VA's intent to make the 30-day rule a factor that directly affected eligibility for bed hold payments, stating: ''We believe that 30 days is a minimal amount of time for demonstrating that a veteran intends to be a resident at the State home and that the veteran was not temporarily placed in the State home.'' 74 FR 19429.

VA adopted the 30-day residency requirement as the measure for determining whether a veteran would likely return to a State home after not having stayed there overnight, and in turn whether the State home should receive continued per diem payments in the veteran's absence to hold the veteran's bed. Through application of this requirement, however, VA has come to recognize that duration of residency in a State home is not an accurate predictor of whether a veteran is likely to return to a State home after a temporary absence. For instance, with absences resulting from the veteran's need for hospital care, the veteran's health status while hospitalized is actually what determines whether and

when he or she will return to a nursing home level of care at the State home. With absences resulting from non-hospital care reasons, the veteran in almost all instances communicates an intent to return to the State home within a specific period of time, or communicates that he or she will not be returning. With both types of absences, we no longer find that a veteran's period of residency at a State home is determinative as to whether the veteran will likely return to the State home. Therefore, we believe the 30-day residency requirement is unnecessary in ensuring standards of bed hold per diem payments, and are removing this requirement from 38 CFR 51.43(c).

Based on our experience in applying § 51.43(c) since 2009, we believe our determination of whether to pay bed hold per diem for veterans who are absent overnight from State homes should be based on whether the veteran's bed would otherwise be taken by another resident. The best predictor of whether a veteran's bed is likely to be taken by another resident during the veteran's absence is the State home's occupancy rate, not the length of time the veteran has resided in the State home. If a State home has sufficient beds to offer new residents so that it need not fill the veteran's bed during the veteran's absence, then per diem payments to hold the veteran's bed are not needed. If the State home does not have a sufficient number of available beds, then per diem payments should be paid for a veteran during any absence, subject to the limitations set forth in the rest of § 51.43(c) to ensure the bed is reserved for the veteran until he or she returns to the State home.

Thus, the current 90 percent occupancy requirement for State homes in § 51.43(c) will serve as the sole criterion to determine whether bed hold per diem is paid to State homes, and those payments will remain subject to the limitations currently in § 51.43(c) (''Per diem also will be paid when there is no overnight stay if * * * the facility has an occupancy rate of 90 percent or greater. However, these payments will be made only for the first 10 consecutive days during which the veteran is admitted as a patient for any stay in a VA or other hospital (a hospital stay could occur more than once in a calendar year) and only for the first 12 days in a calendar year during which the veteran is absent for purposes other than receiving hospital care.''). Maintaining the occupancy measure and payment limitations for bed hold per diem payments, while removing the residency requirement, will help ensure that VA is able to provide stable nursing home care via State homes as we intend.

Additionally, removing the 30-day residency requirement brings VA more in line with generally accepted standards of practice for nursing home care. VA's other community nursing home care programs (such as the contract nursing home care program) do not have a similar residency requirement, and VA seeks to have a consistent bed hold policy for nursing home care provided to veterans in non-VA facilities. Moreover, it is administratively burdensome to track periods of residency in State homes across the country, as the total estimated average daily census for State homes is over 18,000 veterans in the nursing home level of care. This continuous tracking diverts significant VA resources, as this information must be monitored for 139 State nursing homes 5 days a week at 97 VA Medical Centers (VAMC) of jurisdiction, for 52 weeks a year for approximately an hour a day. Assuming a GS–06, step 5 grade level employee at each VAMC tracks residency for those state nursing homes in its jurisdiction, the estimated cost to VA in continuing this practice is $418,000 annually. In comparison, VA estimates that 1,095 more per diem payments would be made per year if there were no residency requirement, for an estimated increased annual cost of $265,000. Based on these calculations, tracking residency, due to the current 30-day residency requirement, costs VA nearly 60 percent more than the amount of the projected increase in per diem payments that VA would make if the 30-day residency requirement were removed. In addition, tracking residency does not ensure veteran beds are held as we intend and does not contribute to our efforts in providing dependable nursing home care to veterans through State homes. Under the current rule, State homes also shoulder the administrative burden of tracking and reporting the residency dates of veterans, and will likely receive a similar benefit from the removal of the 30-day requirement.

Though in the past we believed a 30-day residency requirement helped ensure per diem was paid judiciously, VA now understands that the costs of this requirement outweigh possible savings. There have been numerous ongoing requests from the State home community and the National Association of State Veterans Homes (NASVH) for VA to remove the 30-day residency requirement for bed hold per diem payments. Because this rule benefits veterans and liberalizes a prerequisite for per diem payments, we do not believe that any members of the public are adversely affected by this rule.

Administrative Procedure Act

VA believes this direct final rule is non-controversial, anticipates that this rule will not result in any significant adverse comment, and therefore is issuing it as a direct final rule. Previous actions of this nature, which remove restrictions on VA medical benefits to improve health outcomes, have not been controversial and have not resulted in any significant adverse comment or objection. However, in the ''Proposed Rules'' section of this **Federal Register** publication, we are publishing a separate, substantially identical proposed rule document that will serve as a proposal for the provisions in this direct final rule if any significant adverse comment is filed. (See RIN 2900–AO37).

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. In determining whether an adverse comment is significant and warrants withdrawing a direct final rule, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant comment unless the comment states why the rule would be ineffective without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, the rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that no significant adverse comment was received and confirming the date on which the final rule will become effective. VA will also publish a notice in the **Federal Register** withdrawing the proposed rule.

However, if any significant adverse comment is received, VA will publish in the **Federal Register** a notice acknowledging receipt of a significant adverse comment and withdrawing the direct final rule. In the event the direct

final rule is withdrawn because of receipt of any significant adverse comment, VA can proceed with the rulemaking by addressing the comments received and publishing a final rule. Any comments received in response to the direct final rule will be treated as comments regarding the proposed rule. Likewise, any significant adverse comment received in response to the proposed rule will be considered as a comment regarding the direct final rule. VA will consider such comments in developing a subsequent final rule.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance is read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The State homes that are subject to this rulemaking are State government entities under the control of State governments. All State homes are owned, operated and managed by State governments except for a small number that are operated by entities under contract with State governments. These contractors are not small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action 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 this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles are 64.005, Grants to States for Construction of State Home Facilities; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on September 10, 2012, for publication.

List of Subjects in 38 CFR Part 51

Administrative practice and procedure, Claims, Grant programs–health, Grant programs–veterans, Health care, Health facilities, Health professions, Health records, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: September 24, 2012.

Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 51 as follows:

PART 51—PER DIEM FOR NURSING HOME CARE OF VETERANS IN STATE HOMES

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 1710, 1741–1743, 1745.

■ 2. Amend § 51.43(c) by removing ''the veteran has resided in the facility for 30 consecutive days (including overnight stays) and'', and by adding a sentence at the end of the paragraph to read as follows:

§ 51.43 Per diem and drugs and medicines—principles.

* * * * *

(c) * * * Occupancy rate is calculated by dividing the total number of patients in the nursing home or domiciliary by the total recognized nursing home or domiciliary beds in that facility.

* * * * *

[FR Doc. 2012–23775 Filed 9–26–12; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0141; FRL–9728–6]

Approval and Promulgation of Implementation Plans; Revisions to the Nevada State Implementation Plan; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a limited approval and limited disapproval of revisions to the applicable state implementation plan for the State of Nevada. The revisions include new or amended State rules governing applications for, and issuance of, permits for stationary sources, but not including review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act. EPA is taking this action under the Clean Air Act obligation to take action on State submittals of revisions to state implementation plans. The intended effect of the limited approval and limited disapproval action is to update the applicable state implementation plan with current State rules with respect to permitting, and to set the stage for remedying deficiencies in the permitting rules with respect to certain new or revised national ambient air quality standards. This limited disapproval action would not trigger sanctions under section 179 of the Clean Air Act but does trigger an obligation on EPA to promulgate a Federal Implementation Plan unless the State of Nevada corrects the deficiencies, and EPA approves the related plan revisions, within two years of the final action.

DATES: *Effective Date:* This rule is effective on October 29, 2012.

Docket: EPA has established docket number EPA–R09–OAR–2012–0141 for this action. The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, 75 Hawthorne Street (AIR–3), San Francisco, CA 94105, phone number (415) 972–3534, fax number (415) 947–3579, or by email at *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the terms ''we,'' ''us,'' and ''our'' refer to EPA.

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I. Proposed Action

A. Summary of Proposed Action and Description of SIP Submittals

On June 28, 2012 (77 FR 38557), under section 110(k) of the Clean Air Act (CAA or ''Act''), EPA proposed a limited approval and limited disapproval of revisions to the Nevada State Implementation Plan (SIP). The revisions, which were submitted by the Nevada Division of Environmental Protection (NDEP) on January 24, 2011, include certain new or amended State rules [i.e., certain sections of Nevada Administrative Code (NAC)] that govern applications for, and issuance of, permits for stationary sources [a process referred to herein as ''New Source Review'' (NSR) and rules referred to herein as ''NSR rules''].[1] NDEP's January 24, 2011 submittal also includes a rescission of one definition from the existing SIP (the definition of ''special mobile equipment'').

As described in our June 28, 2012 proposed rule (77 FR at 38557), on November 9, 2011, NDEP amended the January 24, 2011 submittal by replacing an NSR rule (NAC 445B.3457) that had been submitted on January 24, 2011 as a temporary regulation with the version of the rule that had been adopted by the State Environmental Commission (SEC) as a permanent regulation. On May 21, 2012, NDEP further amended the January 24, 2011 submittal by submitting a small set of additional NSR-related rules (and one statutory definition), certain clarifications concerning the previously-submitted NSR rules, and documentation supporting the selection of emissions-based thresholds for triggering the public notice requirements for draft permits for certain source modifications.

Table 1 below lists the rules (and one statutory definition) that were submitted by NDEP on January 24, 2011, November 9, 2011, and May 21, 2012 and on which EPA is taking final limited approval and limited disapproval action in this document.

TABLE 1—SUBMITTED RULES (AND STATUTORY DEFINITION) GOVERNING NSR FOR STATIONARY SOURCES UNDER NDEP JURISDICTION

Submitted rule	Title	Adoption date	Submittal date
NAC 445B.003	''Adjacent properties'' defined	11/03/93	01/24/11
NAC 445B.0035	''Administrative revision to a Class I operating permit'' defined	08/19/04	01/24/11
NAC 445B.007	''Affected state'' defined	11/03/93	01/24/11
NAC 445B.013	''Allowable emissions'' defined	10/04/05	01/24/11
NAC 445B.014	''Alteration'' defined	10/03/95	01/24/11
NAC 445B.016	''Alternative operating scenarios'' defined	10/03/95	01/24/11
NAC 445B.019	''Applicable requirement'' defined	06/17/10	01/24/11
NAC 445B.035	''Class I–B application'' defined	10/03/95	01/24/11
NAC 445B.036	''Class I source'' defined	08/19/04	01/24/11
NAC 445B.037	''Class II source'' defined	06/17/10	01/24/11
NAC 445B.038	''Class III source'' defined	06/17/10	01/24/11
NAC 445B.0423	''Commence'' defined	03/18/08	05/21/12
NAC 445B.044	''Construction'' defined	10/04/05	01/24/11

[1] We note that the stationary source permitting rules that are the subject of today's final rule are not intended to satisfy the requirements for pre-construction review and permitting of major sources or major modifications under part C (''Prevention of Significant Deterioration of air quality'') or part D (''Plan requirements for nonattainment areas'') of title I of the Clean Air Act.

TABLE 1—SUBMITTED RULES (AND STATUTORY DEFINITION) GOVERNING NSR FOR STATIONARY SOURCES UNDER NDEP JURISDICTION—Continued

Submitted rule	Title	Adoption date	Submittal date
NAC 445B.046	''Contiguous property'' defined	09/16/76	01/24/11
NAC 445B.054	''Dispersion technique'' defined	10/04/05	01/24/11
NAC 445B.064	''Excessive concentration'' defined	10/04/05	01/24/11
NAC 445B.066	''Existing stationary source'' defined	10/03/95	01/24/11
NAC 445B.068	''Facility'' defined	10/03/95	01/24/11
NAC 445B.069	''Federally enforceable'' defined	03/18/08	01/24/11
NAC 445B.070	''Federally enforceable emissions cap'' defined	11/03/93	01/24/11
NAC 445B.082	''General permit'' defined	10/03/95	01/24/11
NAC 445B.083	''Good engineering practice stack height'' defined	10/04/05	01/24/11
NAC 445B.087	''Increment'' defined	11/03/93	01/24/11
NAC 445B.093	''Major modification'' defined	08/19/04	01/24/11
NAC 445B.094	''Major source'' defined	05/10/01	01/24/11
NAC 445B.0945	''Major stationary source'' defined	08/19/04	01/24/11
NAC 445B.099	''Modification'' defined	10/03/95	01/24/11
NAC 445B.104	''Motor vehicle'' defined	05/10/01	01/24/11
NRS 485.050	''Motor vehicle'' defined	As amended in 2003	05/21/12
NAC 445B.107	''Nearby'' defined	10/04/05	01/24/11
NAC 445B.108	''New stationary source'' defined	10/03/95	01/24/11
NAC 445B.117	''Offset'' defined	10/03/95	01/24/11
NAC 445B.123	''Operating permit'' defined	06/17/10	01/24/11
NAC 445B.124	''Operating permit to construct'' defined	11/19/02	01/24/11
NAC 445B.1345	''Plantwide applicability limitation'' defined	06/17/10	01/24/11
NAC 445B.138	''Potential to emit'' defined	10/05/10	01/24/11
NAC 445B.142	''Prevention of significant deterioration of air quality'' defined	11/03/93	01/24/11
NAC 445B.147	''Program'' defined	11/03/93	01/24/11
NAC 445B.154	''Renewal of an operating permit'' defined	11/03/93	01/24/11
NAC 445B.156	''Responsible official'' defined	06/17/10	01/24/11
NAC 445B.157	''Revision of an operating permit'' defined	08/19/04	01/24/11
NAC 445B.179	''Special mobile equipment'' defined	10/05/10 (repealed)	01/24/11
NAC 445B.187	''Stationary source'' defined	10/05/10	01/24/11
NAC 445B.194	''Temporary source'' defined	05/10/01	01/24/11
NAC 445B.200	''Violation'' defined	11/03/93	05/21/12
NAC 445B.287	Operating permits: General requirements; exception; restriction on transfers.	06/17/10	01/24/11
NAC 445B.287(2)	[Provision addressing the operating permit requirements for certain types of Class I sources].	06/17/10	05/21/12
NAC 445B.288	Operating permits: Exemptions from requirements; insignificant activities	03/18/08	01/24/11
NAC 445B.295	Application: General requirements	09/06/06	01/24/11
NAC 445B.297	Application: Submission; certification; additional information	03/08/06	01/24/11
NAC 445B.298	Application: Official date of submittal	06/17/10	01/24/11
NAC 445B.305	Operating permits: Imposition of more stringent standards for emissions	06/17/10	01/24/11
NAC 445B.308	Prerequisites and conditions for issuance of certain operating permits; compliance with applicable state implementation plan.	03/18/08	01/24/11
NAC 445B.310	Environmental evaluation: Applicable sources and other subjects; exemption.	09/06/06	01/24/11
NAC 445B.311	Environmental evaluation: Contents; consideration of good engineering practice stack height.	10/05/10	01/24/11
NAC 445B.313	Method for determining heat input: Class I sources	10/05/10	01/24/11
NAC 445B.3135	Method for determining heat input: Class II sources	11/19/02	01/24/11
NAC 445B.314	Method for determining heat input: Class III sources	11/19/02	01/24/11
NAC 445B.315	Contents of operating permits: Exception for operating permits to construct; required conditions.	03/08/06	01/24/11
NAC 445B.318	Operating permits: Requirement for each source; form of application; issuance or denial; posting.	03/08/06	01/24/11
NAC 445B.319	Operating permits: Administrative amendment	08/19/04	01/24/1
NAC 445B.325	Operating permits: Termination, reopening and revision, revision, or revocation and reissuance.	06/17/10	01/24/1
NAC 445B.331	Request for change of location of emission unit	09/06/06	01/24/11
NAC 445B.3361	General requirements	06/17/10	01/24/11
NAC 445B.3363	Operating permit to construct: Application	12/09/09	01/24/11
NAC 445B.33637	Operating permit to construct for approval of plantwide applicability limitation: Application.	08/19/04	01/24/11
NAC 445B.3364	Operating permit to construct: Action by Director on application; notice; public comment and hearing.	12/09/09	01/24/11
NAC 445B.3365	Operating permit to construct: Contents; noncompliance with conditions	03/08/06	01/24/11
NAC 445B.33656	Operating permit to construct for approval of plantwide applicability limitation: Contents; noncompliance with conditions.	03/08/06	01/24/11
NAC 445B.3366	Expiration and extension of operating permit to construct; expiration and renewal of plantwide applicability limitation.	09/06/06	01/24/11
NAC 445B.3368	Additional requirements for application; exception	12/09/09	01/24/11

TABLE 1—SUBMITTED RULES (AND STATUTORY DEFINITION) GOVERNING NSR FOR STATIONARY SOURCES UNDER NDEP JURISDICTION—Continued

Submitted rule	Title	Adoption date	Submittal date
NAC 445B.3375	Class I–B application: Filing requirement	09/06/06	01/24/11
NAC 445B.3395	Action by Director on application; notice; public comment and hearing; objection by Administrator; expiration of permit.	03/18/08	01/24/1
NAC 445B.340	Prerequisites to issuance, revision or renewal of permit	03/18/08	01/24/1
NAC 445B.342	Certain changes authorized without revision of permit; notification of authorized changes.	10/04/05	01/24/11
NAC 445B.3425	Minor revision of permit	08/19/04	01/24/11
NAC 445B.344	Significant revision of permit	11/19/02	01/24/11
NAC 445B.3441	Administrative revision of permit to incorporate conditions of certain permits to construct.	09/06/06	01/24/11
NAC 445B.3443	Renewal of permit	11/12/08	01/24/11
NAC 445B.3447	Class I general permit	11/19/02	05/21/12
NAC 445B.3453	Application: General requirements	03/08/06	01/24/11
NAC 445B.3457	Action by Director on application; notice; public comment and hearing; expiration of permit.	10/05/11	11/09/11
NAC 445B.346	Required contents of permit	10/03/95	01/24/11
NAC 445B.3465	Application for revision	10/04/05	01/24/11
NAC 445B.3473	Renewal of permit	11/12/08	01/24/11
NAC 445B.3477	Class II general permit	03/18/08	01/24/11
NAC 445B.3485	Application: General requirements	09/06/06	01/24/11
NAC 445B.3487	Action by Director on application; expiration of permit	09/06/06	01/24/11
NAC 445B.3489	Required contents of permit	09/06/06	01/24/11
NAC 445B.3493	Application for revision	09/18/01	01/24/11
NAC 445B.3497	Renewal of permit	11/12/08	01/24/11

In our proposed rule (77 FR 38557, at 38559), we discussed the regulatory history of the Nevada SIP and identified the existing Nevada SIP rules governing NSR for stationary sources under NDEP jurisdiction (see table 2).

TABLE 2—EXISTING SIP RULES GOVERNING NSR FOR STATIONARY SOURCES UNDER NDEP JURISDICTION

Nevada Air Quality Regulations (NAQR) or Nevada Administrative Code (NAC)	Fed. Reg. citation and EPA approval date
NAQR article 1.36—Commenced	43 FR 36932; (August 21, 1978).
NAQR article 1.42—Construction	43 FR 36932; (August 21, 1978).
NAQR article 1.43—Contiguous property	43 FR 36932; (August 21, 1978).
NAQR article 1.72—Existing facility	43 FR 36932; (August 21, 1978).
NAQR article 1.104—Major stationary source	43 FR 36932; (August 21, 1978).
NAQR article 1.109—Modification	43 FR 36932; (August 21, 1978).
NAQR article 1.111—Motor vehicle	43 FR 36932; (August 21, 1978).
NAC 445.559—"Operating permit" defined	49 FR 11626; (March 27, 1984).
NAQR article 1.182—Special mobile equipment	43 FR 36932; (August 21, 1978).
NAQR article 1.187—Stationary source	43 FR 36932; (August 21, 1978).
NAC 445.649—"Violation" defined	49 FR 11626; (March 27, 1984).
NAQR article 3.1.6 ["Application forms for requesting the issuance of either a registration certificate or an operating permit can be obtained from the Director.").	43 FR 1341; (January 9, 1978).
NAC 445.704 Registration certificates and operating permits required	49 FR 11626; (March 27, 1984).
NAC 445.705 Exemptions	49 FR 11626; (March 27, 1984).
NAC 445.706(1) Application date; payment of fees	49 FR 11626; (March 27, 1984).
NAC 445.707 Registration certificates: Prerequisite; application; fee; issuance, denial; expiration	49 FR 11626; (March 27, 1984).
NAC 445.712 Operating permits: Prerequisite; application; fee; issuance, denial; posting	49 FR 11626; (March 27, 1984).
NAC 445.713 Operating permits: Renewal	49 FR 11626; (March 27, 1984).
NAC 445.714 Operating permits: Replacement of lost or damaged permits	49 FR 11626; (March 27, 1984).
NAC 445.715 Operating permits: Revocation	49 FR 11626; (March 27, 1984).
NAC 445.716 Operating permits: Change of location	49 FR 11626; (March 27, 1984).
NAQR article 13.1 ("General Provisions for the Review of New Sources"), subsection 13.1.3(1)	46 FR 21758; (April 14, 1981).
NAQR article 13.1 ("General Provisions for the Review of New Sources"), subsections 13.1.4, 13.1.5, 13.1.6, and 13.1.7.	40 FR 13306; (March 26, 1975).
NAQR article 13.2 [applicability thresholds for environmental evaluations (EEs)], subsections 13.2.3 and 13.2.4.	47 FR 27070; (June 23, 1982).
NAQR article 13.3 [content requirements for EEs], subsection 13.3.1, 13.3.1.1, 13.3.1.2.[2]	47 FR 27070; (June 23, 1982).

[2] NDEP's NSR SIP retains certain nonattainment NSR provisions including the definition of the term, "lowest achievable emission rate" (LAER), and NAQR article 13.1.3(2) in the SIP. NAQR article 13.1.1 establishes an environmental evaluation (EE) requirement, and NAQR article 13.1.3(2) establishes the LAER requirement. LAER is defined to apply to applicants who are required to submit EEs, and such applicants are identified by emissions-based threshold values in article 13.2, 13.2.1, and 13.2.2, submitted on July 24, 1979 and approved on June 23, 1982 (47 FR 27070). Thus, the existing SIP definition for LAER, NAQR articles 13.1.1, 13.2, 13.2.1, and 13.2.2 must be retained in the SIP to properly interpret and apply the major source nonattainment requirements in NAQR article 13.1.3(2).

We also described the previous version of the State's NSR rules that we disapproved. See 73 FR 20536; (April 16, 2008). Our 2008 final disapproval of the previous version of the NSR rules provides the context for this rulemaking in that our evaluation of the re-submitted NSR rules focused on changes the State had made in response to the findings in our 2008 final rule.

As discussed further below, in our proposed rule, we found that the State had adequately addressed all of the previously-identified deficiencies in the NSR rules but new deficiencies related to the new or revised $PM_{2.5}$ and Pb national ambient air quality standards (NAAQS) prevent us from proposing a full approval of the rules. Therefore, we proposed a limited approval and limited disapproval of the submitted NSR rules. We did so based also on our finding that, while the rules did not meet all of the applicable requirements, the rules would represent an overall strengthening of SIP by clarifying and enhancing the NSR permitting requirements.

B. Resolution of Prior Deficiencies

In our June 28, 2012 proposed rule, we found that State had adopted rule revisions or provided sufficient explanation and documentation to fully address the 10 specific deficiencies that we found in the rules as set forth in our April 2008 final rule.

First, we concluded that new or amended rules submitted for approval, including NAC 445B.0423 (''Commence'' defined), NAC 445B.069 (''Federally enforceable'' defined), NAC 445B.287, subsection (2) (Provision addressing the operating permit requirements for certain types of Class I sources), NRS 485.050 (''Motor vehicle'' defined), and NAC 445B.083 (''Good engineering practice stack height'' defined) adequately addressed the deficiencies related to the use of undefined terms or incorrect citations, the reliance on rules or statutory provisions that had not been submitted for approval as part of the SIP, or the confusion caused by submittal of multiple versions of the same rule.

Second, we concluded that NAC 445B.138 (''Potential to emit'' defined), as amended, adequately addressed the deficiency in this definition related to the limits that qualify for treatment as part of a stationary source's design for the purposes of determining its potential to emit.

Third, by amending NAC 445B.187 (''Stationary source'' defined) to delete the exclusion for ''special mobile equipment,'' the State Environmental Commission (SEC) adequately addressed the deficiency related to the necessary breadth of the definition of ''stationary source'' for NSR purposes.

Fourth, we concluded that amendments to NAC 445B.313 (Method for determining heat input: Class I sources[3]) adequately addressed the deficiency related to the use of maximum heat input for applicability determination purposes with respect to combustion sources.

Fifth, we concluded, based on NDEP's explanation, that NAC 445B.331 (''Request for change of location of emission unit'') need not be amended to address the deficiency that we had identified previously.

Sixth, we concluded that amendments to NAC 445B.3477 (''Class II general permit'') were adequate to resolve the deficiency related to public participation requirements for issuing such permits, and that, based on NDEP's explanation, no further amendments in the rule were necessary.

Seventh, we concluded that amendments to NAC 445B.311 (''Environmental evaluation: Required information'') adequately addressed the deficiency related to EPA approval for the use of a modification of, or substitution for, an EPA-approved model specified in appendix W of 40 CFR part 51.

Eighth, we concluded that amendments to NAC 445B.3457 (''Action by Director on application; notice; public comment and hearing; expiration of permit'') adequately addressed the deficiencies related to public review of new or modified class II sources, notification to the air pollution control agencies for Washoe County or Clark County for class II sources proposed to be constructed or modified in Washoe County or Clark County, respectively, and public participation for new or modified sources of lead with potentials to emit 5 tons per year or more. In so concluding, we found that the emission-based thresholds that the SEC has established in NAC 445B.3457 to identify class II permit revisions that are subject to the public participation requirement were acceptable under 40 CFR 51.161 (''Public availability of information'') because we believed that the emissions-based thresholds represented well-defined objective criteria and because we found that the thresholds established in NAC 445B.3457 were reasonably calculated to exclude from mandatory public participation only less environmentally significant sources and modifications.

In addition, with respect to public participation associated with permits for new class II sources and for class II modifications, we noted that the SEC also revised NAC 445B.3457 to provide for notification to the public through means (a state Web site and mailing list) other than through the traditional newspaper notice. We concluded that the requirement to provide the required notice by ''prominent advertisement'' in 40 CFR 51.161(b)(3) for new or modified minor sources (other than synthetic minor sources) is media neutral and can be met by means other than, or in combination with, the traditional newspaper notice.[4] See Memorandum dated April 17, 2012 from Janet McCabe, Principal Deputy Assistant Administrator, EPA Office of Air and Radiation, to Regional Administrators, Regions 1–10, titled ''Minor New Source Review Program Public Notice Requirements under 40 CFR 51.161(b)(3).'' With respect to NAC 445B.3457, we concluded that NDEP's provision for notification through an Internet Web site designed to give general public notice and through a mailing list developed to include individuals that have requested to be included on such a list, with one exception, satisfied the requirement to provide the public with notice through ''prominent advertisement'' in the area affected.

We believed that notification of proposed permit actions for one category of sources, synthetic minor sources, i.e., sources that have taken enforceable limitations to restrict their potential to emit below major source thresholds, must be made through traditional means of notification (i.e., newspaper notice) and preferably, should be made through traditional and electronic means on the grounds that

[3] EPA generally refers to stationary sources with potentials to emit 100 tons per year or more of criteria pollutants (those for which national ambient air quality standards have been promulgated, such as, e.g., ozone, carbon monoxide, and particulate matter) as ''major sources'' and such sources with potentials to emit less than 100 tons per year as ''minor sources.'' Generally, speaking, the NSR program adopted by the Nevada SEC relies on the term ''class I'' sources to refer to ''major sources'' and ''class II'' and ''class III'' sources to refer to ''minor sources.'' In Nevada's NSR program, generally speaking, ''class III'' sources are non-exempt sources with potentials to emit of less than 5 tons per year of criteria pollutants, while ''class II'' sources are those sources that are covered under the NSR rules but that are neither ''class I'' or ''class III'' sources.

[4] As noted in footnote 3, above, ''minor sources'' are sources that have the potential to emit regulated NSR pollutants in amounts that are less than the applicable major source thresholds. Synthetic minor sources are those sources that have the potential to emit regulated NSR pollutants at or above the major source thresholds, but that have taken enforceable limitations to restrict their potential to emit below such thresholds.

such sources should be treated for public participation purposes as major sources for which such notice is required. See 40 CFR 51.166(q)(2)(iii).

While NAC 445B.3457 does not provide for traditional newspaper notice of class II sources that constitute synthetic minor sources, we concluded that the deficiency in Nevada's public notice requirements with respect to synthetic minor sources was not significant due to the limited potential number of synthetic minor sources that might not be subject to traditional (newspaper) notice under the State's NSR rules. Nonetheless, we recommended that the SEC amend the public notice regulations to ensure that the general public is notified of new synthetic minor sources by traditional (newspaper) means, at a minimum, or, preferably, in combination with electronic means.

Ninth, we concluded that the deficiencies in the affirmative defense provision in NAC 445B.326 (''Operating permits: Assertion of emergency as affirmative defense to action for noncompliance'') were moot for the purposes of this rulemaking because NDEP did not include NAC 445B.326 in the revise sets of NSR rules submitted to EPA for action as a SIP revision.

Lastly, we concluded that the amendments to NAC 445B.308 (''Prerequisites and conditions for issuance of certain operating permits; compliance with applicable state implementation plan'') adequately addressed the deficiencies by appropriately limiting the Director's discretion to approve any permit for any source where the degree of emission limitation required is affected by that amount of the stack height as exceeds good engineering practice stack height or any other dispersion technique.

In conclusion, based on our point-by-point evaluation of the previous deficiencies in the previously-submitted NSR rules, we found that Nevada had adequately addressed all of the previously-identified deficiencies by submittal of appropriately amended rules and supporting documentation. Please see our June 28, 2012 proposed rule at pages 38560 to 38563 for additional discussion of our evaluation and conclusions concerning the resolution of the previously-identified deficiencies in the NSR rules.

C. New Deficiencies

While we believed that Nevada had adequately addressed the previously-identified deficiencies in the NSR rules, we found in our June 28, 2012 proposed rule that the State's NSR rules fail to address certain new requirements that were not in effect in 2008 when EPA last took action on them.

Under 40 CFR 51.160, in connection with NSR, each SIP must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation or combination of these will result in, among other impacts, interference with attainment or maintenance of a national standard in the state in which the proposed source (or modification) is located or in a neighboring State. In our June 28, 2012 proposed rule, we concluded that the NSR rules did not meet the requirements of 40 CFR 51.160 with respect to the $PM_{2.5}$ NAAQS and the lead (Pb) NAAQS.

With respect to $PM_{2.5}$, we recognized that NDEP had submitted ''infrastructure'' SIPs [5] to address the $PM_{2.5}$ NAAQS and that, in those SIPs, NDEP indicated that NSR requirements for the $PM_{2.5}$ NAAQS were to be met by evaluating new and modified sources for compliance with the PM_{10} standard. At the time these infrastructure SIPs were submitted, EPA's policy allowed States to permit new or modified $PM_{2.5}$ sources using the PM_{10} NSR program requirements as a surrogate for $PM_{2.5}$.

We also recognized that we did not take timely action on the $PM_{2.5}$ ''infrastructure'' SIP submittals, and, as a result of the passage of time, the ''surrogate'' policy has lapsed (since May 16, 2011). As a result, States must now evaluate $PM_{2.5}$ emissions from new or modified sources directly to determine whether such sources would violate the 24-hour (35 $\mu g/m^3$) or annual (15 $\mu g/m^3$) $PM_{2.5}$ standards. See 40 CFR 51.166(a)(6)(i) and 73 FR 28321, at 28344; (May 16, 2008). The submitted NSR rules evaluated herein do not yet address $PM_{2.5}$, and given the now current requirements for $PM_{2.5}$ and the lapse of the surrogate policy, we concluded in our proposed rule that we cannot now fully approve the submitted NSR rules.

With respect to lead (Pb), we recognized that NDEP submitted an infrastructure SIP on October 12, 2011 to address the 2008 Pb NAAQS and that we have not yet taken action on it. Furthermore, we recognize that, at the time NDEP submitted the Pb ''infrastructure'' SIP, the deadline for States to submit the necessary NSR-related changes to address the 2008 Pb NAAQS had not yet passed. Now, however, with the passage of time, the deadline for such NSR-related changes has passed, and we must evaluate the submitted NSR requirements against the now-current NSR requirements. Thus, similar to the approach we are taking for $PM_{2.5}$, we find that the submitted NSR rules do not address the new rolling 3-month average Pb NAAQS (0.15 $\mu g/m^3$) and thus we concluded that we cannot now fully approve the submitted NSR rules. See 73 FR 66964, 67034–67041; (November 12, 2008).

Lastly, we concluded in our proposed rule that the State Environmental Commission must revise the NSR rules to ensure protection of the $PM_{2.5}$ and Pb NAAQS in the issuance of permits for new or modified sources or EPA must promulgate a FIP within two years of final action.

For more information about our evaluation concerning the new deficiencies, please see the June 28, 2012 proposed rule at pages 38563–38564.

II. Public Comment on Proposed Action

EPA's proposed action provided a 30-day public comment period. During this period, we received one comment letter, a letter from the Nevada Division of Environmental Protection (NDEP), dated July 27, 2012. In the July 27, 2012 letter, NDEP expresses general support for EPA's limited approval of the updated NSR rules noting that it results in a significant update of the permitting provisions in Nevada applicable SIP. EPA appreciates NDEP's significant efforts to fully address the deficiencies EPA identified in the previous submittals.

III. Final Action

No comments were submitted that change our assessment of the rules as described in our proposed action. Therefore, pursuant to sections 110(k) and 301(a) of the Clean Air Act, and for the reasons provided above and in our proposed rule, EPA is finalizing a limited approval and limited disapproval of revisions to the Nevada SIP that govern applications for, and issuance of, permits for stationary sources under the jurisdiction of the Nevada Division of Environmental Protection, excluding review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act. Specifically, EPA is finalizing limited approval and limited disapproval of the new or amended sections of the Nevada Administrative Code (and one section of the Nevada Revised Statutes) listed in

[5] ''Infrastructure'' SIPs refer to SIPs submitted in response to EPA's promulgation of a new or revised NAAQS and include provisions necessary to comply with the SIP content requirements set forth in CAA section 110(a)(2), other than those arising from designation of any area within a state as ''nonattainment'' for the new or amended NAAQS.

table 1 above as a revision to the Nevada SIP.

EPA is taking this action because, although we find that the new or amended rules meet most of the applicable requirements for such NSR programs and that the SIP revisions improve the existing SIP, we have also found certain deficiencies that prevent full approval. Namely, the submitted NSR rules do not address the new or revised national ambient air quality standards for $PM_{2.5}$ and lead (Pb) and must be revised accordingly.

The intended effect of this limited approval and limited disapproval action is to update the applicable state implementation plan with current State rules with respect to permitting,[6] and to set the stage for remedying deficiencies in the permitting rules with respect to new or revised national ambient air quality standards for $PM_{2.5}$ and Pb. This limited disapproval action does not trigger mandatory sanctions under section 179 of the Clean Air Act because sanctions apply to nonattainment areas and no areas within the State of Nevada have been designated as nonattainment for the national $PM_{2.5}$ or Pb standards. However, this limited disapproval action does trigger an obligation on EPA to promulgate a Federal Implementation Plan unless the State of Nevada corrects the deficiencies, and EPA approves the related plan revisions within two years of this final action.

IV. Statutory and Executive Order Reviews

A. Executive Order 12988, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 128665, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Reduction Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals or disapprovals under section 110 of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because this limited approval/limited disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this limited approval/limited disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action takes a limited approval/limited disapproval action on pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the 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, because it merely takes a limited approval/limited disapproval action on State rules implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the

[6] Final approval of the rules (and statutory provision) in table 1 supersedes the rules listed in table 2, above, in the existing Nevada SIP.

Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it takes a limited approval/limited disapproval action on State rules implementing a Federal standard.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

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

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

EPA lacks the discretionary authority to address environmental justice in this rulemaking. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely takes a limited approval/limited disapproval action on certain State requirements for inclusion into the SIP under section 110 of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it 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.

K. Congressional Review Act

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

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: August 30, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

Therefore, 40 CFR Chapter I is amended as follows:

PART 52—[AMENDED]

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

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

Subpart DD—Nevada

■ 2. Section 52.1470 in paragraph (c), Table 1 is amended by:

■ a. Adding new table entry titled ''Nevada Revised Statutes, Title 43, Public Safety; Vehicles; Watercraft; Chapter 485, Motor Vehicles: Insurance and Financial Responsibility'' at the beginning of the table; and under the new heading, adding an entry for ''485.050'';

■ b. Removing the entries for ''Article 1.36,'' ''Article 1.42,'' ''Article 1.43,'' ''Article 1.72,'' ''Article 1.104,'' ''Article 1.109,'' ''Article 1.111,'' ''445.559,'' ''Article 1.182,'' ''Article 1.187,'' ''445.649,'' ''Article 3.1.6,'' ''445.704,'' ''445.705,'' ''445.706(1),'' ''445.707,'' ''445.712,'', ''445.713,'' ''445.714'', ''445.715,'' ''445.716,'' ''NAQR Article 13, subsection 13.1, paragraphs 13.1.4–13.1.7,'' and ''NAQR Article 13, subsection 13.3'';

■ c. Adding in numerical order entries for ''445B.003,'' ''445B.0035,'' ''445B.007,'' ''445B.013,'' ''445B.014,'' ''445B.016, ''445B.019,'' ''445B.035,'' ''445B.036,'' ''445B.037,'' ''445B.038,'' ''445B.0423,'' ''445B.044,'' ''445B.046,'' ''445B.054,'' ''445B.064,'' ''445B.066,'' ''445B.068,'' ''445B.069,'' ''445B.070,'' ''445B.082,'' ''445B.083,'' ''445B.087,'' ''445B.093,'' ''445B.094,'' ''445B.0945,'' ''445B.099,'' ''445B.104,'' ''445B.107,'' ''445B.108,'' ''445B.117,'' ''445B.123,'' ''445B.124,'' ''445B.1345,'' ''445B.138,'' ''445B.142,'' ''445B.147,'' ''445B.154,'' ''445B.156,'' ''445B.157,'' ''445B.187,'' ''445B.194,'' and ''445B.200,'' under the heading for ''Nevada Administrative Code, Chapter 445B, Air Controls, Air Pollution; Nevada Administrative Code, Chapter 445, Air Controls, Air Pollution; Nevada Air Quality Regulations—Definitions'';

■ d. Removing the text heading ''Nevada Administrative Code, Chapter 445, Air Controls, Air Pollution; Nevada Air Quality Regulations—Registration Certificates and Operating Permits'' and adding ''Nevada Administrative Code, Chapter 445B, Air Controls, Air Pollution—Operating Permits Generally'', in its place;

■ e. Adding in numerical order under the newly revised heading, ''Nevada

Administrative Code, Chapter 445B, Air Controls, Air Pollution—Operating Permits Generally.'' entries ''445B.287, excluding paragraphs (1)(d) and (4)(b),'' ''445B.288,'' ''445B.295,'' ''445B.297, excluding subsection (2),'' ''445B.298,'' ''445B.305,'' ''445B.308, excluding paragraph (2)(d) and subsections (4), (5), and (10),'' ''445B.310,'' ''445B.311,'' ''445B.313,'' ''445B.3135,'' ''445B.314,'' ''445B.315,'' ''445B.318,'' ''445B.319, excluding paragraph (3)(b),'' ''445B.325, excluding subsections (1), (3), and (4),'' ''445B.331,'' ''445B.3361, excluding paragraph (1)(b) and subsections (6) and (7),'' ''445B.3363,'' ''445B.33637,'' ''445B.3364,'' ''445B.3365,'' ''445B.33656,'' ''445B.3366,'' ''445B.3368,'' ''445B.3375, excluding subsections (2) and (3),'' ''445B.3395, excluding subsections (13), (14), and (15),'' ''445B.340, excluding subsection (3),'' ''445B.342, excluding paragraph (3)(e),'' ''445B.3425,'' ''445B.344,'' ''445B.3441,'' ''445B.3443,'' ''445B.3447, excluding subsection (4),'' ''445B.3453, excluding subsection (3),'' ''445B.3457,'' ''445B.346, excluding subsection (6)'' ''445B.3465,'' ''445B.3473,'' ''445B.3477,'' ''445B.3485,'' ''445B.3487,'' ''445B.3489,'' ''445B.3493,'' and ''445B.3497''; and

■ f. Revising the entries for ''NAQR, Article 13, subsection 13.1, paragraph 13.1.3 [excluding 13.1.3(3)]'' and ''NAQR Article 13, subsection 13.2'' under the heading, ''Nevada Air Quality Regulations—Point Sources and Registration Certificates.''

The additions and revisions read as follows:

§ 52.1470 Identification of plan.

* * * * *

(c) * * *

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
Nevada Revised Statutes, Title 43, Public Safety; Vehicles; Watercraft; Chapter 485, Motor Vehicles: Insurance and Financial Responsibility				
485.050	''Motor vehicle'' defined	10/1/03	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 5/21/12. Nev. Rev. Stat. Ann. § 485.050 (Michie 2010).
Nevada Administrative Code, Chapter 445B, Air Controls, Air Pollution; Nevada Administrative Code, Chapter 445, Air Controls, Air Pollution; Nevada Air Quality Regulations—Definitions				
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445B.003	''Adjacent properties'' defined.	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.0035	''Administrative revision to a Class I operating permit'' defined.	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.007	''Affected state'' defined	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.013	''Allowable emissions'' defined.	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.014	''Alteration'' defined	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.016	''Alternative operating scenarios'' defined.	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.019	''Applicable requirement'' defined.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
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445B.035	"Class I–B application" defined.	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.036	"Class I source" defined	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.037	"Class II source" defined	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.038	"Class III source" defined	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.0423	"Commence" defined	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 5/21/12. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.044	"Construction" defined	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.046	"Contiguous property" defined.	12/04/76	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.054	"Dispersion technique" defined.	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.064	"Excessive concentration" defined.	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.066	"Existing stationary source" defined.	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.068	"Facility" defined	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.069	"Federally enforceable" defined.	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.070	"Federally enforceable emissions cap" defined.	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.082	"General permit" defined	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
445B.083	"Good engineering practice stack height" defined.	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.087	"Increment" defined	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.093	"Major modification" defined	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.094	"Major source" defined	06/01/01	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.0945	"Major stationary source" defined.	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.099	"Modification" defined	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.104	"Motor vehicle" defined	06/01/01	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.107	"Nearby" defined	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.108	"New stationary source" defined.	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.117	"Offset" defined	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.123	"Operating permit" defined	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.124	"Operating permit to construct" defined.	12/17/02	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.1345	"Plantwide applicability limitation" defined.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
* *	*	*	*	* *
445B.138	"Potential to emit" defined	12/16/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. June 2012 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.142	"Prevention of significant deterioration of air quality" defined.	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.147	"Program" defined	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.154	"Renewal of an operating permit" defined.	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.156	"Responsible official" defined.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.157	"Revision of an operating permit" defined.	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.187	"Stationary source" defined	12/16/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. June 2012 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.194	"Temporary source" defined	06/01/01	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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445B.200	"Violation" defined	12/13/93	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 5/21/12. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
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Nevada Administrative Code, Chapter 445B, Air Controls, Air Pollution—Operating Permits Generally				
445B.287, excluding paragraphs (1)(d) and (4)(b).	Operating permits: General requirements; exception; restriction on transfers.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11, except for subsection (2), which was submitted on 5/21/12. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.288	Operating permits: Exemptions from requirements; insignificant activities.	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.295	Application: General requirements.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
445B.297, excluding subsection (2).	Application: Submission; certification; additional information.	05/04/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.298	Application: Official date of submittal.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.305	Operating permits: Imposition of more stringent standards for emissions.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.308, excluding paragraph (2)(d) and subsections (4), (5), and (10).	Prerequisites and conditions for issuance of certain operating permits; compliance with applicable state implementation plan.	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.310	Environmental evaluation: Applicable sources and other subjects; exemption.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.311	Environmental evaluation: Contents; consideration of good engineering practice stack height.	12/16/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. June 2012 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.313	Method for determining heat input: Class I sources.	12/16/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. June 2012 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3135	Method for determining heat input: Class II sources.	12/17/02	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.314	Method for determining heat input: Class III sources.	12/17/02	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.315	Contents of operating permits: Exception for operating permits to construct; required conditions.	05/04/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.318	Operating permits: Requirement for each source; form of application; issuance or denial; posting.	05/04/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.319, excluding paragraph (3)(b).	Operating permits: Administrative amendment.	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.325, excluding subsections (1), (3), and (4).	Operating permits: Termination, reopening and revision, revision, or revocation and reissuance.	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.331	Request for change of location of emission unit.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3361, excluding paragraph (1)(b) and subsections (6) and (7).	General requirements	07/22/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3363	Operating permit to construct: Application.	01/28/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.33637	Operating permit to construct for approval of plantwide applicability limitation: Application.	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
445B.3364	Operating permit to construct: Action by Director on application; notice; public comment and hearing.	01/28/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3365	Operating permit to construct: Contents; noncompliance with conditions.	05/04/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.33656	Operating permit to construct for approval of plantwide applicability limitation: Contents; noncompliance with conditions.	05/04/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3366	Expiration and extension of operating permit to construct; expiration and renewal of plantwide applicability limitation.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3368	Additional requirements for application; exception.	01/28/10	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3375, excluding subsections (2) and (3).	Class I–B application: Filing requirement.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3395, excluding subsections (13), (14), and (15).	Action by Director on application; notice; public comment and hearing; objection by Administrator; expiration of permit.	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.340, excluding subsection (3).	Prerequisites to issuance, revision or renewal of permit.	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.342, excluding paragraph (3)(e)..	Certain changes authorized without revision of permit; notification of authorized changes.	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3425	Minor revision of permit	09/24/04	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.344	Significant revision of permit	12/17/02	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3441	Administrative revision of permit to incorporate conditions of certain permits to construct.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3443	Renewal of permit	12/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3447, excluding subsection (4).	Class I general permit	12/17/02	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 5/21/12. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3453, excluding subsection (3).	Application: General requirements.	05/04/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3457	Action by Director on application; notice; public comment and hearing; expiration of permit.	10/26/11	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 11/09/11. June 2012 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.

TABLE 1—EPA-APPROVED NEVADA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
445B.346, excluding subsection (6).	Required contents of permit	10/30/95	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3465	Application for revision	10/31/05	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3473	Renewal of permit	12/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3477	Class II general permit	04/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3485	Application: General requirements.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3487	Action by Director on application; expiration of permit.	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3489	Required contents of permit	09/18/06	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3493	Application for revision	10/25/01	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
445B.3497	Renewal of permit	12/17/08	[Insert **Federal Register** page number where the document begins] 9/27/12.	Submitted on 1/24/11. November 2010 codification of NAC chapter 445B published by the Nevada Legislative Counsel Bureau.
Nevada Air Quality Regulations—Point Sources and Registration Certificates				
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NAQR, Article 13, subsection 13.1, paragraph 13.1.3 [excluding 13.1.3(1) and 13.1.3(3)].	[related to registration certificates for point sources subject to the requirement for an environmental evaluation; additional requirements for such sources to be located in nonattainment areas].	2/28/80	46 FR 21758 (4/14/81)	Submitted on 3/17/80. See 40 CFR 52.1490(c)(18)(i). NAQR article 13.1.3(3) was deleted without replacement at 73 FR 20536 (4/16/08). See 40 CFR 52.1490(c)(18)(i)(A). NAQR article 13.1.3(1) was superseded by approval of amended NSR rules at [Insert **Federal Register** page number where the document begins] 9/27/12.
NAQR Article 13, subsection 13.2 (excluding 13.2.3 and 13.2.4).	[relates to thresholds used to identify sources subject to environmental evaluation requirement].	12/15/77	47 FR 27070 (6/23/82)	Submitted on 7/24/79. See 40 CFR 52.1490(c)(16)(viii). Subsection 13.2 includes paragraphs 13.2.1–13.2.2. Paragraphs 13.2.3–13.2.4 were superseded by approval of amended NSR rules at [Insert **Federal Register** page number where the document begins] 9/27/12.
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[FR Doc. 2012–23121 Filed 9–26–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0013(a); FRL–9732–7]

Approval and Promulgation of Implementation Plans; North Carolina: Approval of Rocky Mount Motor Vehicle Emissions Budget Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the North Carolina State Implementation Plan (SIP), submitted to EPA on February 7, 2011, by the State of North Carolina, through the North Carolina Department of Environment and Natural Resources (NCDENR), Division of Air Quality (DAQ). North Carolina's February 7, 2011, submission supplements the original redesignation request and maintenance plan for the Rocky Mount, North Carolina 1997 8-hour ozone area submitted on June 19, 2006, and approved by EPA on November 6, 2006. The Rocky Mount, North Carolina 1997 8-hour ozone area is comprised of Edgecombe and Nash Counties in North Carolina. North Carolina's February 7, 2011, SIP revision increases the safety margin allocated to motor vehicle emissions budgets (MVEBs) for both Edgecombe and Nash Counties to account for changes in the emissions model and vehicle miles traveled (VMT) projection model. EPA is approving this SIP revision pursuant to section 110 of the Clean Air Act (CAA or Act). North Carolina's February 7, 2011, SIP revision meets all of the statutory and regulatory requirements, and is consistent with EPA's guidance.

DATES: This rule is effective on November 26, 2012 without further notice, unless EPA receives relevant adverse comment by October 29, 2012. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0013 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email:* R4–RDS@epa.gov.
3. *Fax:* (404) 562–9019.
4. *Mail:* EPA–R04–OAR–2012–0013, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2012–0013. 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 through *www.regulations.gov* or email, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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 at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Zuri Farngalo may be reached by phone at (404) 562–9152 or by electronic mail address *farngalo.zuri@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background
II. EPA's Analysis of North Carolina's SIP Revision
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I. Background

The Rocky Mount, North Carolina 1997 8-hour ozone attainment and maintenance area is comprised of two counties—Edgecombe and Nash (hereafter referred to as the ''Rocky Mount Area'' or ''Area''). In accordance with the CAA, the Rocky Mount Area was designated nonattainment for the 1997 8-hour ozone national ambient air quality standards (NAAQS) on April 30, 2004, with an effective date of June 15, 2004. *See* 69 FR 23858.

On June 19, 2006, the State of North Carolina, through NCDENR, submitted a final request for EPA to: (1) Redesignate the Rocky Mount Area to attainment; and (2) approve a North Carolina SIP revision containing a maintenance plan for Rocky Mount, North Carolina. On November 6, 2006, EPA approved the redesignation request for the Rocky Mount Area. Additionally, EPA approved the 1997 8-hour ozone maintenance plan (including MVEBs for Edgecombe and Nash Counties) for the

Rocky Mount Area. 71 FR 64891. These approvals were based on EPA's determination that the State of North Carolina had demonstrated that the Rocky Mount Area met the criteria for redesignation to attainment specified in the CAA, including the determination that the entire Rocky Mount Area had attained the 1997 8-hour ozone NAAQS.

In the November 6, 2006, final rulemaking, EPA also found adequate and approved MVEBs for Edgecombe and Nash Counties in the Rocky Mount Area. Specifically, EPA found adequate and approved the 2008 and 2017 MVEBs for nitrogen oxides (NO_X) (for both Edgecombe and Nash Counties) that were contained in the 1997 8-hour ozone maintenance plan for the Rocky Mount Area.[1] Further, in the November 6, 2006, action, EPA found adequate and approved the insignificance determination for volatile organic compound (VOC) contribution from motor vehicle emissions to the 1997 8-hour ozone pollution in the Rocky Mount Area.

On February 7, 2011, North Carolina provided a SIP revision (the subject of this action) to increase the amount of safety margins allocated to the NO_X MVEBs to account for changes in the projection models. Section II provides EPA's analysis of North Carolina's February 7, 2011, SIP revision.

II. EPA's Analysis of North Carolina's SIP Revision

As discussed above, on February 7, 2011, the State of North Carolina, through NCDENR, submitted a SIP revision to revise the MVEBs for Edgecombe and Nash Counties in the Rocky Mount Area to account for the new emissions model, VMT projection models, and other emission model input data. The MVEBs (expressed in tons per day (tpd) and kilograms per day (kg/d)) that are being updated through today's action were originally approved by EPA on November 6, 2006, and are outlined in the table below.

TABLE 1—ORIGINAL MVEBS FOR NO_X

	2008		2017	
Edgecombe County	8.05 tpd	7,302.8 kg/d	6.00 tpd	5,443.1 kg/d.
Nash County	13.32 tpd	12,083.7 kg/d	7.41 tpd	6,722.2 kg/d.

DAQ is currently allocating portions of the available safety margin[2] to the MVEBs to account for new emissions models, VMT projections models, as well as changes to future vehicle mix assumptions, that influence the emission estimations. DAQ decided to allocate a majority of the safety margin available to the MVEBs. For 2017, DAQ estimated the amount needed to account for the current emission model and VMT projections model, and then added an additional 21 percent to account for any future changes to the emission model, projection model and other input data.

At this time, North Carolina is seeking to adjust the safety margins. The following tables provide the adjusted NO_X emissions data, in kg/d for the 2008 base attainment year inventories, as well as the projected NO_X emissions inventory 2017.

TABLE 2—EDGECOMBE COUNTY MVEBS

[kg/d]

	NO_X Emissions	
	2008	2017
Base Emissions	2,483	1,143
Safety Margin Allocated to MVEB	1,674	1,108
NO_X Conformity MVEB	4,157	2,251

TABLE 3—NASH COUNTY MVEBS

[kg/d]

	NO_X Emissions	
	2008	2017
Base Emissions	8,790	3,767
Safety Margin Allocated to MVEB	1,655	2,374
NO_X Conformity MVEB	10,444	6,141

A total of 3,329 kg (3.67 tons) and 3,482 kg (3.84 tons) of 2008 and 2017 NO_x safety margin, respectively, were added to the MVEBs for the Rocky Mount Area. Taking into consideration the portion of the safety margin applied to the MVEBs, the resulting difference between the attainment level of emissions from all sources and the projected level of emissions from all sources in the maintenance area, i.e., the new safety margins, for each projected year is listed.

[1] North Carolina established subarea MVEBs at the county level so each county must consider its individual subarea MVEBs for the purposes of implementing transportation conformity.

[2] A safety margin is the difference between the attainment level of emissions from all source categories (i.e., point, area, and mobile) and the projected level of emissions from all source categories. The State may choose to allocate some of the safety margin to the MVEB, for transportation conformity purposes, so long as the total level of emissions from all source categories remains equal to or less than the attainment level of emissions.

TABLE 4—NEW SAFETY MARGINS FOR THE ROCKY MOUNT AREA

Year	VOC tpd	NO_X tpd
2005	N/A	N/A
2008	−0.59	0.0
2011	−0.51	−6.93
2014	−0.07	−9.77
2017	−0.07	−7.79

As shown in Tables 2 and 3 above, the Rocky Mount Area is projected to steadily decrease its total VOC and NO_X emissions from the base year of 2008 to the maintenance year of 2017. This VOC and NO_X emission decrease demonstrates continued attainment/maintenance of the 1997 8-hour ozone NAAQS for ten years from 2008 (the year the Area was effectively designated attainment for the 1997 8-hour ozone NAAQS) as required by the CAA. These projected reductions of ozone precursors indicates continued maintenance of the 1997 8-hour ozone NAAQS.

The revised MVEBs that North Carolina submitted for the Rocky Mount Area were developed with projected mobile source emissions derived using the MOBILE6 motor vehicle emissions model. This model was the most current model available at the time North Carolina was performing its analysis. However, EPA has now issued an updated motor vehicle emissions model known as Motor Vehicle Emission Simulator or MOVES. In its announcement of this model, EPA established a two-year grace period for continued use of MOBILE6.2 in regional emissions analyses for transportation plan and transportation improvement programs (TIPs) conformity determinations (extending to March 2, 2012),[3] after which states (other than California) must use MOVES in conformity determinations for TIPs. As stated above, MOBILE6.2 was the applicable mobile source emissions model that was available when the original SIP was submitted. EPA's ''Policy Guidance on the Use of MOVES2010 and Subsequent Minor Revisions for State Implementation Plan Development, Transportation Conformity, and Other Purposes'' (*http://www.epa.gov/otaq/models/moves/documents/420b12010.pdf*) explains that the CAA does not require states that have already submitted SIPs to revise these SIPs simply because a new motor vehicle emissions model is now available. The guidance further states that the use of MOBILE6.2 in an already submitted SIP should not be an obstacle to approval of that SIP assuming that it is otherwise approvable because it would be unreasonable to require revision to a SIP which in this case was submitted prior to the release of MOVES.

[3] EPA recently extended the grace period to use MOVES for regional emissions analysis in conformity determinations to March 2, 2013 (77FR 11394).

III. Final Action

EPA is taking direct final action to approve North Carolina's February 7, 2011, SIP revision to allocate a portion of the available safety margin to the MVEBs for the 1997 8-hour ozone NAAQS for the Rocky Mount, North Carolina Area. The revised MVEBs, for Edgecomb and Nash Counties in North Carolina ensure continued attainment of the 1997 8-hour ozone NAAQS through the maintenance year 2017. EPA has evaluated North Carolina's February 7, 2011, SIP revision, and has determined that it meets the applicable requirements of the CAA and EPA regulations, and is consistent with EPA policy. On March 12, 2008, EPA issued revised ozone NAAQS. The current action, however, is being taken to address requirements under the 1997 8-hour ozone NAAQS.

EPA is publishing this rule without prior proposal because the Agency views this as a non-controversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should an adverse comment be filed. This rule will be effective on November 26, 2012 without further notice unless the Agency receives adverse comment by October 29, 2012. If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed 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. If no such comments are received, the public is advised this rule will be effective on November 26, 2012 and no further action will be taken on the proposed rule.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the 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, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. 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 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, Ozone, Intergovernmental relations, Incorporation by reference, Nitrogen dioxides, Reporting and recordkeeping requirements, and Volatile organic compounds.

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

Dated: September 11, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart II—North Carolina

■ 2. Section 52.1770(e) is amended by adding a new entry at the end of the table for the ''MVEB Update for the Redesignation and Maintenance Plan for the Rocky Mount, NC Area for the 1997 8-hour Ozone Standard'' to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	**Federal Register** citation
* * *	*	*	*
MVEB Update for the Redesignation and Maintenance Plan for the Rocky Mount, NC Area for the 1997 8-hour Ozone Standard.	February 7, 2011	November 26, 2012	[Insert citation of publication].

[FR Doc. 2012–23716 Filed 9–26–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–9735–3]

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

AGENCY: Environmental Protection Agency.

ACTION: Withdrawal of direct final rule.

SUMMARY: On August 20, 2012 EPA published a Notice of Intent to Delete and a direct final Notice of Deletion for the Hooker (Hyde Park) Superfund Site from the National Priorities List. The EPA is withdrawing the Final Notice of Deletion due to adverse comments that were received during the public comment period. After consideration of the comments received, if appropriate, EPA will publish a Notice of Deletion in the **Federal Register** based on the parallel Notice of Intent to Delete and place a copy of the final deletion package, including a Responsiveness Summary, if prepared, in the Site repositories.

DATES: *Effective Date:* This withdrawal of the direct final action published August 20, 2012 (77 FR 50038) is effective as of September 27, 2012.

ADDRESSES:

Information Repositories: Comprehensive information on the Site, as well as the comments that we received during the comment period, are available in docket EPA–HQ–SFUND–1983–0002, accessed through the *http://www.regulations.gov* Web site. Although listed in the docket index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at: U.S. Environmental Protection Agency, Region 2, Superfund Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866, Phone: 212–637–4308, Hours: Monday to Friday from 9 a.m. to 5 p.m. and U.S. EPA Western NY Public Information Office, 86 Exchange Place, Buffalo, NY 14204–2026, Telephone: (716) 551–4410, Hours: Monday to Friday from 8:30 a.m.–4 p.m.

FOR FURTHER INFORMATION CONTACT: Gloria M. Sosa, Remedial Project Manager, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 20th Floor, New York, NY 10007–1866, telephone: 212–637–4283, email: *sosa.gloria@epa.gov.*

SUPPLEMENTARY INFORMATION:

List of Subjects in 40 CFR Part 300

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

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

Dated: September 21, 2012.

Judith A. Enck,

Regional Administrator, Region 2.

■ Accordingly, the amendment to Table 1 of Appendix B to CFR Part 300 to remove the entry ''Hooker (Hyde Park)'',

''Niagara Falls'', ''NY'' is withdrawn as of September 27, 2012.

[FR Doc. 2012–23819 Filed 9–26–12; 8:45 am]

BILLING CODE 6560–50–P

HEALTH AND HUMAN SERVICES DEPARTMENT

Administration for Children and Families

45 CFR Part 301

State Plan Approval and Grant Procedures

CFR Correction

In Title 45 of the Code of Federal Regulations, Parts 200 to 499, revised as of October 1, 2011, on page 221, in § 301.1 definitions for ''Agent of a Child'' and ''Attorney of a Child'' are added to read as follows:

§ 301.1 General definitions.

* * * * *

Agent of a Child means a caretaker relative having custody of or responsibility for the child.

* * * * *

Attorney of a Child means a licensed lawyer who has entered into an attorney-client relationship with either the child or the child's resident parent to provide legal representation to the child or resident parent related to establishment of paternity, or the establishment, modification, or enforcement of child support. An attorney-client relationship imposes an ethical and fiduciary duty upon the attorney to represent the client's best interests under applicable rules of professional responsibility.

* * * * *

[FR Doc. 2012–23893 Filed 9–26–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 205

Publicizing Contract Actions

CFR Correction

205.470 [Corrected]

In Title 48 of the Code of Federal Regulations, Chapter 2 (Parts 201—299), revised as of October 1, 2011, on page 38, in section 205.470, the first sentence is corrected by removing ''$1,000,000,000'' and adding, in its place, ''$1,000,000''.

[FR Doc. 2012–23901 Filed 9–26–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 209

Contractor Qualifications

CFR Correction

In Title 48 of the Code of Federal Regulations, Chapter 2 (Parts 201–299), revised as of October 1, 2011, on page 55, in section 209.104–70, paragraph (a) is amended by revising the second sentence to read as follows:

209.104–70 Solicitation provisions.

(a) * * * Any disclosure that the government of a terrorist country has a significant interest in an offeror or a subsidiary of an offeror shall be forwarded through agency channels to the address at 209.104–1(g)(i)(C).

* * * * *

[FR Doc. 2012–23905 Filed 9–26–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 212

Acquisition of Commercial Items

CFR Correction

212.504 [Corrected]

In Title 48 of the Code of Federal Regulations, Chapter 2 (Parts 201—299), revised as of October 1, 2011, on page 73, in section 212.504, paragraph (a) is corrected by redesignating (iv) through the first paragraph (xvii) as (iii) through (xvi).

[FR Doc. 2012–23917 Filed 9–26–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 227

Patents, Data, and Copyrights; CFR Correction

In Title 48 of the Code of Federal Regulations, Chapter 2 (Parts 201—299), revised as of October 1, 2011, on page 206, in section 227.7102–1, paragraph (c) is added to read as follows:

227.7102–1 Policy.

* * * * *

(c) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

[FR Doc. 2012–23925 Filed 9–26–12; 8:45 am]

BILLING CODE 1505–01–D

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1812, 1828, and 1852

RIN 2700–AD55

Cross Waivers of Liability Clauses

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA has adopted, with minor changes, a final rule amending the NASA FAR Supplement (NFS) to consolidate and make changes to three existing cross-waiver of liability contract clauses, and to more closely align the clauses with current mission programs.

DATES: *Effective Date:* October 29, 2012.

FOR FURTHER INFORMATION CONTACT: Leigh Pomponio, NASA, Office of Procurement, Contract Management Division (Suite 2P77); (202) 358–0592; email: *leigh.pomponio@nasa.gov.*

SUPPLEMENTARY INFORMATION:

1. Background

A proposed rule was published on May 5, 2011 (76 FR 25657) to consolidate NASA's three existing cross-waiver of liability clauses into two clauses and to align the two clauses with Agency mission requirements, consistent with the cross-waiver of liability regulatory authority at 14 CFR part 1266. The regulatory authority at 14 CFR part 1266 was promulgated on February 26, 2008 (73 FR 10143–50). The February 2008 rule established NASA's cross-waiver of liability authority in two categories of NASA agreements: (1) Agreements for ISS activities pursuant to the ''Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of

America concerning Cooperation on the Civil International Space Station'' (commonly referred to as the ISS Intergovernmental Agreement, or IGA); and (2) launch agreements involving science or space exploration activities unrelated to the ISS.

Following promulgation of the two-category regulatory authority, the three-category contract clause arrangement no longer aligned. The procurement rule of May 7, 2011 proposed to delete one clause and realign the remaining two to cover the two categories of contracts on which cross-waivers of liability are authorized and required: Contracts supporting ISS and contracts supporting launches into space that are not related to the ISS. Clause 1852.228–72, Cross-Waiver of Liability for Space Shuttle Services will be deleted. Clause 1852.228–76 is amended and retitled *Cross-Waiver of Liability for International Space Station Activities,* and 1852.228–78 is amended and retitled *Cross-Waiver of Liability for Science or Space Exploration Activities Unrelated to the International Space Station.* While the proposed rule included continuing applicability of cross waivers of liability to Space Shuttle support contracts, this final rule removes the Space Shuttle support contract references because NASA will not issue any new contracts for Space Shuttle support. Further, wherever the cross-waiver of liability clauses are referenced in the NASA FAR Supplement, conforming changes are being made to clause numbers and titles.

2. Discussion and Analysis

Two respondents submitted comments in response to the proposed rule. NASA reviewed and considered all comments in the development of the final rule. No changes are being made to the rule as a result of the comments. A discussion of the comments follows:

A. One respondent mistakenly cited this docket number, but the comments submitted were unrelated to this rule.

B. One respondent submitted 19 specific recommendations for change. They are individually addressed below. In general, the comments appear to confuse the relationship NASA has with its contractors vice that which NASA has with Cooperating Parties under cooperative Space Act agreements. This procurement rule addresses only the requirements for NASA *contractors.* This rule does not address the relationship that NASA has with other entities under cooperative Space Act agreements.

C. Comments:

1. 1852.228–76(a): The stated objective is ''to extend this cross-waiver of liability to NASA *contracts''* [emphasis added.] There is a distinction between NFS contracts and Space Act agreements that is recognized throughout the proposed rule, but not reflected in paragraph (a). Recommend adding ''Space Act agreements''.

NASA Response: The distinction between NASA contracts and Space Act agreements is recognized throughout the rule, but this rule applies only to contracts, and therefore, Space Act agreements are not cited in the clause. The purpose of this rule is to extend cross-waivers of liability to contracts. Space Act Agreements have their own set of terms, and they are governed by 14 CFR part 1266. To the extent that cross-waivers of liability apply to Space Act agreements, the terms will be included in the Space Act agreement. Space Act agreements are outside the scope of this Rule.

2. 1852.228–76(b)(1): NASA contracts should be added to the definition of ''Agreement'' to ensure that the cross-waiver clauses include FAR-based contracts. NASA Response: ''Agreement'', as defined in the clause, is correct. Agreement, as used here, refers to Space Act agreements between NASA and Cooperating Parties, and does not include contracts. Contracts between NASA and contractors, including subcontracts and supplier contracts thereunder, are not Agreements as defined in the clause.

3. 1852.228–76(b)(5): The definition of ''Party'' should be amended to add NASA contractors.

NASA Response: ''Party'', as defined in the clause, refers to Parties to the cooperative Space Act agreement, i.e. the Space Act agreement between NASA and a Cooperating Party. The definition does not include contractors, and the definition clearly states that contractors and subcontractors are not ''Parties''.

4. 1852.228–76(b)(6): Recommend amending the definition of payload to read ''all property to be flown or used on or in a Launch or *Transfer Vehicle* or the ISS''

NASA Response: It is not necessary to add ''transfer vehicle'' to the definition of ''payload'' because, at the time of launch, a transfer vehicle is ''property flown on a launch vehicle'', and is therefore included in the definition of payload. While it is true that, at some point, a transfer vehicle ceases to be ''payload'' and becomes, instead, a ''space vehicle'', it is not necessary, for purposes of this rule, to define that point in time. A transfer vehicle is subject to cross-waivers of liability whether it is functioning as payload or as a space vehicle. For a detailed discussion on NASA's development of a definition of ''transfer vehicle,'' please see 73 FR 10146.

5. 1852.228–76 (b)(7): The ''Protected Space Operations'' definition includes certain activities ''in implementation of the IGA * * * and contracts to perform work in support of NASA's obligations under the IGA and these related agreements.'' It appears that the capitalized ''Agreements'' in this sentence refers to the IGA; however, ''Agreement'' is defined in the clause to mean otherwise. Recommend clarifying the distinction.

NASA response: Agreements as used in 1852.228–76(b)(7) is consistent with the definition of Agreement in the clause. It does not refer specifically to the IGA.

6. 1852.228–76(c)(1): Recommend changing ''the contractor'' to ''each party''.

NASA response: The ''contractor'' is the correct term. The purpose of the clause is to require the contractor to agree to a waiver of liability. The clause does not apply to ''each party'' to other agreements.

7. 1852.228–76(c)(2): Recommend changing ''the contractor'' to ''each party'' and ''subcontractors'' to ''related entities''.

NASA response: The clause is correct as written. The clause requires the contractor to extend the cross-waiver liability to its subcontractors at any tier. Use of the terms ''Party'' or ''related entities'' would, for reasons stated above, be incorrect. 1852.228–76(c)(2)(ii): Recommend changing ''subcontractors'' to ''related entities.''

NASA Response: See response to 7.

8. 1852.228–76(c)(4)(i): Recommend changing ''the Government'' to ''a Party'', and ''own contractors or between its own contractors and their subcontractors and subcontractors'' to '' related entities''.

NASA Response: The clause is correct as written. Cross-waivers do not apply between the Government and its contractors or between a contractor and its subcontractors. Contract terms and conditions apply to these relationships.

9. 1852.228–76(c)(4)(v): Recommend changing ''contractor'' to ''party'' and ''subcontractor'' to ''related entity''.

NASA Response: See response to 9.

10. 1852.228–76(c)(4)(vi): Recommend changing ''Government'' to ''a Party'' and ''contractor's'' to ''other Party's'' inserting the word ''contractual'' before ''obligations '' and changing ''contract'' to ''agreement''.

NASA Response: The clause is correct as written. Specifically, 1852.228–76(c)(4)(vi) refers to the relationship

between NASA and its contractor and does not include any other parties or any agreements.

11. 1852.228–78(b)(1): NASA contracts should be amended to add the definition of ''Agreement'' to ensure that the cross-waiver clauses include FAR-based contracts. We recommend amending the definition as follows: ''Agreement'' refers to any NASA Space Act agreements *or contracts that contain* the cross-waiver of liability provisions authorized by 14 CFR Part 1266–104.''

NASA Response: This rule amends the NASA FAR Supplement which applies only to contracts and not Space Act Agreements. Also see response to 2.

12. 1852.228–78(b)(4): Recommend the definition of ''Party'' be amended to add NASA contracts.

NASA Response: See response to 3.

13. 1852.228–78(b)(5): Recommend adding ''Transfer Vehicle'' to the definition of ''Payload''.

NASA Response: See response to 4.

14. 1852.228–78(c)(1): Recommend changing ''contractor'' to ''each Party''.

NASA Response: The clause is correct as written. The contract clause obligates the contractor. See response to 6 above.

15. 1852.228–78(c)(2): Recommend changing ''contractor'' to ''party'' and ''own subcontractors at all tiers'' to ''related entities''.

NASA Response: The clause is correct as written. See response to 7.

16. 1852.228–78(c)(4)(i): Recommend changing ''Government'' to ''a Party'' and ''own contractors or between its own contractors and their subcontractors'' to '' Related Entities''.

NASA Response: The clause is correct as written. See response to 9.

17. 1852.228–78(c)(4)(v): Recommend changing ''contractor'' to ''a Party'' and ''subcontractors'' to ''related entities'' .

NASA Response: The clause is correct as written. See response to 9.

18. 1852.228–78(c)(4)(6): Recommend changing ''Government'' to ''a party'' and ''contractor's'' to ''other party's'' and inserting the word ''contractual'' before ''obligations '' and ''contract'' to ''agreement''.

NASA Response: See response to 11.

3. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

4. Regulatory Flexibility Act

NASA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601, *et. seq.,* because it the rule does not impose any additional requirements on small business. The rule updates and realigns already-existing requirements.

5. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) is not applicable because the NFS changes do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1812, 1828, and 1852

Government procurement.

William P. McNally,

Assistant Administrator for Procurement.

Accordingly, 48 CFR parts 1812, 1828, and 1852 are amended as follows:

■ 1. The authority citation for 48 CFR parts 1812, 1828, and 1852 continues to read as follows:

Authority: 42 U.S.C. 2455(a), 2473(c)(1).

PART 1812—ACQUISITION OF COMMERCIAL ITEMS

■ 2. In section 1812.301, paragraph (f)(i)(K) is removed and reserved, and paragraphs (f)(i)(L) and (f)(i)(M) are revised to read as follows:

1812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(i) * * *

(L) 1852.228–76, Cross-Waiver of Liability for International Space Station Activities.

(M) 1852.228–78, Cross-Waiver of Liability for Science or Space Exploration Activities unrelated to the International Space Station.

* * * * *

PART 1828—BONDS AND INSURANCE

■ 3. Section 1828.371 is revised to read as follows:

1828.371 Clauses incorporating cross-waivers of liability for International Space Station activities and Science or Space Exploration activities unrelated to the International Space Station.

(a) In contracts covering International Space Station activities, or Science or Space Exploration activities unrelated to the International Space Station that involve a launch, NASA shall require the contractor to agree to waive all claims against any entity or person defined in the clause based on damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waivers will require the contractor to extend the cross-waiver provisions to their subcontractors at any tier and related entities ensuring those subcontractors and related entities also waive all claims against any entity or person defined in the clause for damages arising out of Protected Space Operations. The purpose of the clauses prescribed in this section is to extend the cross-waivers under other agreements to NASA contractors that perform work in support of NASA's obligations under these agreements.

(b) The contracting officer shall insert the clause at 1852.228–78, Cross-Waiver of Liability for Science or Space Exploration Activities unrelated to the International Space Station, in solicitations and contracts above the simplified acquisition threshold for the acquisition of launches for science or space exploration activities unrelated to the International Space Station or for acquisitions for science or space exploration activities that are not related to the International Space Station but involve a launch. If a science or space exploration activity is in support of the International Space Station, the contracting officer shall insert the clause prescribed by paragraph (c) of this section and designate its application to that particular launch.

(c) The contracting officer shall insert the clause at 1852.228–76, Cross-Waiver of Liability for International Space Station Activities, in solicitations and contracts above the simplified acquisition threshold when the work to be performed involves Protected Space Operations, as that term is defined in the clause, relating to the International Space Station.

(d) At the contracting officer's discretion, the clauses prescribed by paragraphs (b) and (c) of this section may be used in solicitations, contracts,

new work modifications, or extensions to existing contracts under the simplified acquisition threshold involving science or space exploration activities unrelated to the International Space Station, or International Space Station activities, respectively, in appropriate circumstances. Examples of such circumstances are when the value of contractor property on a Government installation used in performance of the contract is significant, or when it is likely that the contractor or subcontractor will have its valuable property exposed to risk or damage caused by other participants in the science or space exploration activities unrelated to the International Space Station, or International Space Station activities.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1852.228–72 [Removed]

■ 4. Section 1852.228–72 is removed.
■ 5. Section 1852.228–76 is revised to read as follows:

1852.228–76 Cross-waiver of liability for international space station activities.

As prescribed in 1828.371(c) and (d), insert the following clause:

CROSS-WAIVER OF LIABILITY FOR INTERNATIONAL SPACE STATION ACTIVITIES (OCT 2012)

(a) The Intergovernmental Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station (IGA) for the International Space Station (ISS) contains a cross-waiver of liability provision to encourage participation in the exploration, exploitation, and use of outer space through the ISS. The objective of this clause is to extend this cross-waiver of liability to NASA contracts in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the International Space Station (ISS). The Parties intend that this cross-waiver of liability be broadly construed to achieve this objective.

(b) As used in this clause, the term:

(1) ''*Agreement*'' refers to any NASA Space Act agreement that contains the cross-waiver of liability provision authorized by 14 CFR 1266.102.

(2) ''*Damage*'' means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage.

(3) ''*Launch Vehicle*'' means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads or persons, or both.

(4) ''*Partner State*'' includes each Contracting Party for which the IGA has entered into force, pursuant to Article 25 of the IGA or pursuant to any successor agreement. A Partner State includes its Cooperating Agency. It also includes any entity specified in the Memorandum of Understanding (MOU) between NASA and the Government of Japan to assist the Government of Japan's Cooperating Agency in the implementation of that MOU.

(5) ''*Party*'' means a party to a NASA Space Act agreement involving activities in connection with the ISS and a party that is neither the prime contractor under this contract nor a subcontractor at any tier.

(6) ''*Payload*'' means all property to be flown or used on or in a Launch Vehicle or the ISS.

(7) ''*Protected Space Operations*'' means all Launch or Transfer Vehicle activities, ISS activities, and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of the IGA, MOUs concluded pursuant to the IGA, implementing arrangements, and contracts to perform work in support of NASA's obligations under these Agreements. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch or Transfer Vehicles, the ISS, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services. ''Protected Space Operations'' also includes all activities related to evolution of the ISS, as provided for in Article 14 of the IGA. ''Protected Space Operations'' excludes activities on Earth which are conducted on return from the ISS to develop further a Payload's product or process for use other than for ISS-related activities in implementation of the IGA.

(8) ''*Related Entity*'' means:

(i) A contractor or subcontractor of a Party or a Partner State at any tier;

(ii) A user or customer of a Party or a Partner State at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party or a Partner State at any tier. The terms ''contractor'' and ''subcontractor'' include suppliers of any kind.

(9) ''*Transfer Vehicle*'' means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(c) Cross-waiver of liability:

(1) The Contractor agrees to a cross-waiver of liability pursuant to which it waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) A Party as defined in (b)(5) of this clause;

(ii) A Partner State other than the United States of America;

(iii) A Related Entity of any entity identified in paragraph (c)(1)(i) or (c)(1)(ii) of this clause; or

(iv) The employees of any of the entities identified in paragraphs (c)(1)(i) through (c)(1)(iii) of this clause.

(2) In addition, the contractor shall, by contract or otherwise, extend the cross-waiver of liability set forth in paragraph (c)(1) of this clause to its subcontractors at any tier by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause; and

(ii) Require that their subcontractors waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the *Convention on International Liability for Damage Caused by Space Objects,* which entered into force on September 1, 1972, where the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this clause, this cross-waiver of liability shall not be applicable to:

(i) Claims between the Government and its own contractors or between its own contractors and subcontractors;

(ii) Claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Party to an Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for Damage resulting from a failure of the contractor to extend the cross-waiver of liability to its subcontractors and related entities, pursuant to paragraph (c)(2) of this clause;

(vi) Claims by the Government arising out of or relating to the contractor's failure to perform its obligations under this contract.

(5) Nothing in this clause shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter 701 is applicable.

(End of clause)

■ 6. Section 1852.228–78 is revised to read as follows:

1852.228–78 Cross-waiver of liability for science or space exploration activities unrelated to the International Space Station.

As prescribed in 1828.371(b) and (d), insert the following clause:

CROSS–WAIVER OF LIABILITY FOR SCIENCE OR SPACE EXPLORATION ACTIVITIES UNRELATED TO THE INTERNATIONAL SPACE STATION

(*OCT 2012*)

(a) The purpose of this clause is to extend a cross-waiver of liability to NASA contracts for work done in support of Agreements between Parties involving Science or Space Exploration activities that are not related to the International Space Station (ISS) but involve a launch. This cross-waiver of liability shall be broadly construed to achieve the objective of furthering participation in space exploration, use, and investment.

(b) As used in this clause, the term:

(1) ''*Agreement*'' refers to any NASA Space Act agreement that contains the cross-waiver of liability provision authorized in 14 CFR 1266.104.

(2) ''*Damage*'' means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage;

(3) ''*Launch Vehicle*'' means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads or persons, or both.

(4) ''*Party*'' means a party to a NASA Space Act agreement for Science or Space Exploration activities unrelated to the ISS that involve a launch and a party that is neither the prime contractor under this contract nor a subcontractor at any tier hereof.

(5) ''*Payload*'' means all property to be flown or used on or in a Launch Vehicle.

(6) ''*Protected Space Operations*'' means all Launch or Transfer Vehicle activities and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an Agreement for Science or Space Exploration activities unrelated to the ISS that involve a launch. Protected Space Operations begins at the signature of the Agreement and ends when all activities done in implementation of the Agreement are completed. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch or Transfer Vehicles, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment, and related facilities or services.

Protected Space Operations excludes activities on Earth which are conducted on return from space to develop further a payload's product or process other than for the activities within the scope of an Agreement.

(7) ''*Related entity*'' means:

(i) A contractor or subcontractor of a Party at any tier;

(ii) A user or customer of a Party at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party at any tier.

Note to paragraph (a)(7): The terms ''contractors'' and ''subcontractors'' include suppliers of any kind.

(8) ''*Transfer Vehicle*'' means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(c) Cross-waiver of liability:

(1) The Contractor agrees to a waiver of liability pursuant to which it waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) A Party;

(ii) A Party to another NASA Agreement or contract that includes flight on the same Launch Vehicle;

(iii) A Related Entity of any entity identified in paragraphs (c)(1)(i) or (c)(1)(ii) of this clause; or

(iv) The employees of any of the entities identified in (c)(1)(i) through (iii) of this clause.

(2) The Contractor agrees to extend the cross-waiver of liability as set forth in paragraph (c)(1) of this clause to its own subcontractors at all tiers by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause; and

(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the *Convention on International Liability for Damage Caused by Space Objects,* entered into force on 1 September 1972, in which the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this clause, this cross-waiver of liability shall not be applicable to:

(i) Claims between the Government and its own contractors or between its own contractors and subcontractors;

(ii) Claims made by a natural person, his/her estate, survivors, or subrogees (except when a subrogee is a Party to an Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health, or death of such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for damages resulting from a failure of the contractor to extend the cross-waiver of liability to its subcontractors and related entities, pursuant to paragraph (c)(2) of this clause; or

(vi) Claims by the Government arising out of or relating to a contractor's failure to perform its obligations under this contract.

(5) Nothing in this clause shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter 701 is applicable.

(End of Clause)

[FR Doc. 2012–23715 Filed 9–26–12; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 3415

Contracting by Negotiation

CFR Correction

In Title 48 of the Code of Federal Regulations, Chapter 29 to End, revised as of October 1, 2011, on page 150, in section 3415.605, paragraph (d) is correctly revised, and section 3415.606 is added to read as follows:

3415.605 Content of unsolicited proposals.

* * * * *

d. No prior commitments were received from Departmental employees regarding acceptance of this proposal.

Date:

Organization:

Name:

Title:

(This certification must be signed by a responsible person authorized to enter into contracts on behalf of the organization.)

3415.606 Agency procedures.

(b)(1) The HCA or designee is the contact point to coordinate the receipt, control, and handling of unsolicited proposals.

(2) Offerors must direct unsolicited proposals to the HCA.

[FR Doc. 2012–23944 Filed 9–26–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 040205043–4043–01]

RIN 0648–XC134

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2012 Commercial Accountability Measure and Closure for South Atlantic Vermilion Snapper

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for the commercial sector for vermilion snapper in the exclusive economic zone (EEZ) of the South Atlantic. The Science Research Director (SRD) has estimated that commercial landings for vermilion snapper are projected to have reached the commercial annual catch limit (ACL) on September 28, 2012. Therefore, NMFS closes the commercial sector for vermilion snapper in the South Atlantic EEZ on September 28, 2012, and it will remain closed throughout the remainder of the fishing year. This closure is necessary to protect the vermilion snapper resource.

DATES: This rule is effective 12:01 a.m., local time, September 28, 2012, until 12:01 a.m., local time, January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Catherine Hayslip, telephone: 727–824–5305, email: *Catherine.Hayslip@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes vermilion snapper and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The commercial ACL (commercial quota) for vermilion snapper in the South Atlantic is 302,523 lb (137,222 kg), gutted weight, for the current fishing period, July 1 through December 31, 2012, as specified in 50 CFR 622.42(e)(4)(ii).

In accordance with regulations at 50 CFR 622.49(b)(6)(i), NMFS is required to close the commercial sector for vermilion snapper when the commercial ACL (commercial quota) for the applicable portion of the fishing year has been reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS has determined that the commercial ACL (commercial quota) for South Atlantic vermilion snapper will have been reached by September 28, 2012. Accordingly, the commercial sector for South Atlantic vermilion snapper is closed effective 12:01 a.m., local time, September 28, 2012, until 12:01 a.m., local time, January 1, 2013.

The operator of a vessel with a valid commercial vessel permit for South Atlantic snapper-grouper having vermilion snapper onboard must have landed and bartered, traded, or sold such vermilion snapper prior to 12:01 a.m., local time, September 28, 2012. During the closure, the bag limit specified in 50 CFR 622.39(d)(1)(v), applies to all harvest or possession of vermilion snapper in or from the South Atlantic EEZ, including the bag limit that may be retained by the captain or crew of a vessel operating as a charter vessel or headboat. The bag limit for such captain and crew is zero. During the closure, the possession limits specified in 50 CFR 622.39(d)(2) apply to all harvest or possession of vermilion snapper in or from the South Atlantic EEZ. During the closure, the sale or purchase of vermilion snapper taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to the sale or purchase of vermilion snapper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, September 28, 2012, and were held in cold storage by a dealer or processor. For a person on board a vessel for which a Federal commercial or charter vessel/headboat permit for the South Atlantic snapper-grouper fishery has been issued, the sale and purchase provisions of the commercial closure for vermilion snapper would apply regardless of whether the fish are harvested in state or Federal waters, as specified in 50 CFR 622.43(a)(5)(ii).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds that the need to immediately implement this action to close the commercial sector for vermilion snapper constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures would be unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule establishing the closure has been subject to notice and comment, and all that remains is to notify the public of the closure. Allowing prior notice and opportunity for public comment is contrary to the public interest. This action needs to be immediately implemented to protect vermilion snapper because the capacity of the fishing fleet allows for rapid harvest of the quota. Prior notice and opportunity for public comment would require time and would potentially result in a harvest well in excess of the established commercial ACL (commercial quota).

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

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

Dated: September 24, 2012.

Lindsay Fullenkamp,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–23815 Filed 9–24–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 188
Thursday, September 27, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50, 52, 54, and 100

[Docket No. PRM–50–106; NRC–2012–0177]

Environmental Qualifications of Electrical Equipment

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) received a petition for rulemaking (PRM), dated June 18, 2012, which was filed with the NRC by the Natural Resources Defense Council, Inc. (NRDC) and Mr. Paul M. Blanch (collectively, the petitioners). The petition was docketed by the NRC on June 22, 2012, and assigned Docket No. PRM–50–106. The petitioners request that the NRC initiate a rulemaking ''to revise its regulations to clearly and unequivocally require the environmental qualification of all safety-related cables, wires, splices, connections and other ancillary electrical equipment that may be subjected to submergence and/or moisture intrusion during normal operating conditions, severe weather, seasonal flooding, seismic events, and post-accident conditions, both inside and outside of containment.'' The NRC is not instituting a public comment period for this PRM at this time.

ADDRESSES: Please refer to Docket ID NRC–2012–0177 when contacting the NRC about the availability of information for this petition. You may access information related to this petition, which the NRC possesses and are publicly available, by any of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0177. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The petition, PRM–50–106, is available in ADAMS under Accession Number ML12177A377.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3667, email: *Cindy.Bladey@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. The Petitioners

The NRDC ''is a national non-profit membership environmental organization with offices in New York City, Washington, DC, San Francisco, Chicago, Los Angeles, and Beijing.'' The NRDC's ''activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented.'' Mr. Paul Blanch, the primary author of the petition, ''is a consultant and expert witness'' on ''nuclear and electrical engineering.''

II. The Petition

The petitioners request that the NRC ''institute a rulemaking to revise the regulatory requirements for the environmental qualification of electrical equipment important to the safe operation of existing and new reactors.'' Specifically, the petitioners request that ''the regulatory requirements contained in 10 CFR § 50.49, Criteria 2 and 4 in Appendix A to 10 CFR 50, and 10 CFR 54 * * * be clarified and supplemented with regard to the environmental qualification of electrical equipment exposed to 'submergence in water, condensation, wetting, and other environmental stresses' during routine operation and infrequent events (e.g., flooding).''

The petitioners state that the designs for nuclear power plants currently operating in the U.S. ''feature electrical cables and wires between power sources (e.g., transformers, batteries and emergency power supplies) and safety equipment throughout the facility.'' The petitioners further state that ''[w]ith few exceptions, these cables and wires are only designed for dry, low humidity environments and, therefore, not qualified for moist or wet environments. Cables and wires with insulation surface defects caused during or exacerbated by installation are more prone to failure when submerged in water or subjected to moisture intrusion. It was generally assumed (petitioner Blanch included) that these containers would remain dry.'' The petitioners assert that ''[b]y existing NRC regulation, it was unnecessary to specify that these cables and wire remain functional under submerged conditions.''

The petitioners state that ''General Design Criterion (GDC) 2, Design Bases for Protection Against Natural Phenomena, and GDC 4, Environmental and Dynamic Effects Design Bases, established regulatory requirements for the design of nuclear power plants.'' The petitioners assert that ''[t]he large number of electrical failures that were experienced during the Three Mile Island (TMI) accident in March 1979 demonstrated that these regulatory requirements, or their enforcement, were inadequate to ensure that electrical equipment would remain functional.''

The petitioners interpret NUREG/CR–6384, Vol. 1, ''Literature Review of Environmental Qualification of Safety-Related Electric Cables'' (ADAMS Accession Number ML031600732), dated April 1996, to indicate that ''[t]he aforementioned 'high probability of impairment' that helped focus the selection of cable penetrations during TMI inspections already indicates that moisture and submersion causes cable damage and demonstrates NRC's acknowledgment of the matter thus corroborating the necessity of this

rulemaking. If these conditions cause a high probability of impairment following an accident, it is logical to assume that these conditions produce a similar outcome in the absence of or prior to an accident as well.''

The petitioners state that ''[t]he NRC recognized from the TMI accident the need to strengthen the regulatory requirements for electrical equipment. The NRC revised its regulations to include specific requirements in 10 C.F.R. § 50.49, wherein § (e)(6) explicitly addressed the submergence factor[.]'' The petitioners further state that ''[t]he regulation did not further limit this requirement to where the cables and wires were located. But the NRC staff introduced such a limitation through * * * Generic Letter 82–09, 'Environmental Qualification of Safety-Related Electrical Equipment,' [ADAMS Accession Number ML031080281], dated April 20, 1982[.]'' The petitioners state that ''[r]ain water and ground water routinely submerge underground cables and wires. The safety implications from the failure of a safety-related cable inside containment submerged by an accident, outside containment submerged by a high energy line break, or outside containment submerged by nature are identical—that safety function is lost. It matters little if the portion of a safety-related cable inside containment and the portion of that same cable outside containment in a high energy line break area survive if another portion of that same cable routed underground fails due to submergence.''

The petitioners further state that ''[t]he TMI accident and laboratory testing have shown that moisture/submergence of electrical cables and wires significantly increase the probability of failure. Failure of the cables and wires also causes failure of connected components[.]'' The petitioners assert that ''NRC requirements only state that safety systems should remain functional and do not provide conditions or acceptance criteria for degraded cables. Additionally, cable degradation as an ongoing process is not a reported issue unless it leads to the failure of a cable system or it is discovered that the cables are operating in conditions for which they were not intended.'' The NRC issued two Information Notices regarding submerged electrical cables, Information Notice 2002–12, ''Submerged Safety-Related Electrical Cables,'' (ADAMS Accession Number ML020790238) and Information Notice 2010–26, ''Submerged Electrical Cables,'' (ADAMS Accession Number ML102800456). The petitioners stated that the NRC did not request specific action from the licensees. The petitioners further state that ''[t]he observations in [Information Notice] 2010–26 range from licensee failures to establish preventative maintenance and test programs or their failure to verify and maintain suitable environments for series of electrical cable systems. In certain cases, the inspections discovered that a number of cable systems were being subjected to conditions for which they were not designed for, such as 'continuous underwater environments,' which led to concerning levels of insulation degradation and cable failure. These affected cable systems included safety-related power cables, where the inspectors noted that failures in these systems could disable important accident mitigation systems.''

In Staff Requirements Memorandum (SRM) for SECY–92–223, ''Resolution of Deviations Identified During the Systematic Evaluation Program,'' (ADAMS Accession Number ML003763736), dated September 18, 1992, the Commission provided direction to its staff regarding the applicability of the GDC. The petitioners state that ''[t]he problem is that past NRC decisions have constrained or eliminated the applicability of these regulatory requirements'' and ''the Commission has determined that these requirements are *NOT* to be applied to the majority of reactors.'' The petitioners further state that ''[t]he regulation did not further limit this requirement to where the cables and wires were located.'' The petitioners assert that a statement by Judge Ann Marshall Young ''further expounds on the need for rulemaking and clarification of 10 C.F.R § 50.49 to address cables that may be exposed to harsh environments during normal, abnormal, and accident conditions. Electrical cables and wires are prone to accelerated failure rates when submerged in water or exposed to high humidity unless designed and qualified for these environmental conditions. The NRC's regulatory requirements address environmental qualification of safety-related systems, structures, and components, including electric cables and wires.''

The petitioners state that ''[t]his rulemaking will supplement and clarify NRC's regulatory requirements to ensure that safety-related electrical cables and wires will be properly qualified for all the environmental conditions they may experience during routine operation and following accidents regardless of when a reactor received its construction permit or where the safety-related cable is located.''

Dated at Rockville, Maryland, this 21st day of September 2012.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2012–23792 Filed 9–26–12; 8:45 am]

BILLING CODE 7590–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AE08

Payday-Alternative Loans

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance notice of proposed rulemaking (ANPR).

SUMMARY: The NCUA Board (Board) is currently reviewing its regulation governing payday-alternative loans (PAL or PAL loans), formerly known as short-term, small amount loans. The Board intends to improve the regulation to encourage more federal credit unions (FCUs) to offer PAL loans and believes it may be necessary to amend the regulation. The Board seeks comment on how best to approach this. Although the Board identifies specific issues for discussion below, it encourages commenters to discuss any issue related to improving the regulation.

DATES: Comments must be received on or before November 26, 2012.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *Email:* Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on Advance Notice of Proposed Rulemaking for Part 701, PAL Amendments'' in the email subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for email.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection: You may view all public comments on NCUA's Web site at *http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx* as submitted,

except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an email to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Associate General Counsel, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background
A. The PAL Rule
B. Evaluation of PAL Data and Justification for the Rulemaking
II. Questions for Comment

I. Background

A. The PAL Rule

On September 16, 2010, the Board amended its general lending rule to enable FCUs to offer PAL loans, previously referred to as short-term, small amount loans, as an alternative to predatory payday loans.[1] PAL loans can help certain members to break free of their dependency on high-cost payday loans. To help FCUs afford to make PAL loans, which tend to have higher rates of default than mainstream loan products, the PAL rule permits FCUs to charge a higher rate of interest for PAL loans if certain conditions are met.

The term ''payday loan'' generally refers to a small amount, short-term loan that is intended to cover a borrower's expenses until his or her next payday, which is when the loan is to be repaid in full.[2] Historically, payday loans have been made by lenders who charge high fees and often engage in predatory lending practices. While some payday loan borrowers use these loans sparingly, many find themselves in a cycle of having their loans ''rollover'' repeatedly, and they incur more high fees as a result. These borrowers are often unable to break free of this unhealthy dependence on payday loans.

As part of the solution, the Board is determined to provide a regulatory framework for FCUs to make PAL loans a viable alternative to predatory payday loans. The Board intends the PAL loan rule to provide short- and long-term benefits for current payday borrowers. In the short term, the rule provides borrowers with a responsible alternative to high-cost payday loans. In the long term, the rule permits FCUs to offer borrowers a way to break the cycle of reliance on payday loans by building creditworthiness and transitioning to traditional, mainstream financial products.

The current PAL regulation permits FCUs to charge an interest rate for PAL loans that is 1000 basis points above the general interest rate set by the Board for non-PAL loans, provided the following conditions are met:

(1) The principal amount of the PAL loan is not less than $200 and not more than $1000;

(2) The PAL loan has a minimum maturity term of one month and a maximum maturity term of six months;

(3) The FCU does not make more than three PAL loans in any rolling six-month period to any one borrower and makes no more than one PAL loan at a time to a borrower;

(4) The FCU does not rollover any PAL loan;

(5) The FCU fully amortizes the loan;

(6) The FCU sets a minimum length of membership requirement of at least one month;

(7) The FCU charges an application fee to all members applying for a new PAL loan that reflects the actual costs associated with processing the application, but in no case may the application fee exceed $20; and

(8) The FCU includes, in its written lending policies, a limit on the aggregate dollar amount of PAL loans made to a maximum of 20% of net worth and implements appropriate underwriting guidelines to minimize risk; for example, requiring a borrower to verify employment by producing at least two recent pay stubs.[3]

The rule also includes a best practices section, which discusses ways to help ensure the product remains viable and responsible.

B. Evaluation of PAL Data and Justification for the Rulemaking

In the 2010 rulemaking, the Board indicated that, after one year, it would review the PAL loan data collected on the 5300 call reports and reevaluate the requirements of the rule.[4] As of September 30, 2011, 372 FCUs reported offering PAL loans with an aggregate balance of $13.6 million on 36,768 outstanding loans.

The most recent data shows that as of June 30, 2012, 420 FCUs reported offering PAL loans with an aggregate balance of approximately $16.7 million on 41,264 outstanding loans.

The Board notes that, during this nine-month period, there was a slight increase in the number of participating FCUs, and it commends those FCUs that offer PAL loans to their members. The Board intends to increase the participation level in a meaningful way and ensure that all FCUs that choose to offer PAL loans are able to recover their costs.

The Board acknowledges that some FCUs may choose not to offer PAL loans because their members do not need them. Further, the Board recognizes that some FCUs offer other non-PAL loan products and services to their members that also reduce dependence on traditional payday lenders. Nevertheless, there are many credit union members who would benefit greatly from enhanced access to PAL loans. Accordingly, the Board is committed to making PAL loans a more widespread product for those members who need them and making it is easier and more affordable for those FCUs that choose to offer them. NCUA advises that an FCU can only make PAL loans available to its members if the FCU can afford to make these loans.

II. Questions for Comment

The Board is considering ways to improve the PAL regulation. An increase in the permissible application fee may enable FCUs with higher application processing costs to afford to offer PAL loans to their members. The Board understands that actual costs to process an application may be higher for some FCUs based on geographic location or the level of underwriting a particular FCU chooses to conduct. While the Board does not expect FCUs to generate a large return from these loans, it does not expect FCUs to offer PAL loans at a loss, which could threaten the FCUs' safety and soundness.

The Board could consider increasing the permissible application fee without making any other changes or it could increase the fee in conjunction with a decrease in the permissible loan interest rate. The Board understands that some credit unions prefer not to charge a higher interest rate on PAL loans, but must do so to offset the higher degree of risk associated with these loans. The Board invites comment on if a higher application fee cap alone would encourage more credit unions to make PAL loans or if credit unions would prefer any application fee increase to be linked with a lower permissible interest rate.

Although the Board is considering increasing the maximum application fee, the Board notes that under

[1] 75 FR 58285 (Sept. 24, 2010).

[2] NCUA Instruction 10200, Credit Union Online Instruction Guide, page 32 (12/2009).

[3] 12 CFR 701.21(c)(7)(iii).

[4] *Id.* at 58288.

Regulation Z (Reg Z), an application fee may only serve to recoup the actual costs incurred by an FCU to process a PAL loan application. FCUs would still need to accurately account for their costs in determining a permissible application fee, and they would not be able to use this fee to offset losses associated with this type of lending. NCUA will continue to scrutinize these fees to ensure compliance with Reg Z and ensure PAL loans remain a beneficial product for FCU members.

In addition to seeking comment on the application fee and interest rate, the Board seeks comment on all aspects of the regulation. The questions enumerated below are intended to stimulate commenter response and suggest areas where NCUA may improve the rule to encourage more FCUs to offer PAL loans. Commenters should feel free to comment on any aspect of the PAL regulation. Of course, commenters should include reasonable justification for all comments provided.

Additional Questions for Consideration

(1) Should the Board increase the permissible PAL loan interest rate, which is currently set at 28% (based on 1000 basis points above the maximum interest rate established by the Board for non-PAL loans)?

(2) Should the Board expand the permissible loan range, which is currently set from $200 to $1000?

(3) Should the Board permit PAL loan maturities of shorter than one month or longer than six months?

(4) Should the Board allow FCUs to make more than one PAL loan at a time to a borrower?

(5) Should the Board eliminate or decrease the one-month minimum length of membership requirement?

(6) Should the Board increase the limit on the permissible aggregate dollar amount of loans made, which currently is 20% of an FCU's net worth?

In addition to soliciting comments on the current PAL rule, the Board is also interested in learning about viable payday-alternative products credit unions are currently offering their members. The Board invites commenters to describe products and programs they offer and to share details about the business models they use to execute successful programs.

By the National Credit Union Administration Board on September 21, 2012.

Mary Rupp,

Secretary of the Board.

[FR Doc. 2012–23718 Filed 9–26–12; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 357

[Docket No. RM12–18–000]

Revisions to Page 700 of FERC Form No. 6

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to modify Page 700 of FERC Form No. 6 (Form 6) to facilitate the calculation of a pipeline's actual return on equity. The Commission proposes to expand the information provided regarding rate base (line 5), rate of return (line 6), return on rate base (line 7), and income tax allowance (line 8).

DATES: Comments are due November 26, 2012.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- *Electronic Filing through: http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document

FOR FURTHER INFORMATION CONTACT:

James Sarikas (Technical Information), Office of Energy Market Regulation, 888 First Street NE., Washington, DC 20426, (202) 502–6831, *James.Sarikas@ferc.gov.*

Brian Holmes (Technical Information), Office of Enforcement, 888 First Street NE., Washington, DC 20426, (202) 502–6008, *Brian.Holmes@ferc.gov.*

Andrew Knudsen (Legal Information), Office of the General Counsel, 888 First Street NE., Washington, DC 20426, (202) 502–6527, *Andrew.Knudsen@ferc.gov.*

SUPPLEMENTARY INFORMATION:

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(Issued September 20, 2012)

1. The Federal Energy Regulatory Commission (Commission) proposes to modify the reporting requirements on Page 700, Annual Cost of Service Based Analysis Schedule, of FERC Form No. 6, Annual Report of Oil Pipeline Companies (Form 6), to facilitate the calculation of a pipeline's actual rate of return on equity based upon Page 700 data. The modifications to Page 700 include requiring additional information regarding rate base, rate of return, return on rate base, and income taxes.[1]

[1] Concurrent with the issuance of this NOPR, the Commission is issuing a final rule in Docket No. RM11–21–000, *Revision to Form No. 6.*

I. Background

2. The Commission is responsible for regulating the rates, terms and conditions that oil pipelines charge for transportation under the Interstate Commerce Act (ICA).[2] The ICA prohibits pipelines from charging rates that are ''unjust and unreasonable'' and permits shippers and the Commission to challenge both pre-existing and newly filed rates.[3]

3. To assist the Commission in the administration of its jurisdictional responsibilities, the ICA authorizes the Commission to prescribe annual or other periodic reports.[4] Through Form 6, the Commission collects annual financial information from crude and refined product pipelines [5] subject to the Commission's jurisdiction, as prescribed in section 357.2 of the Commission's regulations.[6] Form 6 ''is intended to be both a financial and ratemaking document.'' [7]

4. Page 700 of Form 6 provides a simplified presentation of an oil pipeline's jurisdictional cost-of-service. Page 700 serves as a preliminary screening tool to evaluate pipeline rates.[8] However, ''Page 700 information alone is not intended to show what a just and reasonable rate should be.'' [9] Currently, pipelines are required to provide the following on Page 700: Operating and Maintenance Expenses (line 1), Depreciation Expense (line 2), AFUDC Depreciation (line 3), Amortization of Deferred Earnings (line 4), Rate Base (line 5), Rate of Return (line 6), Return on Rate Base (line 7), Income Tax Allowance (line 8), Total Cost of Service (line 9), Total Interstate Operating Revenues (line 10), Throughput in Barrels (line 11), and Throughput in Barrel-Miles (line 12).

II. Discussion

5. The Commission proposes to modify Page 700 to more easily enable the calculation of a pipeline's actual rate of return on equity consistent with the ratemaking principles embodied in Opinion 154–B, *et al.* The actual rate of return on equity reflects the relationship between a pipeline's revenues and its cost of service. As a result, the actual rate of return on equity is particularly useful information when using Page 700 to evaluate whether a pipeline's rates are just and reasonable consistent with the Commission's mandate under the ICA.

6. To provide the data necessary to calculate the actual return on equity, Page 700 must be modified to include additional information related to rate base, rate of return, return on rate base, and income tax rates.

A. Rate Base

7. The Commission seeks to enhance the information provided on Page 700 related to rate base, rate of return, and return on rate base. The components of an oil pipeline's rate base are governed by the Trended Original Cost Methodology adopted by the Commission in Opinion No. 154–B. [10] Under this methodology, a pipeline's Rate Base consists of (1) The Original Cost Rate Base, (2) any unamortized amounts from the oil pipeline's Starting Rate Base Write-Up (SRB),[11] and (3) Accumulated Net Deferred Earnings.[12]

8. Consistent with Opinion No. 154–B, the Commission proposes to enhance the Rate Base information provided on line 5 of Page 700 by adding (1) Rate Base – Original Cost (proposed line 5a), (2) Rate Base – Unamortized Starting Rate Base Write-Up (proposed line 5b), (3) Rate Base – Accumulated Net Deferred Earnings (proposed line 5c). The sum of proposed lines 5a, 5b and 5c comprise the pipeline's Trended Original Cost Rate Base, which is currently reported on line 5 of Page 700 and which the Commission proposes to move to line 5d entitled Total Rate Base – Trended Original Cost – (5a + 5b + 5c).

B. Rate of Return

9. The Commission proposes to require oil pipelines to report the cost of equity and cost of debt components that constitute the overall Weighted Cost of Capital currently reported as ''Rate of Return'' on line 6, Page 700. Specifically, the Commission proposes to include additional information related to debt and equity capital structure ratios, i.e. (1) Rate of Return – Adjusted Capital Structure Ratio for Long Term Debt (proposed line 6a), (2) Rate of Return – Adjusted Capital Structure Ratio for Proprietary Capital (proposed line 6b).[13] The Commission further proposes to add information related to the cost of debt and the cost of equity, specifically: (1) Rate of Return – Cost of Long Term Debt Capital (proposed line 6c), (2) Rate of Return – Real Cost of Proprietary Capital [14] (proposed line 6d). This additional information forms the basis for the Rate of Return – Weighted Average Cost of Capital (the total of 6a * 6c + 6b * 6d), which is now reported as ''Rate of Return'' on line 6 on Page 700 and which the Commission proposes to move to line 6e.

C. Return on Rate Base

10. The Commission proposes to require oil pipelines to report additional information related to the Return on Rate Base in line 7. The Return on Rate Base currently reported on line 7 combines the pipeline's return on equity and the portion of the pipeline's return allocated to paying its cost of debt. The

[2] 49 U.S.C. 1, *et seq.*

[3] 49 U.S.C. 13(1), 15(1), (7). Just and reasonable rate are ''rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital.'' *City of Charlottesville* v. *FERC,* 774 F.2d 1205, 1207 (D.C. Cir. 1985).

[4] 49 App. U.S.C. 1–85 (2000).

[5] Hereafter, the term ''oil pipeline'' shall include both crude and refined product pipelines.

[6] 18 CFR 357.2 (2012).

[7] *Revisions to and Electronic Filing of the FERC Form No. 6 and Related Uniform Systems of Accounts,* Order No. 620, FERC Stats. & Regs., Regulation Preambles July 1996–December 2000 ¶ 31,115, at p. 31,954 (2000) (*citing Cost of Service Requirements and Filing Requirements for Oil Pipelines,* Order No. 571, FERC Stats. & Regs., Regulation Preambles Jan. 1991–June 1996 ¶ 31,006, at p. 31,169 (1995) and Form 6, p. I, Roman Numeral 1; *on reh'g,* Order No. 620–A, 94 FERC 61,130 (2001); *order on reh'g,* Order No. 620–A, 94 FERC ¶ 61,130 (2001)).

[8] All jurisdictional pipelines are required to file page 700, including pipelines exempt from filing the full Form 6. 18 CFR 357.2(a)(2) and (a)(3) (2012).

[9] Order No. 571–A, 69 FERC ¶ 61,411, at p. 31,254 (1994).

[10] *See Williams Pipeline Co.,* Opinion No. 154–B, 31 FERC ¶ 61,377 (1985), *order on reh'g,* Opinion No. 154–C, 33 FERC ¶ 61,327 (1985). Instruction No. 2 of Page 700 of the FERC Form No. 6 requiring the values ''be computed consistent with the Commission's Opinion No. 154–B *et al.* methodology * * *.''

[11] The Starting Rate Base Write-Up is a transitional rate base element employed to bridge the transition from a valuation ratemaking methodology to the Trended Original Cost methodology as adopted in Opinion 154–B. The SRB was to be amortized over the estimated life of the pipeline at the time the SRB was established.

[12] The trended original cost methodology divides the nominal return on equity component of the cost of service into real return and an inflationary return. The real return is collected in the current year. The Net Deferred Earnings consists of the inflation component, which is deferred to be recovered in annual installments over the remaining life of the pipeline. *See* Opinion No. 154–B, 31 FERC ¶ 61,377 (1985), *order on reh'g,* Opinion No. 154–C, 33 FERC ¶ 61,327 (1985). *See, e.g., BP West Coast Prods., LLC* v. *FERC,* 374 F.3d 1263, 1282–83 (D.C. Cir. 2004).

[13] The Adjusted Capital Structure Ratio adjusts upward the level of equity in capital structure to account for the treatment of Accumulated Deferred Earnings under the Opinion 154–B Methodology. Under the 154–B Methodology, a pipeline's return on the Original Cost and the SRB Write-Up is based on a weighted average of the cost of debt and the return on equity. However, a pipeline's rate of return on Accumulated Net Deferred Earnings is the equivalent to the rate of return on equity (proposed line 6d) and does not include a cost of debt component. The upward adjustment to equity ratio allows the pipeline to apply its weighted average cost of capital consisting of debt and equity to one rate base. *ARCO Pipe Line Co.,* 53 FERC ¶ 61,398 at 62,388–89.

[14] The real cost of capital excludes the inflationary component of the nominal return that is placed in Net Deferred Earnings pursuant to the trended original cost methodology.

Commission proposes to require the pipeline to include on Page 700 the Return on Rate Base – Debt Component (proposed line 7a) [15] and the Return on Rate Base – Equity Component (proposed line 7b).[16] The Commission proposes to report on proposed on line 7c the Total Return on Rate Base – (7a + 7b), which is the same information currently reported on line 7.

D. Composite Tax Rate

11. The Commission proposes to modify the Page 700 to include the Composite Tax Rate used to determine the ''Income Tax Allowance.'' [17] Line 8 of the Page 700 currently requires each pipeline to report the total dollar amount attributable to the ''Income Tax Allowance'' in its cost-of-service. The Commission proposes to add a new line 8a which will require a pipeline to report its ''Composite Tax Rate Percentage.''

12. The Commission defines the Composite Tax Rate Percentage as the sum, adjusted consistent with Commission policy, of (a) the applicable state income tax rate and (b) a federal income tax rate. As filed on Page 700, the Composite Tax Rate Percentage should reflect the income tax rate used pursuant to Commission's policies to determine the Income Tax Allowance reported on line 8.[18]

13. The Composite Tax Rate Percentage will create a better understanding of the differential between a pipeline's Total Interstate Operating Revenues (line 10) and the pipeline's Total Cost of Service (line 9). Specifically, the Composite Tax Rate Percentage may be used to determine the portion of this differential that is attributable to income taxes under Commission policy, and the portion that may be treated as part of a pipeline's actual return on equity.

E. Calculation of Actual Rate of Return on Equity

14. These modifications to Page 700 will provide information that may be used to calculate a pipeline's actual rate of return on equity. The actual rate of return on equity is determined by dividing (a) the actual return on equity by (b) the equity portion of Trended Original Cost Rate Base reported on line 5d. The actual return on equity is the sum of three components that can be derived using the proposed modifications to Page 700: (a) The return on equity embedded in a pipeline's Page 700 Total Cost of Service (proposed line 7b); (b) the difference, adjusted for taxes, between a pipeline's Total Interstate Operating Revenues (proposed Line 10) and a pipeline's Total Cost of Service (proposed Line 9); [19] and (c) the current year's contribution to Net Deferred Earnings, which is calculated by multiplying the equity portion of the Trended Original Cost Rate Base (line 5d) by the current year's Department of Labor's consumer price index for all urban areas (CPI–U).[20]

15. Once the actual return on equity has been derived, it may be divided by the equity portion of Trended Original Cost Rate Base. The equity portion of the Trended Original Cost Rate base consists of the Trended Original Cost Rate Base (proposed line 5d) multiplied by the equity component of capital structure (proposed line 6b).

16. These proposed modifications to Page 700 will increase the usefulness of Page 700. Prior to this proposal, any attempt to estimate an oil pipeline's actual return on equity required assumptions regarding several cost of service components, including capital structure (proposed lines 6a and 6b), the composite income tax rate (proposed line 8a), and the return on equity embedded in a pipeline's Page 700 cost of service (proposed line 7b). The Commission believes this additional information will make Page 700 a more useful tool for evaluating a pipeline's rates; however, it welcomes comments as to whether the proposed changes herein are sufficient for the goals we have described above.

F. Conclusion

17. As discussed herein, the proposed modifications will facilitate the calculation of the actual rate of return on equity based upon Page 700 data. The actual rate of return on equity is particularly useful information when using Page 700 to evaluate a pipeline's rates. The additional information proposed to be reported will impose almost no additional burden on oil pipelines because pipelines already must develop cost of service supporting calculations to determine the Income Tax Allowance, Rate Base, Rate of Return, and Return on Rate Base reported on Page 700. Given these existing requirements, the Commission does not anticipate that these proposed additions to Page 700 of Form 6 will impose a significant burden on oil pipelines.

G. Effective Date

18. The Commission proposes that the changes to Form 6 are to be effective for reporting in the 2013 Form 6. The 2013 Form 6 must be filed on or before April 18, 2014.[21] The new schedule appearing on Page 700 therefore would not be required for Form 6 filings until April 18, 2014, for the reporting year ending December 31, 2013.

III. Information Collection Statement

19. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[22] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Paperwork Reduction Act (PRA) [23] requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability.[24]

20. The Commission is submitting these reporting requirements to OMB for its review and approval under section

[15] Return on Rate Base – Debt Component will be the equivalent of the weighted average cost of debt (product of proposed lines 6a and 6c) multiplied by the Trended Original Cost Rate Base (proposed line 5d).

[16] Return on Rate Base – Equity Component will be the equivalent of the weighted average cost of equity (product of proposed lines 6b and 6d) multiplied by the Trended Original Cost Rate Base (proposed line 5d).

[17] The Commission's income tax policy permits ''an income tax allowance for all entities or individuals owning public utility assets, provided that entity or individual has an actual or potential income tax liability to be paid on that income from those assets.'' *Inquiry Regarding Income Tax Allowances,* 111 FERC ¶ 61,139 (2005).

[18] For instance, the business structure for a large number of oil pipelines is a Master Limited Partnership (MLP). The income tax allowance for an MLP pipeline is based upon the tax liability of the owners.

[19] The difference between the pipeline's Total Interstate Operating Revenues (Line 10) and Total Cost of Service (proposed Line 9) provides the pipeline's earnings above its Total Cost of Service. As described above, the Composite Tax Rate Percentage may be used to determine the portion of this differential that is attributable to income taxes under Commission policy and the portion that may be treated as part of a pipeline's actual return on equity.

[20] As noted in footnote 16, the trended original cost methodology divides the nominal return on equity component of the cost of service into real return and an inflationary return.

[21] 18 CFR 357.1.

[22] 5 CFR 1320.

[23] 44 U.S.C. 3501–3520.

[24] OMB's regulations at 5 CFR 1320.3(c)(4)(i) require that ''Any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons.''

3507(d) of the PRA. Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

21. The Commission's estimate of the additional Public Reporting Burden and cost related to the proposed rule in Docket RM12–18–000 follow.

22. For the recurring effort involved in filing the data on proposed lines 5a–5c, 6a–6e, 7a–7c, and 8a of Page 700 for 2013 and future years, we estimate that the change in burden is 0.5 hours per year per respondent.

RM12–18–000, FERC Form 6	Annual number of fliers	Estimated additional burden per filer (Hr)	Total estimated additional burden (Hr)	Estimated additional cost per filer ($) [25]	Total estimated additional cost ($)
Filing new proposed lines on page 700	166	0.5	88	$34.51	$3,036.88

23. *Information Collection Cost and Burden: The Commission seeks comments on the costs and burden to comply with these requirements.*

Title: FERC Form 6, Annual Report of Oil Pipeline Companies.

Action: Proposed Revisions to the FERC Form 6.

OMB Control No: 1902–0022.

Respondents: Oil pipelines.

Frequency of Responses: Annual.

Necessity of the Information: This action ensures the availability of data consistent with the Commission's obligation to regulate interstate oil and petroleum product pipeline rates and the intent of Page 700, to enable the Commission and shippers to monitor and analyze interstate pipeline costs.

Internal review: The Commission has reviewed the proposed changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient and sufficient information collection, communication, and management with regard to the oil pipeline sector of the energy industry. The Commission has, by means of internal review, assured itself that there is specific, objective support for the burden estimates associated with the information collection requirements.

24. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: *DataClearance@ferc.gov,* Phone: (202) 502–8663, fax: (202) 273–0873]. Comments on the requirements of this rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at *oira_submission@omb.eop.gov.* Please reference OMB Control No. 1902–0022, FERC–6 and the docket number of this proposed rulemaking in your submission.

IV. Environmental Analysis

25. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[26] The actions taken here fall within categorical exclusions in the Commission's regulations for information gathering, analysis, and dissemination.[27] Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

V. Regulatory Flexibility Act

26. The Regulatory Flexibility Act of 1980 (RFA) generally requires agencies to prepare certain statements, descriptions, and analyses of proposed rules that will have a significant economic impact on a substantial number of small business entities.[28] Agencies are not required to make such an analysis if a rule would not have such an effect.

27. The Commission does not believe that this proposed rule will have an adverse impact on small entities, nor will it impose upon them any significant costs of compliance. The Commission identified 29 small entities as respondents to the requirements in the proposed rule.[29] As explained above, the Commission estimates that the change to Page 700 will increase the paperwork burden of preparing Page 700 by approximately $34.51 per respondent. The Commission does not estimate that there are any other regulatory burdens associated with this proposed rule. Therefore the Commission certifies that the proposed rule will not have a significant impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

VI. Comment Procedures

28. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 60 days from publication in the **Federal Register**. Comments must refer to Docket No. RM12–18–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

29. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

[25] Based on an estimated average cost per employee for 2012 (including salary plus benefits) of $143,540, the estimated average hourly cost per employee is $69.01. The average work year is 2,080 hours.

[26] Order No. 486, *Regulations Implementing the National Environmental Policy Act,* 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[27] 18 CFR 380.4(a)(5).

[28] 5 U.S.C. 601–12.

[29] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small oil pipeline company as one with less than 1,500 employees. See 13 CFR parts 121, 201.

30. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

31. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

32. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington DC 20426.

33. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

34. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Kimberly D. Bose,

Secretary.

Appendix A—Summary of Proposed Changes to FERC Form 6, Page 700

Line 5a is added to read as follows:

Rate Base – Original Cost

Line 5b is added to read as follows:

Rate Base – Unamortized Starting Rate Base Write-Up

Line 5c is added to read as follows:

Rate Base – Accumulated Net Deferred Earnings

Line 5d is added to read as follows:

Total Rate Base – Trended Original Cost – (5a + 5b + 5c)

Line 6a is added to read as follows:

Rate of Return – Adjusted Capital Structure Ratio for Long Term Debt

Line 6b is added to read as follows:

Rate of Return – Adjusted Capital Structure Ratio for Proprietary Capital

Line 6c is added to read as follows:

Rate of Return – Cost of Long Term Debt Capital

Line 6d is added to read as follows:

Rate of Return – Real Cost of Proprietary Capital

Line 6e is added to read as follows:

Rate of Return – Weighted Average Cost of Capital – (6a × 6c + 6b × 6d)

Line 7a is added to read as follows:

Return on Rate Base – Debt Component

Line 7b is added to read as follows:

Return on Rate Base – Equity Component

Line 7c is added to read as follows:

Total Return on Rate Base – (7a + 7b)

Line 8a is added to read as follows:

Composite Tax Rate % (37.50%–37.50)

Note: Appendix B will not be published in the *Code of Federal Regulations*

BILLING CODE 6717–01–P

Appendix B: Revised Page 700 to Form 6

Name of Respondent	This Report Is: □ (1) An Original □ (2) A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of _____

Annual Cost of Service Based Analysis Schedule

1.) Use footnotes when particulars are required or for any explanations.
2.) Enter on lines 1-9, columns (b) and (c), the value the respondent's Operating & Maintenance Expenses, Depreciation Expense, AFUDC Depreciation, Amortization of Deferred Earnings, Rate Base, Rate of Return, Return, Income Tax Allowance, and Total Cost of Service, respectively, for the end of the current and previous calendar years. The values shall be computed consistent with the Commission's Opinion No. 154-B et al. methodology. Any item(s) not applicable to the filing, the pipeline company shall report nothing in columns (b) and (c).
3.) Enter on line 10, columns (b) and (c), total interstate operating revenue, as reported on page 301, for the current and previous calendar years.
4.) Enter on line 11, columns (b) and (c), the throughput in barrels from the Statistics of Operations schedule, page 601, line 33b, total of items (1) and (2), from the current and previous year's FERC Form No. 6.
5.) Enter on line 12, columns (b) and (c), the throughput in barrel-miles from the Statistics of Operations schedule, page 600, line 33a, total of items (1) and (2), from the current and previous year's FERC Form No. 6.
6.) If the company makes major changes to its application of the Opinion No. 154-B et al. methodology, it must describe such changes in a footnote, and calculate the amounts in columns (b) and (c) of lines No. 1-12 using the changed application.
7.) A respondent may be requested by the Commission or its staff to provide its workpapers which support the data reported on page 700.

Line No.	Item (a)	Current Year Amount (in dollars) (b)	Prior Year Amount (in dollars) (c)
1	Operating and Maintenance Expenses	25,000,000	24,500,000
2	Depreciation Expense	6,500,000	6,450,000
3	AFUDC Depreciation	500,000	510,000
4	Amortization of Deferred Earnings	800,000	840,000
5	Rate Base		
5a	Rate Base – Original Cost	90,000,000	94,000,000
5b	Rate Base – Unamortized Starting Rate Base Write-Up		
5c	Rate Base – Accumulated Net Deferred Earnings	20,000,000	21,000,000
5d	Total Rate Base –Trended Original Cost – (5a + 5b + 5c)	110,000,000	115,000,000
6	Rate of Return % (10.25% - 10.25)		
6a	Rate of Return – Adjusted Capital Structure Ratio for Long Term Debt	36.00	36.00
6b	Rate of Return – Adjusted Capital Structure Ratio for Proprietary Capital	64.00	64.00
6c	Rate of Return – Cost of Long Term Debt Capital	8.00	8.00
6d	Rate of Return – Real Cost of Proprietary Capital	14.25	14.25
6e	Rate of Return – Weighted Average Cost of Capital – (6a x 6c + 6b x 6d)	12.00	12.00
7	Return on Rate Base		
7a	Return on Rate Base – Debt Component	3,168,000	3,312,000
7b	Return on Rate Base – Equity Component	10,032,000	10,488,000
7c	Total Return on Rate Base – (7a + 7b)	13,200,000	13,800,000
8	Income Tax Allowance	9,000,000	9,400,000
8a	Composite Tax Rate % (37.50% - 37.50)	37.50	37.50
9	Total Cost of Service	55,000,000	55,500,000
10	Total Interstate Operating Revenues	60,000,000	57,000,000
11	Throughput in Barrels	80,000,000	79,000,000
12	Throughput in Barrel-Miles	40,000,000,000	39,000,000,000

[FR Doc. 2012–23807 Filed 9–26–12; 8:45 am]
BILLING CODE 6717–01–C

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 51

RIN 2900–AO37

Removal of 30-Day Residency Requirement for Per Diem Payments

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its regulations concerning per diem payments to State homes for the provision of nursing home care to veterans. Specifically, this rule would remove the requirement that a veteran must have resided in a State home for 30 consecutive days before VA will pay per diem for that veteran when there is no overnight stay. The intended effect of this proposed rule is to permit per diem payments to State homes for veterans who do not stay overnight, regardless of how long the veterans have resided at the State homes, so that the State homes will hold the veterans' beds until the veterans return.

DATES: Written comments must be received on or before October 29, 2012.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AO37, Removal of 30-Day Residency Requirement for Per Diem Payments.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Harold Bailey, Program Management Officer (Director of Administration), VA Health Administration Center, Purchased Care (10NB3), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (303) 331–7551. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This proposed rule would amend part 51 of title 38, Code of Federal Regulations (CFR), to remove the requirement that a veteran receiving nursing home care in a State home must have resided in the State home for at least 30 consecutive days before VA would pay per diem when that veteran does not stay in the State home overnight. VA pays per diem to State homes for veterans who stay elsewhere overnight to create a ''bed hold,'' so that the State home reserves the veteran's bed until the veteran returns from a temporary absence. Typically, these temporary absences arise from a veteran's acute need for a higher level of care, such as a period of hospitalization. Temporary absences also arise for reasons other than hospital care, such as when a veteran travels to visit family members.

This proposed rule would also clarify in 38 CFR 51.43 that VA calculates occupancy rate ''by dividing the total number of patients in the nursing home or domiciliary by the total recognized nursing home or domiciliary beds in that facility.'' This would be consistent with current practice, and would help ensure that State homes understand our methodology.

The 30-day residency requirement for bed hold per diem payments was established in 2009 in 38 CFR 51.43(c), which stated: ''Per diem will be paid under §§ 51.40 and 51.41 for each day that the veteran is receiving care and has an overnight stay. Per diem also will be paid when there is no overnight stay if the veteran has resided in the facility for 30 consecutive days (including overnight stays) and the facility has an occupancy rate of 90 percent or greater. However, these payments will be made only for the first 10 consecutive days during which the veteran is admitted as a patient for any stay in a VA or other hospital (a hospital stay could occur more than once in a calendar year) and only for the first 12 days in a calendar year during which the veteran is absent for purposes other than receiving hospital care.'' *See* 74 FR 19433.

In the proposed rule that preceded the addition of § 51.43, we stated that the basis for the 30-day residency requirement was that ''State homes should receive per diem payments to hold beds only for permanent residents and only if the State home would likely fill the bed without such payments. Allowing payments for bed holds only after a veteran has been in a nursing home for at least 30 consecutive days (including overnight stays) appears to be sufficient to establish permanent residency.'' 73 FR 72402. In addition, the 2009 final rule confirmed VA's intent to make the 30-day rule a factor that directly affected eligibility for bed hold payments, stating: ''We believe that 30 days is a minimal amount of time for demonstrating that a veteran intends to be a resident at the State home and that the veteran was not temporarily placed in the State home.'' 74 FR 19429.

VA adopted the 30-day residency requirement as the measure for determining whether a veteran would likely return to a State home after not having stayed there overnight, and in turn whether the State home should receive continued per diem payments in the veteran's absence to hold the veteran's bed. Through application of this requirement, however, VA has come to recognize that duration of residency in a State home is not an accurate predictor of whether a veteran is likely to return to a State home after a temporary absence. For instance, with absences resulting from the veteran's need for hospital care, the veteran's health status while hospitalized is actually what determines whether and when he or she will return to a nursing home level of care at the State home. With absences resulting from non-hospital care reasons, the veteran in almost all instances communicates an intent to return to the State home within a specific period of time, or communicates that he or she will not be returning. With both types of absences, we no longer find that a veteran's period of residency at a State home is determinative as to whether the veteran will likely return to the State home. Therefore, we believe the 30-day residency requirement is unnecessary in ensuring standards of bed hold per diem payments, and propose to remove this requirement from 38 CFR 51.43(c).

Based on our experience in applying § 51.43(c) since 2009, we believe our determination of whether to pay bed hold per diem for veterans who are absent overnight from State homes should be based on whether the veteran's bed would otherwise be taken by another resident. The best predictor of whether a veteran's bed is likely to be taken by another resident during the veteran's absence is the State home's occupancy rate, not the length of time the veteran has resided in the State home. If a State home has sufficient beds to offer new residents so that it need not fill the veteran's bed during the veteran's absence, then per diem payments to hold the veteran's bed are not needed. If the State home does not have a sufficient number of available beds, then per diem payments should be

paid for a veteran during any absence, subject to the limitation set forth in the rest of § 51.43(c) to ensure the bed is reserved for the veteran until he or she returns to the State home.

Thus, the current 90 percent occupancy requirement for State homes in § 51.43(c) would serve as the sole criterion to determine whether bed hold per diem is paid to State homes, and those payments would remain subject to the limitations currently in § 51.43(c) (''Per diem also will be paid when there is no overnight stay if * * * the facility has an occupancy rate of 90 percent or greater. However, these payments will be made only for the first 10 consecutive days during which the veteran is admitted as a patient for any stay in a VA or other hospital (a hospital stay could occur more than once in a calendar year) and only for the first 12 days in a calendar year during which the veteran is absent for purposes other than receiving hospital care.''). Maintaining the occupancy measure and payment limitations for bed hold per diem payments, while removing the residency requirement, would help ensure that VA is able to provide stable nursing home care via State homes as we intend.

Additionally, removing the 30-day residency requirement would bring VA more in line with generally accepted standards of practice for nursing home care. VA's other community nursing home care programs (such as the contract nursing home care program) do not have a similar residency requirement, and VA seeks to have a consistent bed hold policy for nursing home care provided to veterans in non-VA facilities. Moreover, it is administratively burdensome to track periods of residency in State homes across the country, as the total estimated average daily census for State homes is over 18,000 veterans in the nursing home level of care. This continuous tracking diverts significant VA resources, as this information must be monitored for 139 state nursing homes 5 days a week at 97 VA Medical Centers (VAMC) of jurisdiction, for 52 weeks a year for approximately an hour a day. Assuming a GS–06, step 5 grade level employee at each VAMC tracks residency for those State nursing homes in its jurisdiction, the estimated cost to VA in continuing this practice is $418,000 annually. In comparison, VA estimates that 1,095 more per diem payments would be made per year if there were no residency requirement, for an estimated increased annual cost of $265,000. Based on these calculations, tracking residency, due to the current 30-day residency requirement, costs VA nearly 60 percent more than the amount of the projected increase in per diem payments that VA would make if the 30-day residency requirement were removed. In addition, tracking residency does not ensure veteran beds are held as we intend and does not contribute to our efforts in providing dependable nursing home care to veterans through State homes. Under the current rule, State homes also shoulder the administrative burden of tracking and reporting the residency dates of veterans, and would likely benefit from the removal of the 30-day requirement.

Though in the past we believed a 30-day residency requirement helped ensure per diem was paid judiciously, VA now understands that the costs of this requirement outweigh possible savings. There have been numerous ongoing requests from the State home community and the National Association of State Veterans Homes (NASVH) for VA to remove the 30-day residency requirement for bed hold per diem payments. Because this rule would benefit veterans and liberalize a prerequisite for per diem payments, we do not believe that any members of the public would be adversely affected by this rule.

Administrative Procedure Act

Concurrent with this proposed rule, we are publishing a separate, substantively identical direct final rule in the ''Rules and Regulations'' section of this **Federal Register.** (*See* RIN 2900–AO36). The simultaneous publication of these documents will speed notice and comment rulemaking under section 553 of the Administrative Procedure Act should we have to withdraw the direct final rule due to receipt of any significant adverse comment.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, the direct final rule will become effective on the date specified in RIN 2900–AO36. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that no significant adverse comment was received and confirming the date on which the final rule will become effective. VA will also publish in the **Federal Register** a notice withdrawing this proposed rule.

However, if any significant adverse comment is received, VA will publish in the **Federal Register** a notice acknowledging receipt of a significant adverse comment and withdrawing the direct final rule. In the event the direct final rule is withdrawn because of any significant adverse comment, VA can proceed with the rulemaking by addressing the comments received and publishing a final rule. Any comments received in response to the direct final rule will be treated as comments regarding the proposed rule. VA will consider such comments in developing a subsequent final rule. Likewise, any significant adverse comment received in response to the proposed rule will be considered as a comment regarding the direct final rule.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures would be authorized. All VA guidance would be read to conform with this rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed amendment would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612.

The State homes that are subject to this proposed rulemaking are State government entities under the control of State governments. All State homes are owned, operated and managed by State governments except for a small number that are operated by entities under contract with State governments. These contractors are not small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action 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 this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this proposed regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles are 64.005, Grants to States for Construction of State Home Facilities; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on September 10, 2012, for publication.

List of Subjects in 38 CFR Part 51

Administrative practice and procedure, Claims, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: September 24, 2012.

Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 51 as follows:

PART 51—PER DIEM FOR NURSING HOME CARE OF VETERANS IN STATE HOMES

1. The authority citation for part 51 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 1710, 1741–1743, 1745.

2. Amend § 51.43(c) by removing ''the veteran has resided in the facility for 30 consecutive days (including overnight stays) and'', and by adding a sentence at the end of the paragraph to read as follows:

§ 51.43 Per diem and drugs and medicines—principles.

* * * * *

(c) * * * Occupancy rate is calculated by dividing the total number of patients in the nursing home or domiciliary by the total recognized nursing home or domiciliary beds in that facility.

* * * * *

[FR Doc. 2012–23777 Filed 9–26–12; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0013(b); FRL–9732–6]

Approval and Promulgation of Implementation Plans; North Carolina: Approval of Rocky Mount Supplemental Motor Vehicle Emissions Budget Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the North Carolina State Implementation Plan (SIP), submitted to EPA on February 7, 2011, by the State of North Carolina, through the North Carolina Department of Environment and Natural Resources, Division of Air Quality. North Carolina's February 7, 2011, submission supplements the original redesignation request and maintenance plan for Rocky Mount 1997 8-hour ozone area submitted on June 19, 2006, and approved by EPA on November 6, 2006. The Rocky Mount 1997 8-hour ozone area is comprised of Edgecombe and Nash Counties in North Carolina. The February 7, 2011, revision proposes to increase the safety margin allocated to motor vehicle emissions budgets to account for changes in the emissions model and vehicle miles traveled projection model. EPA is proposing approval of this SIP revision pursuant to section 110 of the Clean Air Act. North Carolina's SIP revision meets all the statutory and regulatory requirements, and is consistent with EPA's guidance.

DATES: Written comments must be received on or before October 29, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0013 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4-RDS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2012–0013,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street

SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Zuri Farngalo may be reached by phone at (404) 562–9152 or by electronic mail address *farngalo.zuri@epa.gov.*

SUPPLEMENTARY INFORMATION: On March 12, 2008, EPA issued a revised ozone National Ambient Air Quality Standards (NAAQS). *See* 73 FR 16436. The current action, however, is being taken to address requirements under the 1997 8-hour ozone NAAQS. Requirements for the Rocky Mount Area under the 2008 NAAQS will be addressed in the future.

For additional information regarding today's action see the direct final rule which is published in the Rules Section of this **Federal Register**. Through that direct final rule, EPA is approving the State's implementation plan revision 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 rule, 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 on this document. Any parties interested in commenting on this document should do so at this time.

Dated: September 11, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–23717 Filed 9–26–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2010–0077; 4500030113]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Spring Mountains Acastus Checkerspot Butterfly as an Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the Spring Mountains acastus checkerspot butterfly (*Chlosyne acastus robusta*) as an endangered species under the Endangered Species Act of 1973, as amended (Act). After review of the best available scientific and commercial information, we find that listing the Spring Mountains acastus checkerspot butterfly is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to the Spring Mountains acastus checkerspot butterfly or its habitat at any time.

DATES: The finding announced in this document was made on September 27, 2012.

ADDRESSES: This finding is available on the internet at *http://www.regulations.gov* at Docket Number FWS–R8–ES–2010–0077. 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, Nevada Fish and Wildlife Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130. Please submit any new information, materials, comments, or questions concerning this finding to the above street address.

FOR FURTHER INFORMATION CONTACT: Edward D. Koch, Field Supervisor, Nevada Fish and Wildlife Office (see **ADDRESSES**); by telephone at 775–861–6300; or by facsimile at 775–861–6301. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that listing a species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding we will determine that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are an endangered or threatened species, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

Previous Federal Actions

On September 18, 2009, we received a petition dated September 16, 2009, from Bruce M. Boyd requesting that the Spring Mountains acastus checkerspot butterfly (*Chlosyne acastus robusta*) be listed as an endangered species under the Act. Included in the petition was information regarding the species' taxonomy, historical and current distribution, present status, and potential causes of decline. We acknowledged the receipt of the petition in a letter to Bruce M. Boyd, dated November 24, 2009. In that letter, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the butterfly under section 4(b)(7) of the Act was not warranted (Service 2009, p. 1). We also stated that funding was secured and that we anticipated making an initial finding in fiscal year 2010 as to whether the petition contained substantial information indicating that the action may be warranted. On April 13, 2011, we published a 90-day petition finding (76 FR 20613) in which we concluded that the petition and information in our files provided substantial information indicating that listing the Spring Mountains acastus checkerspot butterfly may be warranted, and we initiated a status review. This notice constitutes the 12-month finding on the September 16, 2009, petition to list the Spring Mountains acastus checkerspot butterfly.

Taxonomy and Subspecies Description

William Henry Edwards (1874, pp. 16–17) provided the first descriptions of the sagebrush checkerspot butterfly (*Chlosyne acastus* (= *Melitaea acastus*)) from specimens collected during the Hayden expedition of 1871, Wheeler expedition of 1872, and by Henry Edwards, Esq. (Brown 1966, pp. 402–405). Specimens collected earlier by Edwards and named *Melitaea sterope* (Edwards 1870, pp. 190–191) were considered a subspecies of northern checkerspot butterfly (*Chlosyne palla*), but were subsequently considered conspecific with sagebrush checkerspot butterflies (Pelham 2008, p. 379). Other synonyms of the genera *Chlosyne* used with the species *acastus* have included *Charidryas* and *Lemonias* (Dyar 1903, pp. 17–18; Opler and Warren 2003, pp. 35–36; Pelham 2008, pp. 379–380).

Since Edwards' first descriptions of the species in 1870 and 1874, nine subspecies of sagebrush checkerspot butterfly have been named and are listed by Pelham in ''A catalogue of the butterflies of the United States and Canada with a complete bibliography of the descriptive and systematic literature'' published in volume 40 of the Journal of Research on the Lepidoptera (2008, pp. 379–380). The common names, acastus and sagebrush checkerspot butterflies, have been used interchangeably in the literature for species and subspecies; however, throughout this finding sagebrush checkerspot butterfly will be used to reference the species (*Chlosyne acastus*) and acastus checkerspot butterfly will be used to reference the subspecies (*C. a. acastus*). The other subspecies in the 2008 Pelham catalogue include: no common name (*C. a. arkanyon*); Dorothy's checkerspot butterfly (*C. a. dorothyi*); Neumoegen's checkerspot butterfly (*C. a. neumoegeni*); Spring Mountains acastus checkerspot butterfly (*C. a. robusta*); Sabina checkerspot butterfly (*C. a. sabina*); no common name (*C. a. sterope*); Death Valley checkerspot butterfly (*C. a. vallismortis*); and no common name (*C. a. waucoba*) (Bauer 1975, pp. 157–158; Garth and Tilden 1986, p. 82; Davenport 2004, p. 15; Pelham 2008, pp. 379–380).

Large expanses of desert geographically separate the Spring Mountains acastus checkerspot butterfly from all other sagebrush checkerspot butterfly populations and subspecies, with the exception of Neumoegen's checkerspot butterflies, which have a range that is adjacent to the Spring Mountains acastus checkerspot butterfly (Austin 1998, p. 577). Biologically, the Spring Mountains acastus checkerspot butterfly is largely separated from the Neumoegen's checkerspot butterfly by different flight periods with only a brief period of potential overlap. Neumoegen's checkerspot butterflies have previously been considered a distinct species (Ehrlich and Ehrlich 1961, p. 135; dos Passos 1969, p. 118; Bauer 1975, p. 158; Austin and Austin 1980, p. 40). In addition to a later flight period, Neumoegen's checkerspot butterflies use different larval host plants than Spring Mountains acastus checkerspot butterflies (Austin and Leary 2008, p. 102). While this may currently assist with classifications (Ackery 1988, pp. 95–203), the use of larval host plants to identify butterflies to the species or subspecies level may not be conclusive because host plant relationships may be evolutionarily dynamic, meaning that host plant use may change during the evolutionary process (Wahlberg 2001, p. 530). Details of Spring Mountains acastus checkerspot butterfly's biology and life history are provided below.

Subspecies of adult sagebrush checkerspot butterflies have similar morphological characteristics. The wingspan of adult sagebrush checkerspot butterfly species may range from 1.2–1.5 inches (in) (3.0–3.8 centimeters (cm)) (Opler 1999, p. 299). The upperside of the wing is a spider-web-like pattern of orange and black (Layberry *et al.* 1998, p. 187). The hindwing underside has bands of mostly creamy white and orange-red spots (Layberry *et al.* 1998, p. 187) with dark margins. The forewing underside is primarily orange. In addition, male and female sagebrush checkerspot butterflies are similar in appearance (Layberry *et al.* 1998, p. 187). While there are similarities amongst the subspecies of sagebrush checkerspot butterflies, there are subtle variations, which were described by Austin 1998 (p. 577), that distinguish the Spring Mountains acastus checkerspot butterfly from other nearby subspecies.

In his description of the adult Spring Mountains acastus checkerspot butterfly, Austin 1998 (p. 577) compares it to the acastus checkerspot butterfly, Death Valley checkerspot butterfly, and the Neumoegen's checkerspot butterfly. Compared to the acastus checkerspot butterfly, the Spring Mountains acastus checkerspot butterfly is described as being larger in size, having a more orange than yellow aspect, and having broader black marks and less basal black on the upperside of the hindwing (Austin 1998, p. 577). The Spring Mountains acastus checkerspot butterfly has less contrast than the acastus checkerspot butterfly between the darker and paler orange areas on both surfaces, especially for females (Austin 1998, p. 577). In addition, the Spring Mountains acastus checkerspot butterfly is described as having a deeper yellow in the pale areas on the underside of the hindwing than the acastus checkerspot butterfly (Austin 1998, p. 577).

Compared to the Death Valley checkerspot butterfly, the Spring Mountains acastus checkerspot butterfly is larger and deeper orange with less contrast (Austin 1998, p. 577). The Death Valley checkerspot butterfly is yellowish-orange with narrower black markings than the Spring Mountains acastus checkerspot butterfly (Austin 1998, p. 577). The underside of the Spring Mountains acastus checkerspot butterfly has a heavier black pattern towards the outside edge of the wings and has a more orange color, which appears more washed out (Austin 1998, p. 577). In addition, the lines of checkerspot pattern on the underside near the base of the hindwing are thicker in the Spring Mountains acastus checkerspot butterfly than the Death Valley checkerspot butterfly (Austin 1998, p. 577).

Compared to the Spring Mountains acastus checkerspot butterfly, the Neumoegen's checkerspot butterfly is paler orange with narrower or inconspicuous to absent black lines that run across the wing (Austin 1998, p. 577). In addition the Neumoegen's checkerspot butterfly has more brilliant pale white areas on the underside of the hindwing than the deeper yellow of the Spring Mountains acastus checkerspot butterfly (Austin 1998, p. 577).

The similarities in appearance among and between species of checkerspot butterflies (for example, *Chlosyne acastus, C. gabbii, C. palla, and C. whitneyi*) have led to challenges in distinguishing species and subspecies (Higgins 1960, pp. 395, 421, 426; Ehrlich and Ehrlich 1961, p. 132; Ferris and Brown 1981, pp. 325–326; Scott 1986, pp. 305–307). In addition, there have been specific conflicting taxonomic views about the sagebrush checkerspot butterflies in the Spring Mountains (Austin and Austin 1980, p. 40; Austin 1981, p. 71; Austin 1985, p. 108; Bauer 1975, pp. 155–156; Britten *et al.* 1993, p. 133; Emmel *et al.* 1998, pp. 141–142; Higgins 1960, p. 428; Kons 2000, p. 532).

Austin recognized the Spring Mountains acastus checkerspot butterfly (*Chlosyne acastus robusta*) as a distinct subspecies based on differences in size and wing color characteristics (Austin 1998, pp. 576–577). Austin (1998, p. 576) notes that distinct phenotypes of *C. acastus* are present in certain montane

populations, which provide the context for the designation of subspecies. Another study used phylogenetic, morphological, distributional, and biological information to taxonomically evaluate the Spring Mountains acastus checkerspot butterfly (Kons 2000, p. 2). Kons (2000, pp. 549–555) did not recognize populations of sagebrush checkerspot butterflies in the Spring Mountains as a subspecies due to the similarity of the characters he examined and compared between sagebrush checkerspot butterflies and other checkerspot butterflies. However, there are differences in the geographic distribution or continuity and biological characteristics between the sagebrush checkerspot butterfly population in the Spring Mountains and populations elsewhere that support Austin's (1998, pp. 576–577) designation of the Spring Mountains acastus checkerspot butterfly as a subspecies.

Even though there is conflicting information on the taxonomic designation of the Spring Mountains acastus checkerspot butterfly, Austin (1998, p. 576) is cited as the reference for the subspecies level taxonomic designation for the Spring Mountains acastus checkerspot butterfly in the Integrated Taxonomic Information System (ITIS). The ITIS is hosted by the United States Geological Survey (USGS) Center for Biological Informatics (CBI) and is the result of a partnership of Federal agencies formed to satisfy their mutual needs for scientifically credible taxonomic information. ITIS recognizes the Spring Mountains acastus checkerspot butterfly as a valid subspecies (Retrieved June 18, 2012, from the Integrated Taxonomic Information System on-line database, *http://www.itis.gov*). Based upon the best available information, populations of sagebrush checkerspot butterflies in the Spring Mountains are considered a valid subspecies and are, thus, a valid taxonomic entity for consideration for listing under the Act.

Distribution

The Spring Mountains acastus checkerspot butterfly is known only from the Spring Mountains in Clark and Nye Counties, Nevada (Austin 1998, p. 577), at elevations ranging from minimums near 1,800 meters (m) (5,900 feet (ft)) to maximums of 2,700 m (8,900 ft) (Weiss *et al.* 1997, p. 17). The majority of observations and habitat for the Spring Mountains acastus checkerspot butterfly occur within the Spring Mountains National Recreation Area (SMNRA), which is managed by the U.S. Department of Agriculture's Forest Service (Forest Service), Humboldt-Toiyabe National Forest. However, one colony occurs on private property bordered by Forest Service-managed lands, and an incidental observation at another location was documented on lands managed by the U.S. Department of the Interior, Bureau of Land Management.

The Spring Mountains acastus checkerspot butterfly occurs throughout the Spring Mountains and has been observed in 17 areas (Table 1). However, the number of occupied areas reported in past studies varies (12 occupied areas were reported in Boyd and Austin 1999, p. 20) based on how observations are spatially grouped. Four of these areas (Trough Spring, Kyle Canyon, Griffith Peak Trail/Harris Spring Road/Harris Mountain Road, and Potosi Mountain/Mt. Potosi/Boy Scout Camp) are referred to interchangeably as colonies or population sites (Boyd and Austin 1999, pp. 9, 20–21; Boyd and Austin 2002, pp. 5, 13; Boyd 2004, pp. 2–3). Colonies are isolated populations (Scott 1986, p. 108) based on mate-locating behavior (Boyd and Austin 2002, p. 5; Boyd 2009, p. 1) of one or more males observed over a period of time, and they represent more than one incidental observation or sighting. Researchers define colonies of Spring Mountains acastus checkerspot butterflies based on the mate-locating behavior of males, also referred to as mate-locating sites (Boyd and Austin 2002, p. 5; Boyd 2009, p. 1). Currently, only four colonies are known to exist. The remaining 13 areas are referred to as incidental observations or sighting areas (Boyd and Austin 2001, p. 2; Boyd and Austin 2002, p. 3; Boyd 2004, p. 3), where intermittent observations of a few butterflies were recorded at a location. Observations at incidental sighting areas, and the potential for subsequent dispersal of individuals, may indicate the presence of additional unknown colonies (Boyd and Austin 1999, pp. 60–61; Boyd *et al.* 2000, p. 10). The areas where the Spring Mountains acastus checkerspot butterfly has been observed in a colony or sighting area represent the overall known population of the subspecies (Table 1).

TABLE 1—AREAS WHERE SPRING MOUNTAINS ACASTUS CHECKERSPOT BUTTERFLY OBSERVATIONS HAVE BEEN DOCUMENTED

[Areas ordered from north to south]

Observation area	First year observed
Mt. Stirling	1983.
Big Timber Spring	1995 or before.
Wheeler Pass Road	1987.
Trough Spring*	2001.
McFarland Spring/Whisky Spring/Camp Bonanza.	2003.
Willow Spring/Willow Creek	1979.
Clark Canyon	1994.
Foxtail Canyon	1998.
Deer Creek and picnic area.	1965.
Deer Creek Road (Telephone Canyon side).	1981 or 1987.
Kyle Canyon—lower	1996 or before.
Kyle Canyon—middle*	1950.
Kyle Canyon—upper	1987.
Griffith Peak Trail/Harris Spring Road/Harris Mountain Road*.	1990.
Coal Spring	1992.
Switchback Spring	2003.
Potosi Mountain/Mt. Potosi/Boy Scout Camp*.	1995.

* Colony.

Sources: Weiss *et al.* 1995, pp. 4, 19; Weiss *et al.* 1997, pp. 6–7, 47; Boyd and Austin 1999, pp. 19–21; Boyd 2004, pp. 2–3; Nevada Natural Heritage Program 2009.

Status and Trends

Weiss *et al.* (1997, p. 2) indicated that butterfly populations are highly dynamic, and butterfly distributions can be highly variable from year to year. Butterflies may be restricted to moist and cool habitats during dry, warm periods, potentially expanding their distribution during periods marked by cooler and moister conditions (Weiss *et al.* 1997, pp. 2–3). Sagebrush checkerspot butterfly populations may undergo extreme fluctuations as a result of rainfall, parasitism, and other factors (Stout 2011, *http://www.raisingbutterflies.org*). Some subspecies, such as the Spring Mountains acastus checkerspot butterfly, may exist as a metapopulation (''local populations which interact via individuals moving among populations'') (Hanski and Gilpin 1991, p. 7) within the Spring Mountains (Weiss *et al.* 1997, p. 3). If this is the case, maintenance of dispersal corridors and unoccupied habitats is an important management consideration (Weiss *et al.* 1997, p. 3).

Determining the status of adults at a colony requires multiple visits during appropriate flight conditions and frequently enough to intercept a potentially short flight period. For example, in 1977, Austin and Austin (1980, p. 40) reported visits to the same area of Kyle Canyon in which the Spring Mountains acastus checkerspot butterfly

was observed on 2, 5, and 7 July, but not on 17 or 30 June and 15 July. Thus, this flight period may have been less than 2 weeks. In contrast, they reported that, in 1965, the flight period lasted over a 5-week period. While these observations may indicate a variable flight period, it is also possible that the perceived flight period may vary as a result of a dynamic interrelationship between search effort and abundance. In addition, assessments of population status and trends based on counts of particular life stages may be complicated by irregular life-history phenomena, such as an extended diapause (a period of dormancy, commonly induced by seasonal change in photoperiod (day length) or temperature) (Sands and New 2008, pp. 81–85). Unnecessary conservation concerns may arise as a result of irregular diapause that results in perceived changes in abundance (Sands and New 2008, pp. 81–85).

The largest known colony of Spring Mountains acastus checkerspot butterfly occurs at Griffith Peak Trail/Harris Spring Road/Harris Mountain Road. This was first documented as a sighting area in 1990, and later described as a potential colony in 1999 (Boyd and Austin 1999, p. 20). The Trough Spring colony was first identified in 2001 (Boyd and Austin 2002, p. 5). Boyd (2004, p. 3) stated that a single male observed at Willow Spring/Willow Creek in 2003 may have dispersed from Trough Spring or another unknown colony, because there had been no sightings in the area since the 1980s. The Spring Mountains acastus checkerspot butterfly was first documented at Potosi Mountain/Mt. Potosi/Boy Scout Camp in 1995 (Weiss *et al.* 1995, p. 6), and was described as a colony for the first time in 2000 (Boyd *et al.* 2000, p. 4).

DataSmiths (2007, p. 17) concluded that absence of adults at a site does not necessarily equate to ephemeral occupation or extirpation. Observations of the Spring Mountains acastus checkerspot butterfly illustrate this point. Boyd *et al.* (2000, p. 4) searched 17 areas (8 historical and 9 potential sites) for the Spring Mountains acastus checkerspot butterfly in 1999. During the 1999 surveys, Spring Mountains acastus checkerspot butterflies were observed at five of the eight historical sites (including Kyle Canyon (middle) Colony Site), with two of these described as potential new colonies (Griffith Peak Trail/Harris Spring Road/Harris Mountain Road and Potosi Mountain/Mt. Potosi/Boy Scout Camp). During 2003 surveys, the Spring Mountains acastus checkerspot butterfly was observed again in the Willow Spring/Willow Creek area (Boyd 2004, pp. 2–3) where it had not been seen during surveys in 1999 (Boyd and Austin 1999, Table 7, p. 98). Similarly, in 2003, the Spring Mountains acastus checkerspot butterfly was observed in the McFarland Spring/Whisky Spring/Camp Bonanza area (Boyd 2004, p. 2), even though it had not been observed there during previous surveys in 1998 (Boyd and Austin 1999, Table 12). These examples demonstrate that a lack of observations at a site does not necessarily mean that a site is extirpated because adult surveys will not detect diapausing larvae, and short adult flight periods coupled with low numbers may drastically reduce the likelihood of observing Spring Mountains acastus checkerspot butterflies.

Yearly population variation also is seen in the fluctuation in numbers of Spring Mountains acastus checkerspot butterflies observed during repeat surveys at the same locations (Table 2). Surveys from 2000 and 2001 at the Griffith Peak Trail/Harris Spring Road/Harris Mountain Road site found that the highest total number of individuals observed on a single day increased from 19 to 104. In 2003, the highest number observed on a single day at the same site decreased to 27. In a 2006 interview with Bruce Boyd regarding observations that year, Boyd reported that the Spring Mountains acastus checkerspot butterfly had ''done better'' than other endemic species and had ''good numbers'' at Griffith Peak Trail/Harris Spring Road/Harris Mountain Road, as well as at Potosi Mountain/Mt. Potosi/Boy Scout Camp (Boyd 2006, pers. comm.). At locations where the butterfly was observed in 2006, Boyd stated that it appeared to be in ''appropriate'' numbers (Boyd 2006, pers. comm.). These observations support the conclusions of Weiss *et al.* (1997, p. 2) of highly dynamic butterfly populations where sightings may occur periodically throughout a species' range, and populations at colony sites may fluctuate.

TABLE 2—SUMMARY OF MONITORING RESULTS OF SPRING MOUNTAINS ACASTUS CHECKERSPOT BUTTERFLY AT THREE COLONY SITES FROM 1998 THROUGH 2011 USING STANDARDIZED SURVEY METHODS

Year	1998	1999	2000	2001	2002	2003	2006	2007	2008	2010	2011
Kyle Canyon (middle)											
Highest #/day	4–10	5	6	8	6	7	4	1	4	.....	1
# Visits	16	11	9	6	4	4	1	6	8	.....	6
Peak date(s)	NR	6/19	6/15 & 6/30	6/18	6/24	6/10	6/21	6/13 & 6/21	6/24	.....	6/13
Griffith Peak Trail/Harris Spring Road/Harris Mountain Road											
Highest #/day	.....	.....	19	104	50	27	.....	.....	.....	2*	5
# Visits	.....	.....	9	5	5	4	.....	.....	.....	.....	3
Peak date	.....	.....	6/11	6/18	6/20	6/29	.....	.....	.....	.....	6/27 & 7/11
Trough Spring											
Highest #/day	.....	.....	.....	.....	20	41	.....	.....	.....	.....	1
# Visits	.....	.....	.....	.....	3	5	.....	.....	.....	.....	3
Peak date	.....	.....	.....	.....	6/18	6/1	.....	.....	.....	.....	6/10

Sources: (Boyd and Austin 1999, Table 8; Boyd 2004, p. 8; Jones and Stokes 2007a, p. 4; Jones and Stokes 2007b, p. 3; Kingsley 2008, p. 3, Service 2011a, pp. 1–3, Thompson *et al.* 2012, Table 2).

NR = not reported.

* = did not use a standardized survey method.

Surveys were conducted in 2010 and 2011 for adult Spring Mountains acastus checkerspot butterflies using both standardized and non-standardized methods. In 2010, at the Griffith Peak Trail/Harris Spring Road/Harris Mountain Road colony site, there were a total of four butterflies observed during the season (two by Pinyon 2011, p. 19; and two by Service 2011a, pp. 1–3), and the highest number of butterflies observed on a single day was two (Service 2011a, pp. 1–3). Numbers appeared to increase in 2011 at this colony site with a total of 86 reported observations (59 by Pinyon 2011, p. 19; 4 by Service 2011a, pp. 1–3; 23 by Thompson *et al.* 2012, Table 2), and the highest number of butterflies observed on a single day was 13 (Pinyon 2011, p. 19). The 13 individuals observed by Pinyon in 2011 were not observed using a standardized method similar to Pollard and Yates (1993 cited in Boyd and Austin 1999, p. 33) and described by Boyd and Austin (1999, p. 33), and are, therefore, not reported in Table 2. Results of the standardized surveys performed by Thompson *et al.* (2012, Table 2) at the other colony sites are shown in Table 2. Surveys for Spring Mountains acastus checkerspot butterfly were planned for 2012; however those data are not yet available.

Habitat

Sagebrush checkerspot butterfly habitat is described as dry washes in sagebrush-juniper woodland, oak or mixed conifer woodland, and streambeds (Opler 1999, p. 199). Elevations used by Spring Mountains acastus checkerspot butterfly coincide with the intergraded upper elevation of piñyon-juniper (*Pinus monophylla-Juniperus osteosperma*) communities at 1,250–2,500 m (4,100–8,200 ft) and the lower elevation white fir-ponderosa pine (*Abies concolor-Pinus ponderosa* var. *scopulorum*) communities at 2,000–2,530 m (6,560–8,300 ft) (Niles and Leary 2007, pp. 5–6). Open vegetation communities associated with previous fire disturbances appear to be the preferred habitat (Boyd and Austin 2002, p. 5).

Biology

Adults

The flight season of the Spring Mountains acastus checkerspot butterfly is between mid-May and mid-July (Austin and Austin 1980 p. 40; Weiss *et al.* 1997, pp. 6, 37; Austin 1998, p. 576; Boyd 2004, pp. 1–2), peaking near the later part of June (Weiss *et al.* 1997, pp. 6, 37; Boyd and Austin 1999, p. 20; Boyd and Austin 2002, p. 4; Boyd 2004, p. 8). Distances moved during flight periods have not been documented, although Schrier *et al.* (1976, p. 285) observed that the closely related northern checkerspot butterfly could move as far as 1.6 km (1 mi). During the flight season, Spring Mountains acastus checkerspot butterfly adults have been observed nectaring on *Eriodictyon angustifolium* (yerba santa), *Heliomeris multiflora var. nevadensis* (= *Viguiera multiflora;* Nevada golden-eye), *Packera multilobata* (= *Senecio multilobatus;* lobeleaf groundsel), *Ceanothus* sp. (ceanothus), *C. greggii* (Mojave ceanothus), *Melilotus* sp. (clover), *Penstemon palmeri* (Palmer penstemon), and *Apocynum* sp. (dogbane) (Austin and Austin 1980, p. 40; Weiss *et al.* 1995, p. 9; Boyd *et al.* 2000, p. 6; Jones & Stokes 2007a, p. 4; Thompson *et al.* 2012, p. 22).

Spring Mountains acastus checkerspot butterfly males may seek females all day by perching and sometimes patrolling gulches (Scott 1986, p. 307; Kingsley 2008, pp. 7–8). Washes and linear features are used primarily as mating sites during the flight season (Boyd and Austin 2001, p. 6; Boyd and Austin 2002, p. 5). Males may perch on several projecting objects in the same area, such as rocks or branches (Scott 1986, pp. 46–47, 307; Kingsley 2008, pp. 4, 7–8). At these sites, the males behave territorially. They remain in the same area and pursue any other butterflies or insects that come within a zone of a few square meters around the male, continuing this behavior towards the intruding animal until it leaves (Boyd and Austin 2001, p. 5; Boyd and Austin 2002, p. 5; Kingsley 2008, pp. 4, 7–8). During a brief flight season (Weiss *et al.* 1997, pp. 6, 37), females remain at the site long enough to find a male to mate with, and then leave the area to oviposit (Boyd and Austin 2001, p. 6; Boyd and Austin 2002, p. 5). Mating has been observed to last 40 minutes (Boyd 2004, p. 3). Sagebrush checkerspot butterflies have a high mating success, as indicated by a high percentage (>95) of females with spermatophores (a sac containing sperm) (Shields 1967, pp. 90, 123; Rhainds 2010, pp. 212–213). Approximately 10 days after mating, the female lays her eggs (Nunnallee 2011, p. 6).

Eggs

Clusters of sagebrush checkerspot butterfly eggs are laid on the underside of host leaves and sometimes on flower buds (Scott 1986, p. 307; Stout 2011, *http://www.raisingbutterflies.org*). Sagebrush checkerspot butterflies may lay 100 to 150 eggs in a cluster (Nunnallee 2011, p. 6). It may be advantageous for female butterflies to lay eggs in clusters to reduce exposure to predation or if host plants are rare or dispersed (Stamp 1980, p. 376). Eggs hatch after 6 days (Nunnallee 2011, p. 6), and the young larvae are gregarious on leaves or flowers (Scott 1986, p. 307; Nunnallee 2011, p. 6).

Larvae

Gregarious pre-diapause larvae of sagebrush checkerspot butterflies form silk webbing where they feed together on the larval host plant (Nunnallee 2011, p. 6; Opler *et al.* 2011, *http://www.butterfliesandmoths.org;* Stout 2011, *http://www.raisingbutterflies.org*). It is hypothesized that gregarious larvae may reduce rates of parasitism on the larvae because of collective defenses and may also facilitate feeding on larval host plants, particularly for early larvae, by enhancing the ability of larvae to overcome plant defenses (Chew and Robbins 1984, p. 75). *Chrysothamnus viscidiflorus* has been documented as a larval host plant (Boyd and Austin 2002, p. 2; Austin and Leary 2008, p. 99), is a widely distributed shrub in Western North America (Anderson 1986a, b as cited in McArthur and Stevens 2004, p. 531; Stubbendieck 2003, p. 248), and has a range that coincides with many of the ranges shown for sagebrush checkerspot butterflies (Opler 1999, p. 199; Opler *et al.* 2011, *http://www.butterfliesandmoths.org*). Common names used interchangeably for subspecies of *C. viscidiflorus* have included Douglas rabbitbrush, chamisa, green rabbitbrush, low rabbitbrush, yellow rabbitbrush, viscid rabbitbrush, sticky-leaved rabbitbrush, downy rabbitbrush, and narrow-leaved rabbitbrush (Stubbendieck *et al.* 2003, p. 249; McArthur and Stevens 2004, p. 532; Niles and Leary 2007, p. 19). Three subspecies of *C. viscidiflorus* have been documented in the Spring Mountains, including *C. v. lanceolatus* (variously known as viscid rabbitbrush, sticky-leaved rabbitbrush, and yellow rabbitbrush), *C. v. puberulus* (downy rabbitbrush), and *C. v. viscidiflorus* (known as viscid rabbitbrush, sticky-leaved rabbitbrush, and narrow-leaved rabbitbrush) (Niles and Leary 2007, p. 19). A common name for *Chrysothamnus viscidiflorus viscidiflorus* has not been accepted (Young and Evans 1974, p. 469).

In the Spring Mountains, Niles and Leary (2007, p. 9) quantified the abundance of the various subspecies of *Chrysothamnus viscidiflorus* as rare, occasional, common, and abundant. *Chrysothamnus viscidiflorus* ssp. *lanceolatus* is occasional to common on slopes, ridges, and in washes (Niles and

Leary 2007, p. 19). *Chrysothamnus viscidiflorus* ssp. *puberulus* (= var. *puberulus*) is occasional to rocky washes and on slopes (Niles and Leary 2007, p. 19). Of butterfly host plants described by Weiss *et al.* (1997, Figure 4), *Chrysothamnus viscidiflorus* is present in areas with low tree canopy cover (mean of 17 percent). *Chrysothamnus viscidiflorus* ssp. *viscidiflorus* (= var. *viscidiflorus*) is occasional to sandy-gravelly washes (Niles and Leary 2007, p. 19). *Chrysothamnus viscidiflorus* has many erect stems that are 1 to 3.5 ft (0.3 to 1.1 m) tall, growing from a base (McArthur and Stevens 2004, p. 531). In the Spring Mountains, *C. viscidiflorus* has been categorized as widespread, with a large population, and is considered very robust to human disturbance (Nachlinger and Reese 1996, pp. 66, 70). More recent information indicates that the larval host plant is widely distributed, but locally uncommon, within the Spring Mountains (D. Thompson 2012, pers. comm.). It is unknown whether or not habitat is a limiting factor for the subspecies.

It is unknown which of these subspecies of *Chrysothamnus viscidiflorus* are used as a larval host plant by the Spring Mountains acastus checkerspot butterfly; however, in maps prepared by Jones and Stokes (2007b, Figure 5a), Spring Mountains acastus checkerspot butterfly observations appeared to be more closely associated with *C. v. ssp. viscidiflorus* than *C. v.* ssp. *puberulus.* Warren (2005, p. 232) reported that all sagebrush checkerspot butterfly subspecies in Oregon use *C. v.* ssp. *viscidiflorus* as a host plant, but that other subspecies of *C. viscidiflorus* may be used as well. *C. viscidiflorus* is the most commonly reported species of larval host plant for sagebrush checkerspot butterfly subspecies, but other plant species have been reported (Service 2011b, p. 4).

While not documented as a larval host plant for the Spring Mountains acastus checkerspot butterfly, *Machaeranthera canescens* occurs in similar habitats (Niles and Leary 2007, p. 20) used by the Spring Mountains acastus checkerspot butterfly. Locations with reported occurrences of *M. canescens* in the Kyle Canyon area (Jones and Stokes 2007b, Figure 13) are near Spring Mountains acastus checkerspot butterfly observation areas (Jones and Stokes 2007b, Figure 5a). Further study using appropriate methods (Shields *et al.* 1969, p. 24) will be required to determine if Spring Mountains acastus checkerspot butterfly uses other larval host plants.

Ericameria nauseosa (= Chrysothamnus nauseosus; rubber rabbitbrush) also has been suspected of being a larval host plant of the Spring Mountains acastus checkerspot butterfly (Weiss *et al.* 1997, p. 6). Boyd and Austin (1999, pp. 20–21) unsuccessfully attempted to feed *E. nauseosa* to Spring Mountains acastus checkerspot butterfly larvae, and reported that their results were inconclusive. Early inferences that *E. nauseosa* may be the larval host plant for the Spring Mountains acastus checkerspot butterfly may be attributed to early uncertainty about its taxonomy and its close resemblance to the northern checkerspot butterfly, which has been documented to use *E. nauseosa* and *C. viscidiflorus* as larval host plants (Scott 1986, p. 306; Austin and Leary 2008, p. 102), and the interchangeable use of the generic common name rabbitbrush when referring to rubber or green rabbitbrush. The best available scientific and commercial information does not indicate there is any use of *E. nauseosa* by sagebrush checkerspot butterflies (Service 2011b, p. 4).

After feeding on the larval host plant during favorable conditions, larvae enter diapause, which allows them to survive through the winter, and which is likely a result of decreasing temperature and photoperiod (Scott 1979, p. 172). Spring Mountains acastus checkerspot butterfly larvae diapause under rocks as half-grown larvae during the winter (Scott 1979, pp. 172, 191; Scott 1986, pp. 27, 307; Opler *et al.* 2011, *http://www.butterfliesandmoths.org*). During times of unfavorable weather, sagebrush checkerspot butterflies may diapause for many months or years (Scott 1986, p. 307; Opler *et al.* 2011, *http://www.butterfliesandmoths.org*).

After winter, post-diapause larvae of other subspecies have been reported to be solitary (Nunnallee 2011, p. 6); however, Spring Mountains acastus checkerspot butterfly larvae of different instars (larval stages of growth between molts of the exoskeleton (Scott 1986, p. 21)) have been observed together in the Spring Mountains (Boyd 2004, p. 3). When disturbed, larvae will release and fall to the understory, where they roll into tight balls and are difficult to find (Wolfe 2004, p. 13). Stamp (1984, p. 6) hypothesized that thrashing by checkerspot butterflies after disturbance may be an adaptation to prevent parasitization by wasps or flies. There are no known reports of parasites or disease in populations of Spring Mountains acastus checkerspot butterflies, likely because of limited numbers and past research emphasis on adults, and because it is difficult to detect parasites or disease in checkerspot and other butterflies. Parasites documented to infect Neumoegen's checkerspot butterfly include the *Siphosturmia confusa* fly (Stireman and Singer 2003, p. 630) and braconid wasp *Cotesia* (= *Apanteles) koebelei* (Krombein *et al.* 1979, p. 249). It has been reported that for the subspecies acastus checkerspot butterfly, populations fluctuate as a result of parasitism (Stout 2011, *http://www.raisingbutterflies.org*). In fact, larval mortality in many species of butterflies occurs as a result of predation (including parasitism) and starvation (Haukioja 1993, as cited in Kuussaari *et al.* 2004, p. 148).

When enough suitable food is present, and after reaching an adequate size, larvae find a pupation site where they attach themselves to a silk mat (Scott 1986, p. 13) on a leaf or twig (Stout 2011, *http://www.raisingbutterflies.org*). In 2002, one of four larvae removed from the population at the Griffith Peak Trail colony site successfully pupated in 11 days (Boyd 2004, p. 3), while other subspecies are reported to pupate in 18 days (Nunnallee 2011, p. 6). After pupation, adult butterflies emerge to feed and seek mates.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this finding, information pertaining to the Spring Mountains acastus checkerspot butterfly in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a particular factor to evaluate whether the species may respond to that factor in a way that causes actual impacts to the species. If there is exposure to a

factor and the species responds negatively, the factor may be a threat and, during the status review, we attempt to determine how significant a threat it is. The threat is significant if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined in the Act. However, the identification of factors that could impact a species negatively may not be sufficient to compel a finding that the species warrants listing. The information must include evidence sufficient to suggest that these factors are 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 our 12-month finding on the petition we considered and evaluated the best available scientific and commercial information.

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

All Sites

Fire Suppression

The Spring Mountains acastus checkerspot butterfly may be negatively affected by fire suppression as inferred by its proximity to areas with fire disturbance (Boyd and Austin 2002, p. 5; Boyd 2004, p. 3–4). It has been speculated that effects to the Spring Mountains acastus checkerspot butterfly may occur as a result of inhibited dispersal (Boyd 2004, p. 3–4). One mechanism for the inhibited dispersal could be a decrease in larval host plants across the landscape caused by fire suppression. *Chrysothamnus viscidiflorus* increases vigorously and rapidly at disturbed sites (Nachlinger and Reese 1996, p. 32; McArthur and Stevens 2004, p. 532). After a disturbance, such as a fire, *C. viscidiflorus* may dominate the habitat for a long period of time (Young and Evans 1974, p. 469).

Fire suppression in the Spring Mountains has resulted in long-term successional changes, including increased forest area and forest structure (higher canopy cover, more young trees, and more trees that are intolerant of fire) (Nachlinger and Reese 1996, p. 37; Amell 2006, pp. 6–9; Boyd and Murphy 2008, pp. 22–28; Denton *et al.* 2008, p. 21, Abella *et al.* 2011, pp.10, 12). Overall, we have limited information about how the frequency, size, or severity of fire has changed through time. However, the available evidence does not suggest that fire suppression has reduced the amount of habitat for the species, is likely to do so in the future, or that habitat is a limiting factor for the Spring Mountains acastus checkerspot butterfly. Therefore, based on the currently available information fire suppression is not currently a threat to the subspecies, nor does it indicate that it is likely to become so in the future.

Our review of the best available information indicates that habitat modification or destruction associated with fire suppression is not a threat to the subspecies, nor does the available information indicate that it is likely to become so in the future. In addition, we discuss the habitat threats at individual colony sites below.

Griffith Peak Trail/Harris Spring Road/Harris Mountain Road Colony Site

Aside from the limited information about the effects of fire suppression on the Spring Mountains acastus checkerspot butterfly rangewide, there is no information available to indicate that habitat modification or destruction is a threat to the Griffith Peak Trail/Harris Spring Road/Harris Mountain Road colony, nor does the available information indicate that it is likely to become so in the future.

Kyle Canyon (Middle) Colony Site

Highway Modifications and Power Line Maintenance

Highway modifications and power line maintenance activities may have affected the Spring Mountains acastus checkerspot butterfly in areas near the Kyle Canyon (middle) colony site. Highway modifications and power line maintenance (grading, sod dumping, large vehicle occurrence (as indicated by tracks), and clearing) were observed in 1998 in the Kyle Canyon area (Boyd and Austin 1999, p. 59), and in 2006, historical grading, repairing and roadway replacement, and illegal dumping also were observed near the Kyle Canyon (middle) colony site (Jones and Stokes 2007a, Appendix B). However, these reports do not provide information or references that characterize the scope, immediacy, and intensity of any of these potential stressors (processes or events with negative impacts). While the reports indicate that these activities took place in the same area where Spring Mountains acastus checkerspot butterfly occurs, there is no available information indicating the level of exposure, such as whether larval and nectar plants were impacted. The site was inventoried 16 times in 1998, and, based on the descriptions provided in the report (Boyd and Austin 1999, p. 10) and the absence of any further disturbance documented in subsequent surveys (11 visits in 1999, 9 visits in 2000, 7 visits in 2001, 6 in 2002, and 5 in 2003) (Boyd *et al.* 2000, pp. 1–36; Boyd and Austin 2001, pp. 1–38; Boyd and Austin 2002, pp. 1–30; Boyd 2004, pp. 1–11), it appears that these activities may be localized and infrequent. In addition, an increase in the number of individuals observed from 1999 to 2001 at the Kyle Canyon (middle) colony site (Table 2) after the highway modifications and power line maintenance suggests that these activities did not cause sufficient impacts to cause a decline at this colony site. No information is available regarding highway modifications and power line maintenance at the Kyle Canyon (middle) Colony Site after 2006.

Highway modifications and power line maintenance activities have occurred historically in localized areas. Although we are not aware of any further highway modification projects, we understand that maintenance activities can take place in the future, know of no planned specific action. The information suggests that currently the intensity of this stressor is low and the exposure to the Spring Mountains acastus checkerspot butterfly is insignificant because these activities occur infrequently in small areas within the butterfly's range. Therefore, we have determined that highway modifications and power line maintenance are not threats to the Spring Mountains acastus checkerspot butterfly now, nor does the available information indicate that they are likely to become so in the future.

Fuel Treatments

Fuel reduction projects may affect the Spring Mountains acastus checkerspot butterfly negatively or beneficially. The effects of fuel reduction treatments on butterflies depend upon the timing (Pilliod *et al.* 2006, p. 23). Fuel reduction projects could affect the Spring Mountains acastus checkerspot butterfly negatively by reducing the quantity or quality of habitat and affecting survival or fecundity. On the other hand, fuel reduction projects could beneficially affect the Spring Mountains acastus checkerspot butterfly by creating conditions that favor nectar and larval host plants (Weiss *et al.* 1997, p. 27). As mentioned above, *Chrysothamnus viscidiflorus* increases vigorously and rapidly at disturbed sites (McArthur and Stevens 2004, p. 532) and may dominate the habitat for a long period of time following disturbance (Young and Evans 1974, p. 469).

The U.S. Forest Service implemented the Spring Mountains Hazardous Fuels Reduction Project in the Spring

Mountains between 2008 and 2011 (Lillis 2010). It was designed to reduce the volume and cover of woody vegetation to lower the wildfire risk to life and property in the SMNRA wildland-urban interface (Forest Service 2007a, pp. 1–18; Forest Service 2007b, pp. 1–57). Design criteria were developed to reduce or avoid potential resource conflicts, including those associated with the Spring Mountains acastus checkerspot butterfly (Forest Service 2007a, p. 4).

In areas where the Spring Mountains Hazardous Fuels Reduction Project coincides with the Spring Mountains acastus checkerspot butterfly, the likelihood of direct mortality to the butterfly or impacts to its habitat were minimized by implementing the design criteria in the project's environmental assessment (Forest Service 2007b, Appendix B, Design Criteria B1, B6, W5, W6, W7, W11, M1). The design criteria provided for surveys of butterflies and habitat, habitat mapping, restrictions on host plant removal in core colonies, avoidance of host plants, minimization of disturbance by using manual methods, weed prevention, education of implementation crews, monitoring during implementation, and post-project monitoring of butterflies and their habitat. The scope or geographic extent of the Spring Mountains Hazardous Fuels Reduction Project is localized because it occurs along the wildland-urban interface in one colony site area, Kyle Canyon (middle). The project's initial entry has already occurred, but re-treating of shrubs may occur every 5 to 10 years after the initial treatment (Forest Service 2007a, p. 3).

The level of exposure to the Spring Mountains acastus checkerspot butterfly's eggs and larvae from the Spring Mountains Hazardous Fuels Reduction Project is low to insignificant because of the project design criteria and the short time required for eggs to hatch. Exposure of active larvae to impacts from fuel reduction projects would be small to insignificant when design criteria are planned and implemented, such as avoiding larval host plants and ensuring that the method (for example, manual versus mechanical) and timing (periods of larval inactivity) of treatment result in larvae having a lower likelihood of exposure. Impacts to Spring Mountains acastus checkerspot butterfly pupae are likely insignificant because they affix to the underside of leaves for a short period in this stage, and are provided some protection by their larval host plant. Finally, Spring Mountains acastus checkerspot butterfly adults are mobile and may escape threats from fuels reduction projects. Effects on breeding adult Spring Mountains acastus checkerspot butterflies are likely insignificant because a short time is required for successful copulation and the duration of fuel treatment activities is likely brief. The Forest Service avoids treatment of vegetation along dry washes (Forest Service 2007a, W8), which also reduces the likelihood of exposure and impacts to breeding Spring Mountains acastus checkerspot butterflies.

Although the Spring Mountains Hazardous Fuels Reduction Project may result in short-term negative impacts to the Spring Mountains acastus checkerspot butterfly, the best available information does not indicate that this project has affected the Spring Mountains acastus checkerspot butterfly negatively at the population level now, nor is it likely to in the future.

Middle Kyle Complex Project

The Forest Service purchased a golf course property in 2004 that will be used for the Middle Kyle Complex Project (Forest Service 2009, pp. 2–4). The project includes construction of a visitor center and associated trail, and design criteria are in place to prevent and minimize impacts to the Spring Mountains acastus checkerspot butterfly (Forest Service 2009, pp. 4–5). This design includes criteria and measures that will avoid and minimize temporary construction disturbance to known Spring Mountains acastus checkerspot butterfly breeding areas. The design criteria include the following: Prohibit construction of Kyle Canyon Wash Trail and bury utilities from early May to mid-July (to avoid the butterfly's flight season); erect temporary construction fencing along the proposed construction limits prior to any ground-disturbing activities; contain all activities within the approved construction limits; maintain temporary fencing until notified by the contracting officer; collect native seed from appropriate larval host and nectar plants; revegetate temporary disturbance areas following completion of construction; implement construction dust control measures to minimize impacts to blooming nectar plant populations; reduce off-trail use in documented Spring Mountains acastus checkerspot butterfly breeding and mate selection areas; and construct a fence or barrier adjacent to the newly constructed trail in Kyle Canyon Wash. When the project is implemented, in 2012 or later, the design criteria and measures should result in minimizing impacts to the Spring Mountains acastus checkerspot butterfly and its habitat in Kyle Canyon Wash. Any negative impacts from the project are anticipated to be minor and have negligible impacts to the overall population of the subspecies and habitat at this site.

The Middle Kyle Complex Project will occur in a localized area, and, because of the design criteria, including avoidance of larval host plants, the project will result in low response, low intensity, and ultimately insignificant exposure of Spring Mountains acastus checkerspot butterflies to impacts. Therefore, we have determined that the Middle Kyle Complex Project is not a threat to the Spring Mountains acastus checkerspot butterfly now, nor does the available information indicate that it is likely to become one in the future.

Potosi Mountain/Mt. Potosi/Boy Scout Camp Colony Site

Fuel Treatments

The Potosi Mountain/Mt. Potosi/Boy Scout Camp colony site is located at the Boy Scouts of America Kimball Scout Reservation, north of Potosi Mountain. A fuels reduction project, funded through a grant from the Nevada Division of Forestry, was implemented in April 2007 (Otero 2007, p. 6). The 2007 fuels reduction project resulted in cut wood waste stacked more than a meter high along and on both sides of the dirt road at this site, and it was asserted that the cut waste effectively blocked all male perching and mate-locating sites in June that year (Boyd 2009, p. 3). We interpret the term ''blocked'' to mean obstruction of male perching and mate-locating sites as a result of these areas being covered by debris. The best available information does not indicate that the larval host plant for the Spring Mountains acastus checkerspot butterfly occurred abundantly near the road at this colony site. *Chrysothamnus viscidiflorus* was not observed in this area after searching the sides of the canyon (Thompson *et al.* 2012, p. 24) where Spring Mountains acastus checkerspot butterflies have been historically observed (Weiss *et al.* 1997, p. 6). However, Spring Mountains acastus checkerspot butterflies may be using adjacent areas that contain the larval host plant and areas near the road for mate locating. Our analysis addresses the alleged impact caused by blocking male perching and mate-locating sites.

The best available information does not indicate if, or to what extent, the alleged blocking of male perching sites had occurred at this site. The Potosi Mountain/Mt. Potosi/Boy Scout Camp colony site was visited two times in 2011, and waste piles were no longer present (Service 2011a, pp. 1–3).

However, wood chips were present near the road and camping areas, but had mostly decomposed, with some patches remaining (Service 2011a, pp. 1–3). Fuel reduction projects likely will reoccur in the future as part of wildland-urban interface projects to prevent damage to life or property from wildfire; however, the available information does not indicate that fuel reduction is impacting the subspecies such that it is currently affected at the population level, nor does it indicate that it is likely to in the future.

The best available information indicates that the fuels reduction project at the Boy Scouts of America Kimball Scout Reservation, north of Potosi Mountain, occurred in April before breeding activity occurred, and, thus, breeding adults likely were not disturbed. Although the number of sites available for perching by males may be reduced temporarily if cut waste is piled for later treatment (commonly chipping or burning), other sites along the road and in the canyon would be available within this site. The Spring Mountains acastus checkerspot butterfly has been observed using multiple perch sites during mate-locating (Kingsley 2008, pp. 4, 7–8). Because breeding occurs during a brief time period, the butterflies use multiple perch sites, and they likely exhibit a high breeding success rate (Shields 1967, p. 123; Rhainds 2010, pp. 212–213), impacts to the Spring Mountains acastus butterfly from the fuels reduction project at Potosi Mountain/Mt. Potosi/Boy Scout Camp colony site were likely minimal and insignificant.

The fuels reduction project at the Potosi Mountain/Mt. Potosi/Boy Scout Camp colony site is localized and will likely occur again in the future because maintenance will be required and fires are being suppressed. The intensity and exposure of the impact from stacking cut waste to the Spring Mountains acastus checkerspot butterfly is low and insignificant because the best available information indicates that Spring Mountains acastus checkerspot butterflies are able to use more than one perching site and that they can successfully breed in only a short period of time. We have determined that the stacking of cut waste at the Potosi Mountain/Mt. Potosi/Boy Scout Camp colony site is not a threat to the Spring Mountains acastus checkerspot butterfly now, nor does the available information indicate that it is likely to become a threat in the future.

Trough Spring Colony Site

Off-Highway Vehicles

Information in our files indicates that off-highway vehicles have been present at the Trough Spring colony site (Service 2011a, pp. 1–3). Off-highway vehicles could adversely affect the Spring Mountains acastus checkerspot butterfly by reducing the quantity or quality of habitat, reducing survival or fecundity, or directly impacting individuals. Off-highway vehicles were observed on the road that goes to Trough Spring during the 2011 field season, but no off-highway vehicles or signs of vehicle use were observed in Spring Mountains acastus checkerspot butterfly habitat with its larval host plant present (Service 2011a, pp. 1–3). Any vehicle access from the end of the road to Trough Spring and Spring Mountains acastus checkerspot butterfly habitat is inhibited by tree downfall and dense shrubs resulting from a wildfire (Service 2011a, pp. 1–3). In addition, the Trough Spring colony site is partially within the Mt. Charleston Wilderness, where motor vehicle use is prohibited.

The best available information suggests that the Spring Mountains acastus checkerspot butterfly is not being affected by off-highway vehicles. Although off-highway vehicles will likely continue to use the road that goes to Trough Spring in the future, the best available information indicates that off-highway vehicles have impacted the habitat and the Spring Mountains acastus checkerspot butterfly. However, the exposure of the Spring Mountains acastus checkerspot butterfly to impacts from off-highway vehicles is insignificant because of obstructions described above between the designated road and the Trough Spring colony site area. We have determined that off-highway vehicle use does not pose a threat to the Spring Mountains acastus checkerspot butterfly at the Trough Spring colony site now, nor does the available information indicate that it is likely to become one in the future.

Horses and Elk

Horses (*Equus ferus*) and elk (*Cervus elaphus*) utilize the Trough Spring area (Service 2011a, pp. 1–3; Thompson *et al.* 2012, p. 22). Horses and elk could affect Spring Mountains acastus checkerspot butterflies by trampling them when moving through or by feeding in areas occupied by all life stages. While horses or elk could cause direct mortality, the likelihood of this occurring is probably low because: (1) Horses feed predominantly on forbs or grasses (National Research Council 1982, pp. 26, 31); (2) elk that may be more likely to feed on *Chrysothamnus viscidiflorus* are more likely to do so in the winter (Stubbendieck *et al.* 2003, p. 249), when larvae are in diapause below rocks (Scott 1979, pp. 172, 191; Scott 1986, pp. 27, 307; Opler *et al.* 2011, *http://www.butterfliesandmoths.org*); (3) eggs or pupae are exposed for only a brief period of time in late spring or early summer (1 to 3 weeks) (Nunnallee 2011, p. 6; Boyd 2004, p. 3); and (4) if larvae are disturbed, they may fall (Wolfe 2004, p. 13) to the ground beneath the plant where trampling and feeding may be inhibited by thicker shrub branches.

Overall, the quantity or quality of larval or nectar plant habitat for the Spring Mountains acastus checkerspot butterfly may be affected by ungulate browsing. Food for Spring Mountains acastus checkerspot butterfly larvae may increase under certain browsing regimes. In experimental tests on the effects of clipping *Chrysothamnus viscidiflorus,* herbage production was increased when the plants were partially defoliated (Willard and McKell 1978, p. 515). Moderate and heavy clipping intensities resulted in reduced herbage production compared to unclipped *C. viscidiflorus* shrubs. Based upon these results, light defoliation may result in greater herbage production than moderate, heavy, and no defoliation. Wild and domestic animals do not prefer most subspecies of *C. viscidiflorus* (Young and Evans 1974, p. 469). While horses are considered grazers, they have been observed to feed on *C. viscidiflorus* in the summer (Smith *et al.,* as cited in National Research Council 1982, p. 31). During visits to the site in 2011, browsing at the Trough Spring colony site appeared to be heavy (Service 2011a, pp. 1–3). Grazing of grasses or forbs can decrease competition for *C. viscidiflorus.* Subspecies of *C. viscidiflorus* have been observed to vary in palatability to ungulates (McArthur and Stevens 2004, p. 532). In the late fall and winter, after more desirable forage has been consumed, *C. viscidiflorus* may be an important source of food for game and livestock (McArthur and Stevens 2004, p. 532).

Grazing and browsing by horses and elk are localized at the Trough Spring colony site, and these activities are expected to continue into the future. Because *Chrysothamnus viscidiflorus* plants are not removed and Spring Mountains acastus checkerspot butterfly larvae are able to evade browsing animals by falling to the ground when disturbed (Wolfe 2004, p. 13), the impact of grazing and browsing is likely

low. If grazing and browsing intensity is moderate to high, however, this may result in direct mortality of individuals or a reduction in available host plants. The available information does not indicate that browsing is negatively impacting the Spring Mountains acastus butterfly at the population level; therefore, the best available scientific and commercial information does not indicate that ungulates are currently a threat to the subspecies, nor are they likely to become so in the future.

All Sites

Conservation Efforts to Reduce Habitat Destruction, Modification, or Curtailment of Its Range

The Spring Mountains acastus checkerspot butterfly is listed in the SMNRA Conservation Agreement (Forest Service *et al.* 1998, p. 32) and is considered under a 2004 voluntary memorandum of agreement (MOA) between the Forest Service and the Service (Forest Service and Fish and Wildlife Service 2004, p. 1). The MOA was designed to establish a general framework for a streamlined process for interagency cooperation between the Humboldt-Toiyabe National Forest and the Service (Forest Service and Fish and Wildlife Service 2004, p. 1). The conservation agreement was in effect from April 13, 1998, to 2008 (Forest Service *et al.* 1998, pp. 44, 49), when it was renewed (Forest Service 2008). The conservation agreement is still being implemented. A new conservation agreement is currently being developed for the SMNRA. The conservation agreement, MOA, and Clark County Multiple Species Habitat Conservation Plan (MSHCP) guide and assist agency planning for Spring Mountains acastus checkerspot butterfly habitat and population monitoring. The conservation agreement and MOA facilitate protection-oriented resource management that considers conservation values through early project planning, as well as species, habitat, and ecosystem inventory, protection, monitoring, restoration, research, and education (Forest Service *et al.* 1998, p. 1), which may help alleviate negative impacts to the butterfly. Voluntary conservation actions from the conservation agreement (Forest Service *et al.* 1998, pp. 1–50) are also found in the MSHCP (RECON 2000c pp. A–79–A–88).

Summary of Factor A

We do not find highway modification and power line maintenance, hazardous fuels reduction projects, equestrian traffic, off-highway vehicle use, and browsing by horses or elk to be threats to the Spring Mountains acastus checkerspot butterfly. Although fire suppression has been suggested to negatively impact Spring Mountains acastus checkerspot butterfly habitat, the available information does not suggest that changes to fire frequency or changes in habitat quality or quantity such that fire suppression is currently a threat to the subspecies or likely to become one in the future. In addition, the available information does not indicate that habitat is a limiting factor for the Spring Mountains acastus checkerspot butterfly now or likely to become so in the future. Based upon our review of the best available scientific and commercial information, we find that the present or threatened destruction, modification, or curtailment of its habitat or range is not a threat to the Spring Mountains acastus checkerspot butterfly, nor is it likely to become so in the future.

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

In areas surrounding the range of the Spring Mountains acastus checkerspot butterfly, sagebrush checkerspot butterflies have been confiscated from illegal commercial traders (U.S. Attorney's Office 1994, pp. 23, 47; Alexander 1996, pp. 1–6). One sagebrush checkerspot was removed from the Grand Canyon National Park in 1985, and 14 were removed from Death Valley National Park in 1987 (U.S. Attorney's Office 1994, pp. 23 and 47), but it is unknown whether any sagebrush checkerspot butterflies have been collected for unauthorized commercial use in the Spring Mountains. The Spring Mountains are located between Grand Canyon National Park to the east (approximately 300 km (180 mi)) and Death Valley National Park to the west (approximately 130 km (80 mi)). There is no available information regarding the utilization of Spring Mountains acastus checkerspot butterflies for unauthorized commercial purposes.

Spring Mountains acastus checkerspot butterflies have been collected for authorized commercial use, including for scientific and educational purposes. We infer that the earliest collections of Spring Mountains acastus checkerspot butterflies are from the 1920s, based on Boyd and Austin (1999, p.19). Most documented collections of Spring Mountains acastus checkerspot butterfly have occurred for scientific or educational purposes (Table 3). On Forest Service-administered lands, a special use permit is required for the commercial collection of butterflies (36 CFR 251.50), which would include collections for research, museums, universities, or professional societies (Forest Service 2003, pp. 2–3).

TABLE 3—NUMBERS OF SPRING MOUNTAINS ACASTUS CHECKERSPOT BUTTERFLY SPECIMENS COLLECTED BY AREA, YEAR, AND SEX FOUND IN PUBLISHED DOCUMENTS

Collection area/year	Male	Female	Unknown	Total
Deer Cr. Rd.				
1950			1	1
1965	1			1
1977	6	2		8
1981		3		3
Deer Cr. Rd. Total	7	5	1	13
Spring Mountains (general reference)				
1934	10	1		11
2002			2	2
Harris Spring Rd./Harris Mountain Rd.				
1990	16	6		22
1999	2	2		4
Griffith Peak Trail				
2002			4[L]	4

TABLE 3—NUMBERS OF SPRING MOUNTAINS ACASTUS CHECKERSPOT BUTTERFLY SPECIMENS COLLECTED BY AREA, YEAR, AND SEX FOUND IN PUBLISHED DOCUMENTS—Continued

Collection area/year	Male	Female	Unknown	Total
Kyle Canyon				
1950	.....	.....	2	2
1965	2	.....	62	64
1974	1	2	.....	3
1977	15	2	.....	17
1978	6	1	.....	7
1979	41	3	.....	44
1981	8	1	.....	9
1987	17	5	.....	22
1988	5	.....	.....	5
1989	28	5	.....	33
1990	13	2	.....	15
2006	.....	.....	2	2
Kyle Canyon Total	136	21	66	223
Willow-Cold Creek				
1979	1	.....	.....	1
Area Totals	172	35	73	.....
Total	.....	.....	.....	280

References: Austin and Austin 1980, p. 40; Austin 1998, p. 576; Boyd 2004, p. 3; Boyd *et al.* 2000, p. 7; Jones and Stokes 2007a, Service 2012, pp. 1–4, and YPM ENT Catalog (*http://peabody.yale.edu/collections/search-collections?ent*) Note: duplicate specimens from Austin and Austin 1980 and Austin 1998 have been accounted for.
└ = larvae

Prior to 2006, collecting for noncommercial (recreational and personal) purposes did not require a collecting permit issued by the Regional Forester in most areas (Forest Service 1998, p. 1; Joslin 1998, p. 74). Since 1996 within the SMNRA, Lee Canyon, Cold Creek, Willow Creek, and upper Kyle Canyon have been identified as areas where permits are required for any butterfly collecting (Forest Service 1996, pp. 28, E9). There are no records indicating that special use permits have been issued for commercial or noncommercial collecting of Spring Mountains acastus checkerspot butterflies in the Spring Mountains (S. Hinman 2011, pers. comm.). However, there are published and unpublished documented accounts of collections from the Spring Mountains (Austin and Austin 1980, p. 40; Austin 1998, p. 576; Boyd 2004, p. 3; Jones and Stokes 2007a, Table 5; Service 2012, pp. 1–4; YPM ENT Catalog, *http://peabody.yale.edu/collections/search-collections?ent*) (see Table 3 for references).

The best available information indicates that Spring Mountains acastus checkerspot butterflies have been collected for personal use (Service 2012, pp. 1–4). In some cases, private collectors have more extensive collections of particular species than museums (Alexander 1996, p. 2). Published and unpublished accounts of Spring Mountains acastus checkerspot butterfly specimens in collections vary, with typically more males collected than females during any year (Table 3). Documented specimens indicate that most collections are from the Kyle Canyon area. A survey of butterfly collectors in The Lepidopterists' Society in the Northwest showed that approximately one-third of the respondents indicated that they collected for personal collections, another third collected for research or museum collections, and the remainder fell within categories that may count for either (Mazzei and Shapiro 2001, p. 103).

The collection of butterflies in general results in the direct mortality of individuals and, when a population is small, may affect the population's ability to recover. Butterfly collecting is generally thought to have less of an impact on butterfly populations compared to other threats; however, populations already stressed by other factors may be threatened by intensive collecting (Thomas 1984, p. 345; Miller 1994, pp. 76, 83; New *et al.* 1995, p. 62). Thomas 1984 (p. 345) suggested that closed, sedentary populations of fewer than 250 adults are most likely to be at risk from overcollection. While there is little documentation of the extirpation of any butterfly species as a result of overcollecting (Miller 1994, p. 76), it has been shown that removing a large number of female specimens from a population may result in a greater threat of population decline (Hayes 1981, p. 197) and potentially hasten the extinction of a species (Thomas 1984, p. 341).

The reported observed or captured sex ratio (males:females) in Spring Mountains acastus checkerspot butterflies is strongly biased (170:33) towards males (Table 3). Although many factors can affect the differences between the observed and actual sex ratios, which vary between years (Ehrlich *et al.* 1984, pp. 527–539; Boggs and Nieminen 2004, pp. 92–94), the magnitude of this difference suggests that this bias is real, and that there are typically fewer females than males in Spring Mountains acastus checkerspot butterfly populations. Because males and females are similar in appearance, it may be difficult for most collectors to selectively capture either sex.

There is no available information regarding the utilization of Spring Mountains acastus checkerspot butterflies for commercial purposes (other than for scientific and educational purposes) in the past, or information to indicate a historic, current, or future demand. The Spring Mountains acastus checkerspot butterfly has been collected historically for recreational, scientific, and educational purposes. Published accounts of collections for management or scientific purposes indicate that collecting Spring Mountains acastus checkerspot butterflies has become less frequent in the last couple of decades (Table 3).

Summary of Factor B

Survey data indicate abundances may be low, but we do not know actual population numbers of the Spring Mountains acastus checkerspot butterfly. Therefore, the percentage of the population of Spring Mountains acastus checkerspot butterfly that has been removed through collecting is unknown. However, the number of reported Spring Mountains acastus checkerspot butterflies collected has declined in recent decades, and the available information does not indicate that collection has had an adverse effect on the species, or nor is it likely to have an adverse effect in the future. Nonetheless, because collection is known to occur, we will work with the Forest Service to enhance the effectiveness of their permitting program and continue to monitor abundance and collection efforts. Based upon our review of the best available scientific and commercial information, we find that overutilization for commercial, recreational, scientific or educational purposes is not a threat to the Spring Mountains acastus checkerspot butterfly now, nor is it likely to become so in the future.

Factor C. Disease or Predation

There is no available information regarding any impacts from either disease or predation on the Spring Mountains acastus checkerspot butterfly. Therefore, based on the best available scientific and commercial information, we do not find disease or predation to be threats to the Spring Mountains acastus checkerspot butterfly now, nor are they likely to become so in the future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms or other agreements that could provide some protection for the Spring Mountains acastus checkerspot butterfly include: (1) Local land use laws, processes, and ordinances; (2) State laws and regulations; and (3) Federal laws and regulations. Actions adopted by local groups, States, or Federal entities that are discretionary, including conservation strategies and guidance, are not regulatory mechanisms; however, we will discuss and evaluate them below. The Spring Mountains acastus checkerspot butterfly primarily occurs on Federal land under the jurisdiction of the Forest Service; therefore, our discussion will primarily focus on Federal laws.

Local Laws and Ordinances

There is no available information regarding local land use laws and ordinances that have been issued by Clark County or other local government entities for protection of the Spring Mountains acastus checkerspot butterfly.

State Law

Nevada Revised Statute sections 503 and 527 offer protective measures to wildlife and plants, but do not include invertebrate species such as the Spring Mountains acastus checkerspot butterfly. Therefore, no regulatory protection is offered under Nevada State law.

Federal Law

Spring Mountains acastus checkerspot butterflies have been detected consistently in four known colony sites in recent years. Three of the colony sites, Griffith Peak Trail/Harris Spring Road/Harris Mountain Road, Kyle Canyon (middle), and Trough Spring, are located mainly on Federal land. Large portions of the Griffith Peak Trail and Trough Spring colony sites are located within the Mt. Charleston Wilderness. The Forest Service manages lands designated as wilderness under the Wilderness Act of 1964 (16 U.S.C. 1131–1136). Within these areas, the Wilderness Act states the following: (1) New or temporary roads cannot be built; (2) there can be no use of motor vehicles, motorized equipment, or motorboats; (3) there can be no landing of aircraft; (4) there can be no other form of mechanical transport; and (5) no structure or installation may be built. As such, the majority of Spring Mountains acastus checkerspot butterfly habitat in the Griffith Peak Trail and Trough Springs area is protected from direct loss and degradation by the prohibitions of the Wilderness Act. Spring Mountains acastus checkerspot butterfly habitat at Kyle Canyon, Potosi Mountain, along the Harris Spring and Harris Mountains Road, and elsewhere is located outside of the Mt. Charleston Wilderness, and, thus, it is not subject to protections afforded by the Wilderness Act.

The National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*), requires Federal agencies, such as the Forest Service, to describe proposed agency actions, consider alternatives, identify and disclose potential environmental impacts of each alternative, and involve the public in the decision-making process. Federal agencies are not required to select the NEPA alternative having the least significant environmental impacts. A Federal agency may select an action that will adversely affect sensitive species, provided that these effects are identified in a NEPA document. NEPA itself is a disclosure law, and does not require subsequent minimization or mitigation of actions taken by Federal agencies. Although Federal agencies may include conservation measures for the Spring Mountains acastus checkerspot butterfly as a result of the NEPA process, such measures are not required by the statute. The Forest Service is required to analyze its projects in accordance with NEPA.

The SMNRA is 1 of 10 districts of the Humboldt-Toiyabe National Forest. Public Law 103–63, dated August 4, 1993 (the Spring Mountains National Recreation Area Act, 16 U.S.C. 460hhh *et seq.*), established the SMNRA to include approximately 316,000 acres (128,000 hectares) of Federal lands managed by the Forest Service in Clark and Nye Counties, Nevada, for the following purposes:

(1) To preserve the scenic, scientific, historic, cultural, natural, wilderness, watershed, riparian, wildlife, threatened and endangered species, and other values contributing to public enjoyment and biological diversity in the Spring Mountains of Nevada;

(2) To ensure appropriate conservation and management of natural and recreation resources in the Spring Mountains; and

(3) To provide for the development of public recreation opportunities in the Spring Mountains for the enjoyment of present and future generations.

The National Forest Management Act of 1976, as amended (NFMA) (16 U.S.C. 1600 *et seq.*), provides the principal guidance for the management of activities on lands under Forest Service jurisdiction through associated land and resource management plans for each forest unit. Under NFMA and other Federal laws, the Forest Service has the authority to regulate recreation, vehicle travel, and other human disturbance; livestock grazing; fire management; energy development; and mining on lands within its jurisdiction. Current guidance for the management of Forest Service lands in the SMNRA is under the Toiyabe National Forest Land and Resource Management Plan and the SMNRA General Management Plan. In June 2006, the Forest Service added the Spring Mountains acastus checkerspot butterfly and three other endemic butterflies to the Regional Forester's Sensitive Species List in accordance with Forest Service Manual 2670. The Forest Service's objective in managing

sensitive species is to prevent listing of species under the Act, maintain viable populations of native species, and develop and implement management objectives for populations and habitat of sensitive species. Projects listed under Factor A above for the Kyle Canyon (middle) colony site have been guided by these Forest Service plans, policies, and guidance. However, removal or degradation of butterfly habitat has occurred as a result of projects approved by the Forest Service in Kyle Canyon.

Because the Spring Mountains acastus checkerspot butterfly is designated a sensitive species, Standard 0.28 of the Land and Resource Management Plan for the Spring Mountains requires a collecting permit issued by the Regional Forester (except for traditional use by American Indians) (Forest Service 1996, p. 18). Furthermore, Standard 11.6 indicates that collecting, regardless of species, in specific areas including Cold Creek, Lee Canyon, upper Kyle Canyon, and Willow Creek also requires a permit (Forest Service 1996, p. 31). These items, identified as ''standards,'' are constraints or mitigation measures that must be followed as directed by the General Management Plan (Forest Service 1996, p. 2). Collection permits are not required for activities contracted by or performed under agreement with the Forest Service. The best available information indicates that collecting has occurred before and after the Spring Mountains acastus checkerspot butterfly was designated a sensitive species (see Factor B discussion above); however, no permits have been issued to date.

Summary of Factor D

The current existing regulatory mechanism designed to regulate the collection of Spring Mountains acastus checkerspot butterflies exists, but there are no records of permits being issued for this purpose. Despite the existence of the permitting program, collections of Spring Mountains acastus checkerspot butterfly and other species of butterflies have taken place without permits being issued. We are unable at this time to determine the current population abundance or trends for the Spring Mountains acastus checkerspot butterfly. We concluded that collection is not a threat to the subspecies. Therefore, we cannot conclude that existing regulatory mechanisms regarding collection are inadequate. However, because butterfly collection is known to occur in the Spring Mountains, we will work with the Forest Service to enhance the effectiveness of their permitting program and continue to monitor abundance and collection efforts. After reviewing the best available commercial and scientific information, we conclude that the inadequacy of existing regulatory mechanisms is not currently a threat to the Spring Mountains acastus checkerspot butterfly, nor is it likely to become so because our analysis under the other Factors concluded that there are no significant threats to the species.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Drought at All Sites

Drought is variously defined depending upon the temporal and spatial scales of interest (Heim 2002, p. 1150; Passioura 2007, p. 113). We consider drought in the context of reduced water availability that would affect Spring Mountains acastus checkerspot butterfly larval host and nectar plants at a magnitude sufficient to cause a decline in the population. Climate models show the southwestern United States has transitioned into a more arid climate of drought that is predicted to continue into the next century (Seager *et al.* 2007, p. 1181).

Reductions in butterfly populations due to drought have been observed (Ehrlich *et al.* 1980, pp. 101–105; Thomas 1984, p. 344). In 2006, populations of many butterfly species were at low levels throughout southern Nevada, south of the Great Basin, likely as a result of drought conditions (Murphy 2006, p. 3). In 2007, other species of butterflies in the Spring Mountains experienced population declines, and these declines were hypothesized to be a result of drought (DataSmiths 2007, p. 22). Because other species of butterflies in the Spring Mountains experienced declines thought to be associated with drought, we believe that drought could affect the Spring Mountains acastus checkerspot butterfly similarly. However, we do not have information about Spring Mountains acastus checkerspot butterfly abundance trends as they relate to drought occurrences in order to determine at this time if drought may affect the subspecies now or in the future.

The Spring Mountains acastus checkerspot butterfly's larval host plant, *Chrysothamnus viscidiflorus,* is classified as having a ''high'' drought tolerance (USDA Natural Resources Conservation Service (NRCS) 2011); however, certain soil characteristics, such as loam (a soil consisting of a mixture of varying proportions of clay, silt, and sand), can reduce its tolerance to drought (Sperry and Hacke 2002, p. 367). We do not have information on where such soil characteristics occur in the Spring Mountains and whether they occur in Spring Mountains acastus checkerspot butterfly habitat. Additionally, *C. viscidiflorus* is at a competitive disadvantage for limited early spring moisture because of its low leaf area (Miller 1988, p. 62). Drought can cause butterfly host plants to mature early, which can reduce larval food availability (Ehrlich *et al.* 1980, pp. 101–105; Weiss 1987, p. 165). The available information about drought does not indicate that Spring Mountains acastus checkerspot butterfly host plants are maturing early and therefore reducing larval food availability for the subspecies. Therefore, we cannot speculate about the effects of drought on the Spring Mountains acastus checkerspot butterfly.

Precipitation during the growing season for *Chrysothamnus viscidiflorus* (April through July) has exhibited an overall decline during the last decade at three climate stations in and around the Spring Mountains (Service 2011c, pp. 1–3). The Spring Mountains acastus checkerspot butterfly population may be experiencing drought conditions associated with this decline in precipitation. However, because the larval host plant is drought-tolerant and the available information does not indicate how individual Spring Mountains acastus checkerspot butterflies may be impacted by drought, we have determined that, based on the best available scientific and commercial information, drought is not a threat to the subspecies at this time, nor is it likely to become a threat in the future.

Small Populations

Populations with small numbers of individuals have a higher risk of extinction than populations with large numbers of individuals due to random environmental events (Shaffer 1981, p. 131; Gilpin and Soule 1986, pp. 24–28; Shaffer 1987, pp. 69–75). The number of surveyed individuals of Spring Mountains acastus checkerspot butterflies has remained small over the last 5 years (Table 2); however the available information does not indicate that historical or recent population size for the Spring Mountains acastus checkerspot butterfly have declined such that small population size may be a threat to the subspecies now, nor is it likely to become so in the future.

We are unable at this time to determine with any certainty the current population abundance or trends of the Spring Mountains acastus checkerspot butterfly. At the four sites where survey data exist, it appears that abundances have consistently been low. Surveying

for butterflies may pose difficulties because of low densities, limited resources, route considerations, surveyor experience, and varying weather conditions (Zonneveld *et al.* 2003, pp. 476–486). On the basis of a review of the available information and given the uncertainty about abundance and trends, we cannot conclude that small population size is a threat to the subspecies at this time, nor does available information indicate it is likely to become so in the future.

Vehicle and Hiking Traffic at the Griffith Peak Trail/Harris Spring Road/Harris Mountain Road Colony Site

One researcher has hypothesized that disturbance by vehicle and hiking traffic may threaten the Griffith Peak Trail/Harris Spring Road/Harris Mountain Road colony site as a result of direct disturbance to the butterflies by vehicles and hikers (Boyd 2009, pp. 3–4). Vehicles and hikers could affect Spring Mountains acastus checkerspot butterflies by altering the behavior of the butterflies and causing adult mortality from crushing or collision. Road and trail use are likely to continue into the future. The Harris Spring Road leads to Harris Mountain Road, where Spring Mountains acastus checkerspot butterflies have been observed (Boyd and Austin 2001, Figure 1). This is a rough gravel road with switchbacks that restrict vehicle speeds. Visitor use during weekdays is low (Service 2011, p. 1), but likely increases on the weekends. Mortality caused by crushing or collision with vehicles would likely be rare because vehicles are unlikely to attain speeds beyond those that butterflies could escape from. Exposure of Spring Mountains acastus checkerspot butterflies to disturbance from hikers is insignificant because the best available data indicate that disturbance is sporadic and limited, allowing sufficient time for mating to occur. Studies of sagebrush checkerspot butterflies have shown that they have a high breeding success (Shields 1967, pp. 90 and 123; Rhainds 2010, pp. 212–213), and Spring Mountains acastus checkerspot butterflies are likely similar. After females mate, they disperse to oviposit, apparently away from the colony site breeding areas (Boyd and Austin 2001, p. 6; Boyd and Austin 2002, p. 5). Disturbance by vehicles and hikers is localized, ongoing, and low in intensity. Exposure of Spring Mountains acastus checkerspot butterflies to these activities is insignificant based upon our review of the best available information. Therefore, we have determined that disturbance from vehicles and hikers is not a threat to the Spring Mountains acastus checkerspot butterfly now, nor is it likely to be a threat in the future.

Summary of Factor E

Drought has occurred and is expected to continue throughout the range of the Spring Mountains acastus checkerspot butterfly and may negatively impact the subspecies. However, the larval host plant is drought-tolerant, and the available information does not indicate that individual Spring Mountains acastus checkerspot butterfly populations have been impacted by drought such that drought is a threat to the Spring Mountains acastus checkerspot butterfly now, nor is it likely to become a threat in the future. The available information does not indicate that small population size is a threat to the subspecies at this time, nor is it likely to become so in the future given the uncertainty about abundance and number of colonies. In addition, the available information indicates that disturbance from vehicles and hikers is not a threat to the Spring Mountains acastus checkerspot butterfly because disturbance by vehicles and hikers is localized, ongoing, and low in intensity. Based on our review of the best available scientific and commercial information, there is no indication that other natural or manmade factors are a threat to the subspecies at this time, nor are they likely to become so in the future.

Cumulative Effects From Factors A Through E

We considered whether there may be cumulative effects to the Spring Mountains acastus checkerspot butterfly from the combined impacts of potential threats such that even if each threat individually does not result in population-level impacts, that cumulatively the effects may be significant. We considered whether the combined effects of fire suppression, collection, climate change, and small population size may result in a significant impact to the Spring Mountains acastus checkerspot butterfly. At this time, given the complex and uncertain nature of effects associated with climate change and the uncertainties associated with information on the abundance and population trends of the Spring Mountains acastus checkerspot butterfly, the best available information does not indicate that synergistic interactions between climate change and the other potential threats (fire suppression, collection, and small population size) will impact the Spring Mountains acastus checkerspot butterfly. Even though each of these potential threats may result in an impact to the Spring Mountains acastus checkerspot butterfly, the best available information does not indicate that synergistic effects between fire suppression, collection, climate change, and small population size are unlikely to result in a significant overall population impact to the Spring Mountains acastus checkerspot butterfly now, nor are they likely to do so in the future.

Finding

As required by the Act, we considered the five factors in assessing whether the Spring Mountains acastus checkerspot butterfly is an endangered or threatened species throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Spring Mountains acastus checkerspot butterfly. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with recognized Spring Mountains acastus checkerspot butterfly experts and other Federal agencies.

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' However, it likely describes the extent to which the Service could reasonably rely on predictions about the future in making determinations about the future conservation status of the species.

In considering the foreseeable future as it relates to the status of the Spring Mountain Acastus butterfly we considered the best available scientific and commercial historical and current data to identify any existing trends or indications that conditions are likely to change in the future. We considered how current stressors are affecting the species and if that information indicates any changes in those stressors in the future. Thus the foreseeable future includes consideration of the ongoing effects of current stressors and whether there are likely to be any changes in the stressor in the future that will result in population level effects.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the stressors to the subspecies or its habitat are not of sufficient imminence, intensity, or

magnitude to indicate that the Spring Mountains acastus checkerspot butterfly is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout all or a significant portion of its range. While the best available information indicates that survey numbers are low, it does not suggest a significant change in distribution or abundance of the Spring Mountains acastus checkerspot butterfly. Further, the best available information does not indicate that any threats are acting on the subspecies. Fire suppression has impacted other butterfly species in the Spring Mountains, but the best available information does not indicate that the larval host plant for the Spring Mountains acastus checkerspot butterfly has been reduced in abundance and distribution as a result of fire suppression. Additionally, while we are aware of butterfly collection in the Spring Mountains, the best available information does not indicate that population abundances of the Spring Mountains acastus checkerspot butterfly are being negatively impacted by collection. We are currently working with the Forest Service to address collection permitting and prohibitions to avoid any potential future threats that could occur from collection. Additionally, the best available information does not indicate that any of these stressors are likely to change such that they are likely to have population level impacts on the subspecies in the future. Therefore, we find that listing the Spring Mountains acastus checkerspot butterfly as an endangered or threatened species is not warranted throughout all of its range at this time.

Significant Portion of the Range

Under the Act and our implementing regulations, a species may warrant listing if it is an endangered or threatened species throughout all or a significant portion of its range. The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines ''species'' as follows: ''The term 'species' includes 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.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

In determining whether the Spring Mountains acastus checkerspot butterfly is an endangered or threatened species in a significant portion of its range, we first addressed whether any portions of the range of the Spring Mountains acastus checkerspot butterfly warrant further consideration. We evaluated the current range of the Spring Mountains acastus checkerspot butterfly to determine if there is any apparent geographic concentration of the primary stressors potentially affecting the subspecies. We found the stressors are not of sufficient imminence, intensity, or magnitude, and are not geographically concentrated such that it warrants evaluating whether a portion of the range is significant under the Act.

We do not find that the Spring Mountains acastus checkerspot butterfly is in danger of extinction now, nor is likely to become endangered within the foreseeable future, throughout all or a significant portion of its range. Therefore, listing the Spring Mountains acastus checkerspot butterfly as an endangered or threatened species under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, the Spring Mountains acastus checkerspot butterfly to our Nevada Fish and Wildlife Offices (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor the Spring Mountains acastus checkerspot butterfly and encourage its conservation. If an emergency situation develops for the Spring Mountains acastus checkerspot butterfly or any other species, we will act to provide immediate protection.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Nevada Fish and Wildlife Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are the staff members of the Nevada Fish and Wildlife Office and the Pacific Southwest Regional Office.

Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 19, 2012.

Rowan W. Gould,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2012–23739 Filed 9–26–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 77, No. 188

Thursday, September 27, 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

September 24, 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 Housing Service

Title: 7 CFR 1944–N—Housing Preservation Grants.

OMB Control Number: 0575–0115.

Summary of Collection: The Rural Housing Service (RHS) is authorized to make grants to eligible applicants to provide repair and rehabilitation assistance so that very low- and low-income rural residents can obtain adequate housing. Such assistance is made by grantees to very low- and low-income persons, and to co-ops. Grant funds are used by grantees to make loans, grants, or other comparable assistance to eligible homeowners, rental unit owners, and co-ops for repair and rehabilitation of dwellings to bring them up to code or minimum property standards. These grants were established by Public Law 98–181, the Housing Urban Rural Recovery Act of 1983, which amended the Housing Act of 1949 (Pub. L. 93–383) by adding section 533, 42 U.S.C. S 2490(m), Housing Preservation Grants.

Need and Use of the Information: An applicant will submit a ''Statement of Activity'' that describes its proposed program. RHS will collect information to determine eligibility for a grant to justify its selection of the applicant for funding; to report program accomplishments and to justify and support expenditure of grant funds. RHS uses this information to determine if the grantee is complying with its grant agreement and to make decisions regarding continuing with modifying, or terminating grant assistance. If the information were not collected and presented to RHS, the Agency could not monitor the program or justify disbursement of grant funds.

Description of Respondents: Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 2,373.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly.

Total Burden Hours: 13,905.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–23795 Filed 9–26–12; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 24, 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) 720–8958.

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.

Food and Nutrition Service

Title: Uniform Grant Application for Non-Entitlement Discretionary Grants.

OMB Control Number: 0584–0512.

Summary of Collection: The Food and Nutrition Service (FNS) has a number of non-entitlement discretionary grant

programs to collect the information from grant applicants needed to evaluate and rank applicants and protect the integrity of the grantee selection process. All FNS discretionary grant programs will be eligible, but not required to use the uniform grant application package. The authorities for these grants vary. The term ''grant'' in this submission refers only to non-entitlement discretionary grants or cooperative agreements. Discretionary grant announcements include a number of information collections, including a ''project description'' (program narrative), budget information, disclosure of lobbying activities certification, and disclosure of Corporate Felony Convictions and Corporate Federal Tax Delinquencies. The requirements for the program narrative statement are based on the requirements for program narrative statements described in section 1.c (5) of OMB Circular A–102 and OMB A–110 (as implemented at USDA 7 CFR parts 3015, 3016 and 3019); and will apply to all types of grantees; State and local governments, non-profit organizations, institutions of higher education, hospitals, and for profit organizations.

Need and Use of the Information: The primary users of the information collected from the applicant are FNS and other Federal staff who will serve on a panel to systematically review, evaluate, and approve the grant/cooperative agreement applications and recommend the applicants most likely to meet program objectives and most responsive to the solicitation. The selection criteria will be contained in the Request for Application package. Without this information, FNS will not have adequate data to select appropriate grantees or evaluate which grants should be continued, or monitor financial reporting requirements.

Description of Respondents: State, Local, or Tribal Government; Business or other for-profit; Not for profit institutions.

Number of Respondents: 2,097.

Frequency of Responses: Reporting: Other (one-time).

Total Burden Hours: 123,903.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–23797 Filed 9–26–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration.

Title: Domestic Client Life-cycle Multi-Purpose Forms.

OMB Control Number: 0625–0143.

Form Number(s): ITA–4096P.

Type of Request: Regular submission (revision of a currently approved information collection).

Burden Hours: 14,234.

Number of Respondents: 47,318.

Average Hours per Response: 5–30 minutes.

Annual Cost to the Public: $60,000.

Needs and Uses: The Commercial Service (CS) offers their clients DOC programs, market research, and services to enable the client to begin exporting or to expand existing exporting efforts. Specific information is required in order to determine the client's business objectives and needs. This information collection is designed to elicit such data so that appropriate services can be proposed and conducted to most effectively meet the client's exporting goals. The CS has made efforts to provide more customized services to clients thereby requesting approval to use a service order form for customized services as well as for standardized services such as the International Company Profile, International Partner Search and Gold Key Service. The information collected is used internally and is not disseminated to the public.

These forms will also reduce client burden through forms' flexibility and technology. The CS also seeks increased forms flexibility to ensure that CS asks and captures only the specific information needed for a particular service/event, thereby continuing to reduce client burdens as CS utilizes pre-populated information for clients who have previously registered with CS. As a client request specific CS services, a set of questions will be presented to determine how CS will proceed to give the client the best export outcome.

This revision to produce a customized for each CS client, and will cover all aspects of a client's life-cycle with CS, involves merging with other information collections: OMB Control Nos: 0625–0065, 0625–0130, 0625–0151, 0625–0215, 0625–0220, 0625–0228, 0625–0237, and 0625–0238. These collections include all client intake, events/activities and export success forms. The set of questions used to generate the customized forms have been approved under the aforementioned information collections. Upon OMB approval, these information collections will be discontinued.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–5167 or via the Internet at *Wendy_L._Liberante@omb.eop.gov*.

Dated: September 21, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–23761 Filed 9–26–12; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–71–2012]

Foreign-Trade Zone 72—Indiana, IN; Application for Reorganization (Expansion of Service Area) Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Indianapolis Airport Authority, grantee of Foreign-Trade Zone 72, requesting authority to reorganize the zone to expand its service area under the alternative site framework (ASF) adopted by the Board (15 CFR 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u) and the regulations of the Board (15 CFR part 400). It was formally filed on September 19, 2012.

FTZ 72 was approved by the Board on September 28, 1981 (Board Order 179,

46 FR 50091, 10/9/1981) and expanded on September 2, 1992 (Board Order 598, 57 FR 41915, 9/14/1992) and on November 18, 2004 (Board Order 1359, 69 FR 70121, 12/2/2004). FTZ 72 was reorganized under the ASF on March 3, 2011 (Board Order 1747, 76 FR 12936–12937, 3/9/2011). The zone project currently has a service area that includes Bartholomew, Benton, Boone, Carroll, Cass, Clay, Clinton, Decatur, Delaware, Fayette, Fountain, Franklin, Grant, Greene, Hamilton, Hancock, Hendricks, Henry, Howard, Jennings, Johnson, Lawrence, Madison, Marion, Miami, Monroe, Montgomery, Morgan, Owen, Parke, Putnam, Rush, Shelby, Tippecanoe, Tipton, Vigo, Warren, Wayne and White Counties, Indiana.

The applicant is now requesting authority to expand the service area of the zone to include Union and Vermillion Counties, as described in the application. If approved, the grantee would be able to serve sites throughout the expanded service area based on companies' needs for FTZ designation. The proposed expanded service area is adjacent to the Indianapolis Customs and Border Protection Ports of Entry

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 26, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to December 11, 2012.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.* For further information, contact Elizabeth Whiteman at Elizabeth *Whiteman@trade.gov* or (202) 482–0473.

Dated: September 19, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–23827 Filed 9–26–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket B–37–2012]

Foreign-Trade Zone 126—Reno, NV, Withdrawal of Production Notification, Brightpoint North America L.P. (Cell Phone Kitting and Distribution), Reno, NV

Notice is hereby given of the withdrawal of the notification of the Economic Development Authority of Western Nevada, grantee of FTZ 126, requesting production authority on behalf of Brightpoint North America L.P. in Reno, Nevada. Initial notice of the notification was given on May 16, 2012 (77 FR 28851).

The case has been closed without prejudice.

Dated: September 21, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–23823 Filed 9–26–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Emerging Technology and Research Advisory Committee; Notice of Open Meeting

The Emerging Technology and Research Advisory Committee (ETRAC) will meet on October 11, 2012, 8:30 a.m., Room 6087B, at the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on emerging technology and research activities, including those related to deemed exports.

Agenda

Thursday, October 11

Open Session

1. Co-chairman's opening comments, Committee Introductions
2. Housekeeping/Elections and Open Call for New Members
3. Update and discussion with BIS on FY13 plans
4. Presentation from State Department on Wassenaar ''USE'' redefinition
5. Committee discussion of Deemed Export language to address redefinition of ''USE''
6. Public Comments, Suggestions
7. DARPA
8. OSTP on Dual-Use Research of Concern and implications for the deemed export rule. The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than October 4, 2012.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

For more information, call Yvette Springer at (202) 482–2813.

Dated: September 21, 2012.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2012–23754 Filed 9–26–12; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–851]

Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe (Under 4½ Inches) From Japan: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* September 27, 2012.

FOR FURTHER INFORMATION CONTACT: Joshua Morris or Tyson Smith, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1779 or (202) 482–2044, respectively.

Background

On July 31, 2012, the Department published a notice of initiation of an antidumping duty administrative review of the antidumping order on certain small diameter carbon and alloy seamless standard, line and pressure pipe (under 4½ inches) (hereinafter, ''small diameter pipe'') from Japan for the period of June 1, 2011, through May 31, 2012. The review covered Canadian

Natural Resources Ltd. (''CNRL), a Canadian exporter of small diameter pipe, which had requested an administrative review of itself.[1]

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the party that requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. On August 30, 2012, CNRL withdrew its request for review within the 90-day period. No other party requested a review and, therefore, the Department is rescinding this administrative review.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. For CNRL, antidumping duties shall be assessed at rates equal to the cash deposit rate in effect on the date of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice of rescission of administrative review.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: September 20, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–23835 Filed 9–26–12; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 77 FR 45338 (July 31, 2012).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–908]

Sodium Hexametaphosphate From the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On March 23, 2012, the Department of Commerce (''Department'') published in the **Federal Register** the *Preliminary Results* of the second administrative review of the antidumping duty order on sodium hexametaphosphate (''sodium hex'') from the People's Republic of China (''PRC'') for the period of review (''POR'') March 1, 2010, through February 28, 2011.[1] Based upon our analysis of the comments, we made changes to the margin calculation for the final results.

DATES: *Effective Date:* September 27, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone—202.482.0413.

SUPPLEMENTARY INFORMATION:

Case History

On March 23, 2012, the Department published the *Preliminary Results.* On May 17, 2012, the Department extended the time limit for these final results by 60 days.[2]

Between May 4 and May 25, 2012, interested parties submitted surrogate value information and rebuttal surrogate value comments. Interested parties were further provided an opportunity to comment on the *Preliminary Results.* Between June 4, 2012, and June 11, 2012, we received briefs and rebuttal briefs from ICL Performance Products and Innophos, Inc. (''Petitioners'') and Hubei Xingfa Chemical Group Co., Ltd. (''Xingfa'').

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the memorandum entitled, ''Second Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Issues and Decision Memorandum for the Final Results,'' which is dated concurrently with and adopted by this notice (''I&D Memo''). A list of the issues which parties raised, and to which we respond in the I&D Memo is attached to this notice as Appendix I. The I&D Memo is a public document and 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 (''CRU''), room 7046 of the main Department of Commerce building. In addition, a complete version of the I&D Memo can be accessed directly on the Internet at *http://www.trade.gov/ia/.* The signed I&D Memo and the electronic versions of the I&D Memo are identical in content.

Changes Since the Preliminary Results

The Department has made changes to the preliminary margin calculation. Specifically, we:

- Used the unconsolidated financial statement of Aditya Birla Chemicals (Thailand), Ltd., to calculate all surrogate financial ratios;[3]
- Valued electricity using data from the Thai Metropolitan Electric Authority;[4]
- Capped Xingfa's supplier distances;[5]
- Valued truck freight and brokerage and handling using *Doing Business: Thailand 2011;*[6]
- Valued white coal using a Thai harmonized tariff schedule number (''HTS'') for anthracite; and[7]
- Valued super sacks using a Thai HTS.[8]

Scope of the Order

The merchandise subject to this review is sodium hexametaphosphate. Sodium hexametaphosphate is a water-soluble polyphosphate glass that consists of a distribution of polyphosphate chain lengths. It is a collection of sodium polyphosphate polymers built on repeating $NaPO_3$ units. Sodium hexametaphosphate has a P_2O_5 content from 60 to 71 percent.

[1] *See Sodium Hexametaphosphate from the People's Republic of China: Preliminary Results of Second Antidumping Duty Administrative Review,* 77 FR 17013 (March 23, 2012) (''*Preliminary Results*'').

[2] *See Sodium Hexametaphosphate from the People's Republic of China: Extension of Time Limit for the Final Results,* 77 FR 29314 (May 25, 2012).

[3] *See* I&D Memo at Comment I.

[4] *See* I&D Memo at Comments II.

[5] *See* I&D Memo at Comment IV.A.

[6] *See* I&D Memo at Comment IV.B.

[7] *See* I&D Memo at Comment V.A.

[8] *See* I&D Memo at Comment VIII.

Alternate names for sodium hexametaphosphate include the following: Calgon; Calgon S; Glassy Sodium Phosphate; Sodium Polyphosphate, Glassy; Metaphosphoric Acid; Sodium Salt; Sodium Acid Metaphosphate; Graham's Salt; Sodium Hex; Polyphosphoric Acid, Sodium Salt; Glass H; Hexaphos; Sodaphos; Vitrafos; and BAC–N–FOS. Sodium hexametaphosphate is typically sold as a white powder or granule (crushed) and may also be sold in the form of sheets (glass) or as a liquid solution. It is imported under heading 2835.39.5000, HTSUS. It may also be imported as a blend or mixture under heading 3824.90.3900, HTSUS. The American Chemical Society, Chemical Abstract Service (''CAS'') has assigned the name ''Polyphosphoric Acid, Sodium Salt'' to sodium hexametaphosphate. The CAS registry number is 68915–31–1. However, sodium hexametaphosphate is commonly identified by CAS No. 10124–56–8 in the market. For purposes of the review, the narrative description is dispositive, not the tariff heading, CAS registry number or CAS name.

The product covered by this review includes sodium hexametaphosphate in all grades, whether food grade or technical grade. The product covered by this review includes sodium hexametaphosphate without regard to chain length *i.e.,* whether regular or long chain. The product covered by this review includes sodium hexametaphosphate without regard to physical form, whether glass, sheet, crushed, granule, powder, fines, or other form, and whether or not in solution.

However, the product covered by this review does not include sodium hexametaphosphate when imported in a blend with other materials in which the sodium hexametaphosphate accounts for less than 50 percent by volume of the finished product.

Separate Rates Determination

In our *Preliminary Results,* we determined that Xingfa met the criteria for separate rate status. We have not received any information since the issuance of the *Preliminary Results* that provides a basis for reconsidering this preliminary determination. Therefore, the Department continues to find that Xingfa has met the criteria for a separate rate.

Final Results of Review

The dumping margin for the POR is as follows:

Exporter	Margin (percent)
Hubei Xingfa Chemical Group Co., Ltd	91.23

The Department will disclose calculations performed for these final results to the parties within five days of the date of publication of this notice, in accordance with section 351.224(b) of the Department's regulations.

Assessment

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to section 351.212(b)(1) of the Department's regulations, we will calculate importer-specific (or customer) *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. In accordance with section 351.106(c)(2) of the Department's regulations, we will instruct CBP to liquidate, without regard to antidumping duties, all entries of subject merchandise during the POR for which the importer-specific assessment rate is zero or *de minimis.*

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporter listed above, the cash deposit rate will be the rate established in the final results of review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have a separate rate, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 188.05 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. The deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with section 351.305 of the Department's regulations, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: September 19, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix I

Comment I. Surrogate Financial Ratios
Comment II. Surrogate Value for Electricity
Comment III. Surrogate Value for Yellow Phosphorous
Comment IV. Freight
A. Capping the *Sigma*[9] Distance
B. Surrogate Value for Truck Freight
C. Surrogate Value for Barge Freight
Comment V. Coal
A. Surrogate Value for White Coal
B. Surrogate Value for Crude Coal
Comment VI. Surrogate Value for Phosphate Rock
Comment VII. Surrogate Value for Phosphate Slag
Comment VIII. Surrogate Value for Super

[9] *See Sigma Corp.* v. *United States,* 117 F. 3d 1401 (Fed. Cir. 1997) (''*Sigma*'').

Sacks

[FR Doc. 2012–23832 Filed 9–26–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–823–810]

Solid Agricultural Grade Ammonium Nitrate from Ukraine: Final Results of the Expedited Second Sunset Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* September 27, 2012.

SUMMARY: On June 1, 2012, the Department of Commerce (''Department'') published in the **Federal Register** the notice of initiation of the second sunset review of the antidumping duty order on solid agricultural grade ammonium nitrate from Ukraine. The Department has conducted an expedited sunset review of this order. As a result of this sunset review, the Department finds that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping at the rates identified in the ''Final Results of Review'' section of this notice.

FOR FURTHER INFORMATION CONTACT: Mahnaz Khan or Yasmin Nair, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–0914 and (202) 482–3813, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2012, the Department initiated the second sunset review of the antidumping duty order on solid agricultural grade ammonium nitrate from Ukraine, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-Year (''Sunset'') Review,* 77 FR 32527 (June 1, 2012). The Department received a notice of intent to participate from domestic interested parties CF Industries, Inc. and El Dorado Chemical Company (collectively, ''Petitioners''), within the deadline specified in 19 CFR 351.218(d)(1)(i). Petitioners claimed interested party status under section 771(9)(C) of the Act as a manufacturer, producer, or wholesaler in the United States of a domestic-like product.

On July 2, 2012, the Department received a substantive response from Petitioners. In addition to meeting the other requirements of 19 CFR 351.218(d)(3), Petitioners provided information on the volume and value of Ukrainian exports of solid agricultural grade ammonium nitrate to the United States. The Department received no responses from other parties to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited (120-day) sunset review.

Scope of the Order

The merchandise covered by the order are solid, fertilizer grade ammonium nitrate (''ammonium nitrate'' or ''subject merchandise'') products, whether prilled, granular or in other solid form, with or without additives or coating, and with a bulk density equal to or greater than 53 pounds per cubic foot. Specifically excluded from the scope is solid ammonium nitrate with a bulk density less than 53 pounds per cubic foot (commonly referred to as industrial or explosive grade ammonium nitrate). The merchandise subject to the order is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 3102.30.00.00. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum (''Decision Memorandum'') from Susan H. Kuhbach, Director, Office 1, Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with this notice, which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margin of dumping likely to prevail if the order were revoked. Parties can find a complete discussion of all issues raised in these reviews and the corresponding recommendations in this public memorandum, which 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 in room 7046 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/ia/*. The signed Decision Memorandum and electronic versions of the Decision Memorandum are identical in content.

Final Results of Review

Pursuant to sections 752(c)(1) and (3) of the Act, we determine that revocation of the antidumping duty order on solid agricultural grade ammonium nitrate from Ukraine would be likely to lead to continuation or recurrence of dumping and that the magnitude of the margin of dumping likely to prevail if the order were revoked is 156.29% for J.S.C. ''Concern Stirol'' and for all other exporters.

This notice also serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: September 20, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–23828 Filed 9–26–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC128

Takes of Marine Mammals Incidental to Specified Activities; Seabird and Pinniped Research Activities in Central California, 2012–2013

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: We have received an application from PRBO Conservation Science (PRBO), for an Incidental Harassment Authorization to take marine mammals, by harassment,

incidental to conducting proposed seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California. PRBO is requesting an Authorization per the Marine Mammal Protection Act. We are requesting comments on our proposal to issue an Incidental Harassment Authorization to PRBO to incidentally harass, by Level B harassment only, four species of marine mammals during the specified activity from November 2012, through November 2013.

DATES: We must receive comments and information no later than October 29, 2012.

ADDRESSES: Address your comments on the application to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Cody@noaa.gov.* Please include 0648–XC128 in the subject line. We are not responsible for email comments send to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

All comments received are a part of the public record and we will generally post them to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

To obtain an electronic copy of the application containing a list of the references used in this document, write to the previously mentioned address, telephone the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or access our Web page at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, Office of Protected Resources, NMFS (301) 427–8401.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(D) of the MMPA (MMPA; 16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if: (1) We make certain findings; (2) the taking is limited to harassment; and (3) we provide a notice of a proposed authorization to the public for review.

We shall grant authorization for the incidental taking of small numbers of marine mammals if we find that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking; other means of effecting the least practicable adverse impact on the species or stock and its habitat; and requirements pertaining to the mitigation, monitoring and reporting of such takings. We have defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the Marine Mammal Protection Act established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the Act establishes a 45-day time limit for our review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, we must either issue or deny the authorization and must publish a notice in the **Federal Register** within 30 days of our determination to issue or deny the authorization.

Except with respect to certain activities not pertinent here, the Marine Mammal Protection Act defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

We received an application on April 29, 2012, from PRBO requesting the taking by harassment, of small numbers of marine mammals, incidental to conducting seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California. PRBO, along with partners Oikonos Ecosystem Knowledge and Point Reyes National Seashore, plan to conduct the proposed activities for one year. We determined the application complete and adequate on June 5, 2012.

Their proposed research activities would involve monitoring and censusing seabird colonies; observing seabird nesting habitat; restoring nesting burrows; observing breeding elephant seals, and resupplying a field station. The proposed activities would occur in the vicinity of pinniped haul out sites located on Southeast Farallon Island (37°41′54.32″ N, 123°0′8.33″ W), Año Nuevo Island (37°6′29.25″ N, 122°20′12.20″ W), or within Point Reyes National Seashore (37°59′38.61″ N, 122°58′24.90″ W) in central California.

Acoustic and visual stimuli generated by: (1) Noise generated by motorboat approaches and departures; (2) noise generated during restoration activities and loading operations while resupplying the field station; and (3) human presence during seabird and pinniped research activities, may have the potential to cause California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina*), northern elephant seals (*Mirounga angustirostris*), and Steller sea lions (*Eumetopias jubatus*) hauled out on Southeast Farallon Island, Año Nuevo Island, or Point Reyes National Seashore to flush into the surrounding water or to cause a short-term behavioral disturbance for marine mammals in the proposed areas. These types of disturbances are the principal means of marine mammal taking associated with these activities and PRBO has requested an authorization to take 5,104 California sea lions, 526 harbor seals, 190 northern elephant seals, and 20 Steller sea lions (*Eumetopias jubatus*) by Level B harassment only.

To date, we have issued four 1-year Incidental Harassment Authorizations to PRBO for the conduct of the same activities from 2007 to 2012 and the current Authorization expires on July 28, 2012 (76 FR 46724, August 3, 2011). This is PRBO's fifth request for an Authorization and they will submit a monitoring report to us no later than 90 days after the expiration of the current Authorization.

Description of the Specified Geographic Region

The proposed action area consists of the following three locations in the northeast Pacific Ocean:

South Farallon Islands

The South Farallon Islands consist of Southeast Farallon Island located at 37°41′54.32″ N, 123°0′8.33″ W and West

End Island. These two islands are directly adjacent to each other and separated by only a 30-foot (ft) (9.1 meter (m)) channel. The South Farallon Islands have a land area of approximately 120 acres (0.49 square kilometers (km)) and are part of the Farallon National Wildlife Refuge. The islands are located near the edge of the continental shelf 28 miles (mi) (45.1 km) west of San Francisco, CA, and lie within the waters of the Gulf of the Farallones National Marine Sanctuary.

Año Nuevo Island

Año Nuevo Island located at 37°6′29.25″ N, 122°20′12.20″ W is one-quarter mile (402 m) offshore of Año Nuevo Point in San Mateo County, CA. This small 25-acre (0.1 square km) island is part of the Año Nuevo State Reserve, all of which is owned and operated by California State Parks. The Island lies within the Monterey Bay National Marine Sanctuary and the Año Nuevo State Marine Conservation Area.

Point Reyes National Seashore

Point Reyes National Seashore is located approximately 40 miles (64.3 km) north of San Francisco Bay and also lies within the Gulf of the Farallones National Marine Sanctuary. The proposed research areas (Life Boat Station, Drakes Beach, and Point Bonita) are within the headland coastal areas of the National Park.

Description of the Specified Activity

Seabird Research on Southeast Farallon Island

PRBO proposes to conduct: (1) Daily observations of seabird colonies at a maximum frequency of three 15-minute visits per day; and (2) conduct daily observations of breeding common murres (*Uria aalge*) at a maximum frequency of one, 5-hour visit per day between September 2012, and September 2013. These activities usually involve one or two observers conducting daily censuses of seabirds or conducting mark/recapture studies of breeding seabirds on Southeast Farallon Island. The researchers plan to access the island's two landing areas, the North Landing and the East Landing, by 14 to 18 ft (4.3 to 5.5 m) open motorboats which are hoisted onto the island using a derrick system and then travel by foot to coastal areas of the island to view breeding seabirds from behind an observation blind.

The potential for incidental take related to the mark/recapture studies is very low as these activities are conducted within the interior of the island away from the intertidal areas where the pinnipeds haulout. Most potential for incidental take would occur when the researchers approach or depart the intertidal area by motorboat or when the researchers walk within 50 ft (15.2 m) of the haulout areas to enter the observation blinds to observe shorebirds.

Field Station Resupply on Southeast Farallon Island

PRBO proposes to resupply the field station once every two weeks at a maximum frequency of 26 visits. Resupply activities involve personnel approaching either the North Landing or East Landing by motorboat. At East Landing—the primary landing site—all personnel assisting with the landing would stay on the loading platform approximately 30 ft (9.1 m) above the water. At North Landing, loading operations would occur at the water level in the intertidal areas. Most potential for incidental take would occur when the researchers approach the area by motorboat or when the researchers load or unload supplies onshore.

Seabird Research on Año Nuevo Island

PRBO, in collaboration with Oikonos—Ecosystem Knowledge, proposes to monitor seabird burrow nesting habitat quality and to conduct habitat restoration at a maximum frequency of 20 visits per year. This activity involves two to three researchers accessing the north side of the island by a 12 ft (3.7 m) Zodiac boat. Once onshore, the researchers will check subterranean nest boxes and restore any nesting habitat for approximately 15 minutes.

Most potential for incidental take would occur at the landing beach on the north side of the island when the researchers arrive and depart to check the boxes. Non-breeding pinnipeds may occasionally be present, including California sea lions that may be hauled out near a small group of subterranean seabird nest boxes on the island terrace. In both locations researchers are located more than 50 ft (15.2 m) away from any pinnipeds which may be hauled out.

Seabird Research on Point Reyes National Seashore

The National Park Service in collaboration with PRBO monitors seabird breeding and roosting colonies; conducts habitat restoration; removes non-native plants; monitors intertidal areas; maintains coastal dune habitat. Seabird monitoring usually involves one or two observers conducting the survey by small boats (12 to 22 ft; 3.6 to 6.7 m) along the Point Reyes National Seashore shoreline. Researchers would visit the site at a maximum frequency of 20 times per year, with an emphasis on increasing monitoring during the nesting season. Researchers would conduct occasional, intermittent visits during the rest of the year.

A majority of the research occurs in areas where marine mammals are not present. However, the potential for incidental harassment will occur at the landing beaches along Point Reyes Headland, boat ramps, or parking lots where northern elephant seals, harbor seals, or California sea lions may be hauled out in the vicinity.

Pinniped Research on West End Island

Pinniped research activities involve surveying breeding northern elephant seals on West End Island between early December and late February. At least three researchers would visit the site at a maximum frequency of five times per year. To conduct the census, the researchers would travel by foot approximately 1,500 ft (457.2 m) above the site to conduct the census. Historically, a few juvenile Steller sea lions may haul out on a spit of rocks called Shell Beach Rocks below the transit path to the northern elephant seal haul out. Thus, the potential for incidental harassment of Steller sea lions may occur when the researchers transit above Shell Beach Rocks.

We expect that acoustic and visual stimuli resulting from the proposed motorboat operations and human presence has the potential to harass marine mammals, incidental to the conduct of the proposed activities. We also expect that these disturbances would be temporary and result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals.

Description of the Marine Mammals in the Area of the Proposed Specified Activity

The marine mammals most likely to be harassed incidental to conducting seabird and pinniped research at the proposed research areas on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore are primarily California sea lions, Northern elephant seals, Pacific harbor seals, and to a lesser extent the eastern distinct population of the Steller sea lion which is listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*)

We refer the public to Carretta *et al.,* (2011) for general information on these species which are presented below this section. The publication is available at:

http://www.nmfs.noaa.gov/pr/pdfs/sars/po2011.pdf.

Northern Elephant Seal

Northern elephant seals are not listed as threatened or endangered under the Endangered Species Act, nor are they categorized as depleted under the Marine Mammal Protection Act. The estimated population of the San Miguel stock is approximately 2,492 animals and the current maximum population growth rate is 12 percent (Carretta *et. al.,* 2011).

Northern elephant seals range in the eastern and central North Pacific Ocean, from as far north as Alaska and as far south as Mexico. Northern elephant seals spend much of the year, generally about nine months, in the ocean. They are usually underwater, diving to depths of about 1,000–2,500 ft (330–800 m) for 20- to 30-minute intervals with only short breaks at the surface. They are rarely seen out at sea for this reason. While on land, they prefer sandy beaches.

Northern elephant seals breed and give birth in California (U.S.) and Baja California (Mexico), primarily on offshore islands (Stewart *et al.,* 1994), from December to March (Stewart and Huber, 1993). Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, and females feed further south, south of 45° N (Stewart and Huber, 1993; Le Boeuf *et al.,* 1993). Adults return to land between March and August to molt, with males returning later than females. Adults return to their feeding areas again between their spring/summer molting and their winter breeding seasons.

At Point Reyes, the population ranges from 1,500 and 2,000 animals (NPS, 2012). Adult northern elephant seals visit Point Reyes twice a year (NPS, 2012). They arrive in early winter from their feeding grounds off Alaska and the largest congregations occur in the winter, when the females arrive to deliver their pups and nurse them, and in spring when immature seals and adult females return to molt. During the time they are onshore they are fasting (NPS, 2012).

The population on the Farallon Islands has declined by 3.4 percent per year since 1983, and in recent years numbers have fluctuated between 100 and 200 pups (W. Sydeman, D. Lee, unpubl. data). At Southeast Farallon, the population consists of approximately 500 animals (FNMS, 2012).

Observers first sighted elephant seals on Año Nuevo Island in 1955 and today the population ranges from 900 to 1,000 adults (M. Lowry, unpubl. data). Males began to haul out on the mainland in 1965. California State Park reports that by 1988/1989, approximately 2,000 elephant seals came ashore to Año Nuevo (CSP, 2012).

California Sea Lion

California sea lions are not listed as threatened or endangered under the Endangered Species Act, nor are they categorized as depleted under the Marine Mammal Protection Act. The California sea lion is now a full species, separated from the Galapagos sea lion (*Z. wollebaeki*) and the extinct Japanese sea lion (*Z. japonicus*) (Brunner 2003, Wolf *et al.,* 2007, Schramm *et al.,* 2009). The estimated population of the U.S. stock of California sea lion is approximately 296,750 animals and the current maximum population growth rate is 12 percent (Carretta *et al.,* 2011).

California sea lion breeding areas are on islands located in southern California, in western Baja California, Mexico, and the Gulf of California. During the breeding season, most California sea lions inhabit southern California and Mexico. Rookery sites in southern California are limited to the San Miguel Islands and the southerly Channel Islands of San Nicolas, Santa Barbara, and San Clemente (Carretta *et al.,* 2011). Males establish breeding territories during May through July on both land and in the water. Females come ashore in mid-May and June where they give birth to a single pup approximately four to five days after arrival and will nurse pups for about a week before going on their first feeding trip. Females will alternate feeding trips with nursing bouts until the pup is weaned between four and 10 months of age (NMML, 2010).

Adult and juvenile males will migrate as far north as British Columbia, Canada while females and pups remain in southern California waters in the non-breeding season. In warm water (El Niño) years, some females are found as far north as Washington and Oregon, presumably following prey.

The U.S. stock of California sea lion is the only stock present in the proposed research area and in recent years, California sea lions have begun to breed annually in small numbers at Southeast Farallon and Año Nuevo Islands.

On the Farallon Islands, California sea lions haul out in many intertidal areas year round, fluctuating from several hundred to several thousand animals. California sea lions at Point Reyes National Seashore haul out at only a few locations, but will occur on human structures such as boat ramps. The annual population averages around 300 to 500 during the fall through spring months, although on occasion, several thousand sea lions can arrive depending upon local prey resources (S. Allen, unpublished data). On Año Nuevo Island, California sea lions may haulout at one of eight beach areas on the perimeter of the island (see Figure 2 in the Application). The island's average population ranges from 4,000 to 9,500 animals (M. Lowry, unpublished data).

Pacific Harbor Seal

Pacific harbor seals are not listed as threatened or endangered under the Endangered Species Act, nor are they categorized as depleted under the Marine Mammal Protection Act. The estimated population of the California stock of Pacific harbor seals is approximately 30,196 animals (Carretta *et al.,* 2011).

The animals inhabit near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. Pacific harbor seals are divided into two subspecies: *P. v. stejnegeri* in the western North Pacific, near Japan, and *P. v. richardsi* in the northeast Pacific Ocean. The latter subspecies, recognized as three separate stocks, inhabits the west coast of the continental United States, including: the outer coastal waters of Oregon and Washington states; Washington state inland waters; and Alaska coastal and inland waters.

In California, over 500 harbor seal haulout sites are widely distributed along the mainland and offshore islands, and include rocky shores, beaches and intertidal sandbars (Lowry *et al.,* 2005). Harbor seals mate at sea and females give birth during the spring and summer, although, the pupping season varies with latitude. Pups are nursed for an average of 24 days and are ready to swim minutes after being born. Harbor seal pupping takes place at many locations and rookery size varies from a few pups to many hundreds of pups.

In California, over 500 harbor seal haulout sites are widely distributed along the mainland and offshore islands, and include rocky shores, beaches and intertidal sandbars (Lowry *et al.,* 2005). On the Farallon Islands, approximately 40 to 120 Pacific harbor seals haul out in the intertidal areas (PRBO unpublished data). Harbor seals at Point Reyes National Seashore haul out at nine locations with an annual population of up to 4,000 animals (M. Lowry, unpublished data). On Año Nuevo Island, harbor seals may haulout at one of eight beach areas on the perimeter of the island (see Figure 2 in PRBO's Application) and the island's average population ranges from 100 to

150 animals (M. Lowry, unpublished data).

Steller Sea Lion

Steller sea lions consist of two distinct population segments: the western and eastern distinct population segments divided at 144° West longitude (Cape Suckling, Alaska). The eastern distinct population segment of the Steller sea lion is threatened; however NMFS is proposing to remove the eastern distinct population segment of Steller sea lions from the list of endangered wildlife, after a status review by its biologists found the species is recovering. The western distinct population segment is endangered under the Endangered Species Act. Both segments are depleted under the Marine Mammal Protection Act.

Steller sea lions range along the North Pacific Rim from northern Japan to California (Loughlin *et al.,* 1984), with centers of abundance and distribution in the Gulf of Alaska and Aleutian Islands, respectively. The species is not known to migrate, but individuals disperse widely outside of the breeding season (late May through early July), thus potentially intermixing with animals from other areas.

The western segment of Steller sea lions inhabit central and western Gulf of Alaska, Aleutian Islands, as well as coastal waters and breed in Asia (e.g., Japan and Russia). The eastern segment includes sea lions living in southeast Alaska, British Columbia, California, and Oregon.

In 2011, the estimated population of the eastern distinct population segment ranged from a minimum of 52,847 up to 72,223 animals and the maximum population growth rate is 12.1 percent (Angliss and Allen, 2011).

The eastern distinct population segment of Steller sea lions breeds on rookeries located in southeast Alaska, British Columbia, Oregon, and California. There are no rookeries located in Washington state. Steller sea lions give birth in May through July and breeding commences a couple of weeks after birth. Pups are weaned during the winter and spring of the following year.

Despite the wide-ranging movements of juveniles and adult males in particular, exchange between rookeries by breeding adult females and males (other than between adjoining rookeries) appears low, although males have a higher tendency to disperse than females (NMFS 1995, Trujillo *et al.,* 2004, Hoffman *et al.,* 2006). A northward shift in the overall breeding distribution has occurred, with a contraction of the range in southern California and new rookeries established in southeastern Alaska (Pitcher *et al.,* 2007).

The current population of eastern Steller sea lions in the proposed research area is estimated to number between 50 and 750 animals. Overall, counts of non-pups at trend sites in California and Oregon have been relatively stable or increasing slowly since the 1980s (Angliss and Allen, 2011).

PRBO estimates that between 50 and 150 Steller sea lions live on the Farallon Islands. On Southeast Farallon Island, the abundance of females declined an average of 3.6 percent per year from 1974 to 1997 (Sydeman and Allen, 1999).

The National Marine Fisheries Service's Southwest Fisheries Science Center estimates between 400 and 600 live on Año Nuevo Island (PRBO unpublished data, 2008; Southwest Fisheries Science Center unpublished data, 2008). At Año Nuevo Island off central California, a steady decline in ground counts started around 1970, and there was an 85 percent reduction in the breeding population by 1987 (LeBoeuf *et al.,* 1991)

Pup counts at Año Nuevo Island declined five percent annually through the 1990s (NOAA Stock Assessment, 2003) and have apparently stabilized between 2001 and 2005 (M. Lowry, SWFSC unpublished data). In 2000, the combined pup estimate for both islands was 349. In 2005, the pup estimate was 204 on ANI. Pup counts on the Farallon Islands have generally varied from five to 15 (Hastings and Sydeman, 2002; PRBO unpublished data). Pups have not been born at Point Reyes Headland since the 1970s, and Steller sea lions are seen in very low numbers there currently (S. Allen, unpubl. data).

Other Marine Mammals in the Proposed Action Area

California (southern) sea otters (*Enhydra lutris nereis*), listed as threatened under the Endangered Species Act and categorized as depleted under the Marine Mammal Protection Act, usually range in coastal waters within two km of shore. PRBO has not encountered California sea otters on Southeast Farallon Island, Año Nuevo Island, or Point Reyes National Seashore during the course of seabird or pinniped research activities over the past five years. This species is managed by the U.S. Fish and Wildlife Service and is not considered further in this notice.

Potential Effects on Marine Mammals

Acoustic and visual stimuli generated by: (1) Motorboat operations; and (2) the appearance of researchers may have the potential to cause Level B harassment of any pinnipeds hauled out on Southeast Farallon Island, Año Nuevo Island, or Point Reyes National Seashore. The effects of sounds from motorboat operations and the appearance of researchers might include hearing impairment or behavioral disturbance (Southall, *et al.,* 2007).

Hearing Impairment

Marine mammals produce sounds in various important contexts—social interactions, foraging, navigating, and to responding to predators. The best available science suggests that pinnipeds have a functional aerial hearing sensitivity between 75 hertz (Hz) and 75 kilohertz (kHz) and can produce a diversity of sounds, though generally from 100 Hz to several tens of kHz (Southall, *et al.,* 2007).

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran, Carder, Schlundt, and Ridgway, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is called the initial threshold shift. If the threshold shift eventually returns to zero (i.e., the threshold returns to the pre-exposure value), it is called temporary threshold shift (Southall *et al.,* 2007).

Pinnipeds have the potential to be disturbed by airborne and underwater noise generated by the small boats equipped with outboard engines (Richardson, Greene, Malme, and Thomson, 1995). However, there is a dearth of information on acoustic effects of motorboats on pinniped hearing and communication and to our knowledge there has been no specific documentation of hearing impairment in free-ranging pinnipeds exposed to small motorboats during realistic field conditions.

Behavioral Disturbance

Disturbances resulting from human activity can impact short- and long-term pinniped haul out behavior (Renouf *et al.,* 1981; Schneider and Payne, 1983; Terhune and Almon, 1983; Allen *et al.,* 1984; Stewart, 1984; Suryan and Harvey, 1999; Mortenson *et al.,* 2000; and Kucey and Trites, 2006). Disturbance includes a variety of effects,

including subtle to conspicuous changes in behavior, movement, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007). However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (e.g., Lusseau and Bejder, 2007; Weilgart, 2007).

Numerous studies have shown that human activity can flush harbor seals off haulout sites (Allen *et al.,* 1984; Calambokidis *et al.,* 1991; Suryan and Harvey, 1999; and Mortenson *et al.,* 2000). The Hawaiian monk seal (*Monachus schauinslandi*) has been shown to avoid beaches that have been disturbed often by humans (Kenyon, 1972). And in one case, human disturbance appeared to cause Steller sea lions to desert a breeding area at Northeast Point on St. Paul Island, Alaska (Kenyon, 1962).

In 1997, Henry and Hammil (2001) conducted a study to measure the impacts of small boats (i.e., kayaks, canoes, motorboats and sailboats) on harbor seal haulout behavior in Métis Bay, Quebec, Canada. During that study, the authors noted that the most frequent disturbances (n=73) were caused by lower speed, lingering kayaks and canoes (33.3 percent) as opposed to motorboats (27.8 percent) conducting high speed passes. The seal's flight reactions could be linked to a surprise factor by kayaks-canoes which approach slowly, quietly and low on water making them look like predators. However, the authors note that once the animals were disturbed, there did not appear to be any significant lingering effect on the recovery of numbers to their pre-disturbance levels. In conclusion, the study showed that boat traffic at current levels has only a temporary effect on the haulout behavior of harbor seals in the Métis Bay area.

In 2004, Johnson and Acevedo-Gutierrez (2007) evaluated the efficacy of buffer zones for watercraft around harbor seal haulout sites on Yellow Island, Washington state. The authors estimated the minimum distance between the vessels and the haul-out sites; categorized the vessel types; and evaluated seal responses to the disturbances. During the course of the seven-weekend study, the authors recorded 14 human-related disturbances which were associated with stopped powerboats and kayaks. During these events, hauled out seals became noticeably active and moved into the water. The flushing occurred when stopped kayaks and powerboats were at distances as far as 453 and 1,217 ft (138 and 371 m) respectively. The authors note that the seals were unaffected by passing powerboats, even those approaching as close as 128 ft (39 m), possibly indicating that the animals had become tolerant of the brief presence of the vessels and ignored them. The authors reported that on average, the seals quickly recovered from the disturbances and returned to the haulout site in less than or equal to 60 minutes. Seal numbers did not return to pre-disturbance levels within 180 minutes of the disturbance less than one quarter of the time observed. The study concluded that the return of seal numbers to pre-disturbance levels and the relatively regular seasonal cycle in abundance throughout the area counter the idea that disturbances from powerboats may result in site abandonment (Johnson and Acevedo-Gutierrez, 2007).

As a general statement from the available information, pinnipeds exposed to intense (approximately 110 to 120 decibels re: 20 μPa) non-pulse sounds often leave haulout areas and seek refuge temporarily (minutes to a few hours) in the water (Southall *et al.,* 2007). Based on the available data, previous monitoring reports from PRBO, and studies described here, any pinnipeds found in the vicinity of the proposed project are only anticipated to have short-term behavioral reactions to the noise attributed to PRBO's motorboat operations and human presence related to the seabird and pinniped research. We would expect the pinnipeds to return to a haulout site within 60 minutes of the disturbance (Allen *et al.,* 1985). The effects to pinnipeds appear at the most, to displace the animals temporarily from their haul out sites and we do not expect that the pinnipeds would permanently abandon a haul-out site during the conduct of the proposed research. The maximum disturbance to Steller sea lions would result in the animals slowly flushing into the water in response to presence of the researchers.

Finally, no research activities would occur on pinniped rookeries and breeding animals are concentrated in areas where researchers would not visit. Therefore, we do not expect mother and pup separation or crushing of pups during animals hauling out to the water to occur.

The potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections) which, as noted, are designed to effect the least practicable adverse impact on affected marine mammal species and stocks.

Anticipated Effects on Habitat

We do not anticipate that the proposed operations would result in any temporary or permanent effects on the habitats used by the marine mammals in the proposed area, including the food sources they use (i.e., fish and invertebrates). While it is anticipated that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible and was considered in further detail earlier in this document, as behavioral modification. The main impact associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, previously discussed in this notice.

Proposed Mitigation

In order to issue an incidental take authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act, we must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

PRBO has based the mitigation measures which they will implement during the proposed seismic survey, on the following: (1) Protocols used during previous PRBO seabird and pinniped research activities as required by us; (2) recommended best practices in Richardson *et al.* (1995); (3) the Terms and Conditions of Scientific Research Permit 373–1868–00; and (4) the Terms and Conditions listed in the Incidental Take Statement for the 2008 Biological Opinion for these activities.

To reduce the potential for disturbance from acoustic and visual stimuli associated with the activities PRBO and/or its designees has proposed to implement the following mitigation measures for marine mammals:

(1) Abide by all of the Terms and Conditions listed in the Incidental Take Statement for the 2008 Biological Opinion, including: Monitoring for offshore predators and reporting on

observed behaviors of Steller sea lions in relation to the disturbance.

(2) Abide by the Terms and Conditions of Scientific Research Permit 373–1868–00.

(3) Postpone beach landings on Año Nuevo Island until pinnipeds that may be present on the beach have slowly entered the water.

(4) Select a pathway of approach to research sites that minimizes the number of marine mammals harassed, with the first priority being avoiding the disturbance of Steller sea lions at haul-outs.

(5) Avoid visits to sites used by pinnipeds for pupping.

(6) Monitor for offshore predators and not approach hauled out Steller sea lions or other pinnipeds if great white sharks (*Carcharodon carcharias*) or killer whales (*Orcinas orca*) are seen in the area. If predators are seen, eastern U.S. stock Steller sea lions or any other pinniped must not be disturbed until the area is free of predators.

(7) Keep voices hushed and bodies low to the ground in the visual presence of pinnipeds.

(8) Conduct seabird observations at North Landing on Southeast Farallon Island in an observation blind, shielded from the view of hauled out pinnipeds.

(9) Crawl slowly to access seabird nest boxes on Año Nuevo Island if pinnipeds are within view.

(10) Coordinate research visits to intertidal areas of Southeast Farallon Island (to reduce potential take) and coordinate research goals for Año Nuevo Island to minimize the number of trips to the island.

(11) Coordinate monitoring schedules on Año Nuevo Island, so that areas near any pinnipeds would be accessed only once per visit.

(12) Have the lead biologist serve as an observer to evaluate incidental take.

We have carefully evaluated the applicant's proposed mitigation measures and have considered a range of other measures in the context of ensuring that we have prescribed the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, we expect that the successful implementation of the measure would minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on our evaluation of PRBO's proposed measures, as well as other measures considered by us or recommended by the public, we have preliminarily determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring

In order to issue an incidental take authorization for an activity, section 101(a)(5)(D) of the Marine Mammal Protection Act states that we must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The Act's implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for an authorization must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and our expectations of the level of taking or impacts on populations of marine mammals present in the action area.

As part of its 2012 application, PRBO proposes to sponsor marine mammal monitoring during the present project, in order to implement the mitigation measures that require real-time monitoring, and to satisfy the monitoring requirements of the incidental harassment authorization.

The PRBO researchers will monitor the area for pinnipeds during all research activities. Monitoring activities will consist of conducting and recording observations on pinnipeds within the vicinity of the proposed research areas. The monitoring notes would provide dates, location, species, the researcher's activity, behavioral state, numbers of animals that were alert or moved greater than one meter, and numbers of pinnipeds that flushed into the water.

PRBO has complied with the monitoring requirements under the previous authorizations for the 2007 through 2011 seasons. The results from previous PRBO monitoring reports support our original findings that the mitigation measures set forth in the 2007–2011 Authorizations effected the least practicable adverse impact on the species or stock.

PRBO will submit an annual monitoring report for the 2011–2012 Authorization (effective dates, July 29, 2011 through July 28, 2012) by November, 2012. Upon receipt, we will post this annual report on our Web site at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Proposed Reporting

PRBO will submit a final monitoring report to us no later than 90 days after the expiration of the Incidental Harassment Authorization, if we issue it. The final report will describe the operations conducted and sightings of marine mammals near the proposed project. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The final report will provide:

(i) A summary and table of the dates, times, and weather during all seabird and pinniped research activities.

(ii) Species, number, location, and behavior of any marine mammals observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that are known to have been exposed to acoustic or visual stimuli associated with the seabird and pinniped research activities.

(iv) A description of the implementation and effectiveness of the monitoring and mitigation measures of the Authorization and full documentation of methods, results, and interpretation pertaining to all monitoring.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the authorization (if issued), such as an injury (Level A harassment), serious injury, or mortality (e.g., vessel-strike, stampede, etc.), PRBO shall immediately cease the specified activities and immediately report the incident to the Incidental Take Program Supervisor, Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *ITP.Cody@noaa.gov* and the Southwest Regional Stranding Coordinator at (562) 980–3230 (*Sarah.Wilkin@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Description and location of the incident (including water depth, if applicable);
- Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and

• Photographs or video footage of the animal(s) (if equipment is available).

PRBO shall not resume its activities until we are able to review the circumstances of the prohibited take. We shall work with PRBO to determine what is necessary to minimize the likelihood of further prohibited take and ensure Marine Mammal Protection Act compliance. PRBO may not resume their activities until notified by us via letter, email, or telephone.

In the event that PRBO discovers an injured or dead marine mammal, and the lead visual observer determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as we describe in the next paragraph), PRBO will immediately report the incident to the Incidental Take Program Supervisor, Permits and Conservation Division, Office of Protected Resources, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *ITP.Cody@noaa.gov* and the Southwest Regional Stranding Coordinator at (562) 980–3230 (*Sarah.Wilkin@noaa.gov*). The report must include the same information identified in the paragraph above this section. Activities may continue while we review the circumstances of the incident. We will work with PRBO to determine whether modifications in the activities are appropriate.

In the event that PRBO discovers an injured or dead marine mammal, and the lead visual observer determines that the injury or death is not associated with or related to the authorized activities (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), PRBO will report the incident to the Incidental Take Program Supervisor, Permits and Conservation Division, Office of Protected Resources, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *ITP.Cody@noaa.gov* and the Southwest Regional Stranding Coordinator at (562) 980–3230 (*Sarah.Wilkin@noaa.gov*), within 24 hours of the discovery. PRBO staff will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to us.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the Marine Mammal Protection Act defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

We propose to authorize take by Level B harassment only for the proposed pinniped and seabird research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore. Acoustic (i.e., increased sound) and visual stimuli generated during these proposed activities may have the potential to cause marine mammals in the harbor area to experience temporary, short-term changes in behavior.

Based on PRBO's previous research experiences, with the same activities conducted in the proposed research area, and on marine mammal research activities in these areas, we estimate that approximately 5,104 California sea lions, 526 harbor seals, 190 northern elephant seals, and 20 Steller sea lions could be potentially affected by Level B behavioral harassment over the course of the effective period of the proposed Authorization.

We base these estimates by multiplying three components: (1) The maximum number of animals that could be present; (2) the maximum number of disturbances; and (3) the estimated number of days that an animal could be present in the proposed area. We derived these estimates from the results of the 2007–2010 monitoring reports and anecdotal information from PRBO scientists.

TABLE 1—ESTIMATES OF THE POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO ACOUSTIC AND VISUAL STIMULI DURING PRBO'S PROPOSED SEABIRD AND PINNIPED RESEARCH DURING NOVEMBER, 2012–NOVEMBER, 2013

Activity	Maximum estimated number present	Maximum estimated number of disturbances	Estimated number of days with animal presence	Requested number of incidental takes
California sea lions: Requested take = 5,104				
SEFI Daily Observations	27	3	E. Landing—15 N. Landing—22 Other Areas—4	E. Landing—1,215. N. Landing—1,782. Other Areas—324.
SEFI Murre Research	26	1	Other Areas—17	Other Areas—442.
SEFI Field Station Resupply	31	1	E. Landing—13	E. Landing—403.
ANI Seabird Monitoring	68	1	Other Areas—12	Other Areas—816.
ANI Intermittent Activities	110	1	Other Areas—1	Other Areas—110.
PRNS Seabird Monitoring	3	1	Other Areas—4	Other Areas—12.
Harbor seals: Requested Take = 526				
SEFI Daily Observations	5	3	E. Landing—4 N. Landing—7 Other Areas—18	E. Landing—60. N. Landing—105. Other Areas—270.
SEFI Murre Research	2	1	N. Landing—9	N. Landing—18.
SEFI Field Station Resupply	12	1	E. Landing—2 N. Landing—2	E. Landing—24. N. Landing—24.
ANI Seabird Monitoring	2	1	Other Areas—5	Other Areas—10.
PRNS Seabird Monitoring	15	1	Other Areas—1	Other Areas—15.

TABLE 1—ESTIMATES OF THE POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO ACOUSTIC AND VISUAL STIMULI DURING PRBO'S PROPOSED SEABIRD AND PINNIPED RESEARCH DURING NOVEMBER, 2012–NOVEMBER, 2013—Continued

Activity	Maximum estimated number present	Maximum estimated number of disturbances	Estimated number of days with animal presence	Requested number of incidental takes
Northern elephant seals: Requested Take = 190				
SEFI Daily Observations	2	3	E. Landing—4 N. Landing—7	E. Landing—24. N. Landing—42.
SEFI Murre Research	4	1	N. Landing—5	N. Landing—20.
SEFI Field Station Resupply	2	1	E. Landing—1	E. Landing—2.
ANI Seabird Monitoring	10	1	Other Areas—10	Other Areas—100.
PRNS Seabird Monitoring	2	1	Other Areas—1	Other Areas—2.
Steller sea lions: Requested Take = 20				
SEFI Daily Observations	2	3	Other Areas—1	Other Areas—6.
SEFI Murre Research	9	1	Other Areas—1	Other Areas—9.
SEFI Field Station Resupply	1	1	E. Landing—1	E. Landing—1.
ANI Seabird Monitoring	1	1	Other Areas—2	Other Areas—2.
ANI Intermittent Activities	1	1	Other Areas—1	Other Areas—1.
PRNS Seabird Monitoring	1	1	Other Areas—1	Other Areas—1.

Other Areas: Elephant Seal Colony (SEFI), Sea Lion Cove (SEFI), Landing Cove (ANI), and Drakes Beach (PRNS).

Estimates of the numbers of marine mammals that might be affected are based on consideration of the maximum number of marine mammals that could be disturbed by approximately 1,908 visits to Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore during the course of the proposed activity.

There is no evidence that PRBO's planned activities could result in injury, serious injury or mortality within the harbor area for the requested Authorization. The required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality. Thus, we do not propose to authorize any injury, serious injury or mortality. We expect all potential takes to fall under the category of Level B harassment only.

Encouraging and Coordinating Research

PRBO will continue to coordinate monitoring of pinnipeds during the research activities occurring on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore. PRBO conducts bone fide research on marine mammals, the results of which may contribute to the basic knowledge of marine mammal biology or ecology, or are likely to identify, evaluate, or resolve conservation problems.

Negligible Impact and Small Numbers Analysis and Determination

We have defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, we consider:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited in scope); and

(3) The context in which the takes occur (e.g., impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

(4) The status of stock or species of marine mammals (i.e., depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment/survival; and

(6) The effectiveness of monitoring and mitigation measures.

As mentioned previously, we estimate that four species of marine mammals could be potentially affected by Level B harassment over the course of the proposed Authorization. For each species, these numbers are small (each, less than or equal to two percent) relative to the population size. These incidental harassment numbers represent approximately two percent of the U.S. stock of California sea lion, 1.5 percent of the California stock of Pacific harbor seal, 0.15 percent of the California breeding stock of northern elephant seal, and 0.04 percent of the eastern distinct population segment of Steller sea lion.

For reasons stated previously in this document and based on the following factors, PRBO's specified activities are not likely to cause long-term behavioral disturbance, abandonment of the haulout area, injury, serious injury, or mortality because:

(1) The effects of the pinniped and seabird research activities would be limited to short-term startle responses and localized behavioral changes due to the short and sporadic duration of the research activities. Minor and brief responses, such as short-duration startle or alert reactions, are not likely to constitute disruption of behavioral patterns, such as migration, nursing, breeding, feeding, or sheltering.

(2) The availability of alternate areas for pinnipeds to avoid the resultant acoustic and visual disturbances from the research operations. Results from previous monitoring reports support our conclusions that the pinnipeds returned to the various sites do not permanently abandon a haul-out site during the conduct of the pinniped and research activities.

(3) There is no potential for large-scale movements leading to injury, serious injury, or mortality because the researchers must delay ingress into the landing areas until pinnipeds present have slowly entered the water.

(4) The limited access of PRBO researchers to Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore during the pupping season.

We do not anticipate that any injuries, serious injuries, or mortalities would occur as a result of PRBO's proposed activities, and we do not propose to authorize injury, serious injury or mortality. These species may exhibit behavioral modifications, including temporarily vacating the area during the proposed seabird and pinniped research activities to avoid the resultant acoustic and visual disturbances. Due to the nature, degree, and context of the behavioral harassment anticipated, the activities are not expected to impact rates of recruitment or survival. Further, these proposed activities would not take place in areas of significance for marine mammal feeding, resting, breeding, or calving and would not adversely impact marine mammal habitat.

We have preliminarily determined, provided that PRBO carries out the previously described mitigation and monitoring measures, that the impact of conducting the proposed seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California, November, 2012 through November, 2013, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, we have preliminarily determined that the total taking from the proposed activities will have a negligible impact on the affected species or stocks; and that impacts to affected species or stocks of marine mammals would be mitigated to the lowest level practicable.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Section 101(a)(5)(D) of the Marine Mammal Protection Act also requires us to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of marine mammals in the study area (northeastern Pacific Ocean) that implicate section 101(a)(5)(D) of the Act.

Endangered Species Act

The Steller sea lion, eastern U.S. stock is listed as threatened under the Act and occurs in the research area. NMFS' Office of Protected Resources, Permits and Conservation Division conducted a formal section 7 consultation under this Act. On November 18, 2008, NMFS issued a Biological Opinion (2008 BiOp) and concluded that the issuance of an Incidental Authorization is likely to affect, but not likely to jeopardize the continued existence of Steller sea lions. NMFS has also issued an incidental take statement (ITS) for Steller sea lions pursuant to section 7 of the Act. The ITS contains reasonable and prudent measures for implementing terms and conditions to minimize the effects of this take. We have reviewed the 2008 BiOp and determined that there is no new information regarding effects to Steller sea lions; the action has not been modified in a manner which would cause adverse effects not previously evaluated; there has been no new listing of species or no new designation of critical habitat that could be affected by the action; and the action will not exceed the extent or amount of incidental take authorized in the 2008 BiOp. Therefore, the proposed Authorization does not require the reinitiation of section 7 consultation under the Act.

National Environmental Policy Act (NEPA)

To meet our NEPA requirements for the issuance of an Authorization to PRBO, we prepared an Environmental Assessment (EA) in 2007 that was specific to seabird research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore and evaluated the impacts on the human environment of our authorization of Level B harassment resulting from seabird research in Central California. At that time, we determined that conducting the seabird research would not have a significant impact on the quality of the human environment and issued a Finding of No Significant Impact (FONSI) and, therefore, it was not necessary to prepare an environmental impact statement for the issuance of an Authorization to PRBO for this activity. In 2008, we prepared a supplemental EA (SEA) titled ''Supplemental Environmental Assessment For The Issuance Of An Incidental Harassment Authorization To Take Marine Mammals By Harassment Incidental To Conducting Seabird And Pinniped Research in Central California And Environmental Assessment For The Continuation Of Scientific Research On Pinnipeds In California Under Scientific Research Permit 373–1868–00,'' to address new available information regarding the effects of PRBO's seabird and pinniped research activities that may have cumulative impacts to the physical and biological environment. At that time, we concluded that issuance of an Authorization would not significantly affect the quality of the human environment and issued a FONSI for the 2008 SEA regarding PRBO's activities. In conjunction with this year's application, we have again reviewed the 2007 EA and the 2008 SEA and determined that there are no new direct, indirect or cumulative impacts to the human and natural environment associated with the Authorization requiring evaluation in a supplemental EA and we, therefore, preliminarily reaffirm the 2008 FONSI. A copy of the EA, SEA, and the NMFS FONSI for this activity is available upon request (see **ADDRESSES**).

Proposed Authorization

As a result of these preliminary determinations, we propose to authorize the take of marine mammals incidental to PRBO's proposed seabird and pinniped research activities in the northeast Pacific Ocean, provided they incorporate the previously mentioned mitigation, monitoring, and reporting requirements. The duration of the Incidental harassment Authorization would not exceed one year from the date of its issuance.

Information Solicited

We request interested persons to submit comments and information concerning this proposed project and our preliminary determination of issuing a take authorization (see **ADDRESSES**). Concurrent with the publication of this notice in the **Federal Register**, we will forward copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: September 19, 2012.

Matthew J. Brookhart,

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

[FR Doc. 2012–23820 Filed 9–26–12; 8:45 am]

BILLING CODE 3510–22–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2012–013]

Privacy Act of 1974, as Amended

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of a Revised Privacy Act System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Bureau of Consumer Financial

Protection, hereinto referred to as the Consumer Financial Protection Bureau (''CFPB'' or the ''Bureau''), gives notice of the establishment of a revised Privacy Act System of Records.

DATES: Comments must be received no later than October 29, 2012. The new system of records will be effective November 6, 2012, unless the comments received result in a contrary determination.

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

- *Electronic: privacy@cfpb.gov.*
- *Mail or Hand Delivery/Courier:* Claire Stapleton, Chief Privacy Officer, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

Comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 435–7220. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Claire Stapleton, Chief Privacy Officer, Consumer Financial Protection Bureau 1700 G Street NW., Washington, DC 20552, (202) 435–7220.

SUPPLEMENTARY INFORMATION: The CFPB revises its Privacy Act System of Records Notice (''SORN'') ''CFPB.0013—CFPB External Contact Database.'' In revising this SORN, the CFPB is expanding its system of records to include photographs of CFPB employees and members of the public who attend a CFPB sponsored event or an event where the CFPB is participating. In addition, a new routine use is being added to authorize the CFPB to disclose PII from the system in the form of photographs to the general public through photographs on the CFPB's Web site, blog postings and other social media, in reports, and in other publications used to promote the CFPB and to support internal communications. Additionally, this notice includes non-substantive changes to the text of the Categories of Individuals, Categories of Records, and Routine Uses of Records Maintained in the System.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Act''), Public Law 111–203, Title X, established the CFPB to administer and enforce federal consumer financial protection law. The CFPB will maintain the records covered by this notice.

The report of the revised system of records has been submitted to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget, pursuant to Appendix I to OMB Circular A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated November 30, 2000,[1] and the Privacy Act, 5 U.S.C. 552a(r).

The revised system of records entitled ''CFPB.013—CFPB External Contact Database'' is published in its entirety below.

Dated: September 21, 2012.

Claire Stapleton,

Chief Privacy Officer, Bureau of Consumer Financial Protection.

CFPB.013

SYSTEM NAME:

CFPB External Contact Database.

SYSTEM LOCATION:

Consumer Financial Protection Bureau, 1700 G Street NW., Washington DC, 20552.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system include all individuals involved in CFPB communications with external affairs related activities including: (1) Media representatives (including, without limitations, newspaper, magazine, radio or television station, wire service, internet or any other form of media) who request interviews or meetings with the CFPB staff; (2) individuals who accompany the CFPB staff on official travel; (3) CFPB employees or members of the public attending a CFPB sponsored event, work activity, or an event in which the CFPB participated; (4) individuals who request building passes for access to the CFPB facility (including, without limitations, media representatives, correspondents, technicians, and/or producers); (5) individuals who request information from the CFPB Communications Office concerning specific issues and/or topics; (6) individuals who have been contacted for media events, interviews or meetings, occasions, invitations, travel opportunities or the placement of articles; (7) individuals on the mailing list for the CFPB speeches or updates; (8) individuals who request the CFPB accept a speaking engagement, accept an honor, attend a function, or request information about the CFPB, and its mission and/or policies, etc.; (9) individuals who have participated in a survey or focus group sponsored by the CFPB; (10) CFPB contacts of nongovernmental organizations throughout the United States (media, external affairs, educational, etc.); (11) officials of federal, state, and local governments; (12) assignment information of current and former CFPB staff; (13) CFPB staff authorized to perform domestic speaking/media engagements; and (14) CFPB staff involved in external affairs related communications.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system will include information related to communications with external affairs contacts. Such records include without limitation: (1) Contact information (name, business phone number, email address) for individuals who are involved in the operation of the CFPB's external affairs activities; (2) domestic travel records, including dates, places visited and purpose of trip, biographies, speaking engagements, and interviews; (3) communications between CFPB staff and individuals representing the media, non-profits, academia, and the private sector; (4) photographs of CFPB employees and members of the public attending a CFPB sponsored event or an event in which the CFPB participated; (5) information necessary to obtain entry into CFPB facility, such as name, address, telephone number, date of birth, Social Security numbers, state of citizenship; (6) press releases; (7) names of local media organizations, non-profit, academia, and private sector organizations; (8) information on CFPB staff who ask the CFPB for permission to publish information about themselves or articles they have authored; (9) information on individuals who have participated in either a survey or focus group sponsored by the CFPB; (10) invitations sent to the CFPB to participate in or attend a speaking engagement, including the names of requesters and/or the organizations they represent, phone numbers, email addresses, assigned action officials and status; (11) automated and hard copy travel records, usually containing names, titles, addresses, organizations,

[1] Although pursuant to Section 1017(a)(4)E, of the Consumer Financial Protection Act, Public Law 111–203, the CFPB is not required to comply with OMB-issued guidance, it voluntarily follows OMB privacy-related guidance as a best practice and to facilitate cooperation and collaboration with other agencies.

telephone/fax/internet numbers, when necessary for travel documents.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 111–203, Title X, sections 1011, 1012, 1021, codified at 12 U.S.C. 5491, 5492, 5511.

PURPOSE(S):

The purpose of the system is to enable the CFPB to communicate with the American public about its mission and activities. The information will be used to facilitate the CFPB's activities, including external contacts with the media, non-profits, academia, and the private sector. The information collected will also facilitate CFPB events and press conferences.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed, consistent with the CFPB Disclosure of Records and Information Rules promulgated at 12 CFR part 1070 *et seq.* to:

(1) Appropriate agencies, entities, and persons when: (a) The CFPB suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the CFPB has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the CFPB or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the CFPB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm;

(2) Another federal or state agency to (a) permit a decision as to access, amendment or correction of records to be made in consultation with or by that agency, or (b) verify the identity of an individual or the accuracy of information submitted by an individual who has requested access to or amendment or correction of records;

(3) To the Office of the President in response to an inquiry from that office made at the request of the subject of a record or a third party on that person's behalf;

(4) Congressional offices in response to an inquiry made at the request of the individual to whom the record pertains;

(5) Contractors, agents, or other authorized individuals performing work on a contract, service, cooperative agreement, job, or other activity on behalf of the CFPB or Federal Government and who have a need to access the information in the performance of their duties or activities;

(6) The U.S. Department of Justice (''DOJ'') for its use in providing legal advice to the CFPB or in representing the CFPB in a proceeding before a court, adjudicative body, or other administrative body before which the CFPB is authorized to appear, where the use of such information by the DOJ is deemed by the CFPB to be relevant and necessary to the litigation, and such proceeding names as a party or interests:

(a) The CFPB;

(b) Any employee of the CFPB in his or her official capacity;

(c) Any employee of the CFPB in his or her individual capacity where DOJ has agreed to represent the employee; or

(d) The United States, where the CFPB determines that litigation is likely to affect the CFPB or any of its components;

(7) A court, magistrate, or administrative tribunal in the course of an administrative proceeding or judicial proceeding, including disclosures to opposing counsel or witnesses (including expert witnesses) in the course of discovery or other pre-hearing exchanges of information, litigation, or settlement negotiations, where relevant or potentially relevant to a proceeding, or in connection with criminal law proceedings;

(8) A grand jury pursuant either to a federal or state grand jury subpoena, or to a prosecution request that such record be released for the purpose of its introduction to a grand jury, where the subpoena or request has been specifically approved by a court. In those cases where the Federal Government is not a party to the proceeding, records may be disclosed if a subpoena has been signed by a judge;

(9) Appropriate agencies, entities, and persons, to the extent necessary to secure information relevant to the CFPB's external affairs activities, including external contacts with the media, non-profits, academia, and the private sector;

(10) Members of the media, federal, state, and local government officials or other recipients of the CFPB's external affairs communications to inform them about attendees and invited guests of the CFPB media events and press briefings; and

(11) To the public, members of the media, federal, state, and local government officials, or other recipients of CFPB reports, viewers of the CFPB's Web site, blog postings, and other social media, and recipients of other public relations materials issued by the CFPB about the activities of the CFPB.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPENSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper and electronic records.

RETRIEVABILITY:

Records are retrievable by the name of the individual or organization, date of event or date of received inquiry or request, or assigned file number, email address or by some combination thereof.

SAFEGUARDS:

Access to electronic records is restricted to authorized personnel who have been issued non-transferrable access codes and passwords. Other records are maintained in locked file cabinets or rooms with access limited to those personnel whose official duties require access.

RETENTION AND DISPOSAL:

The CFPB will maintain electronic and paper records indefinitely until the National Archives and Records Administration (NARA) approves the CFPB's records disposition schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Consumer Financial Protection Bureau, Media Relations Officer, 1700 G Street NW., Washington, DC 20552.

NOTIFICATION PROCEDURE:

Individuals seeking notification and access to any record contained in this system of records, or seeking to contest its content, may inquire in writing in accordance with instructions appearing in Title 12, Chapter 10 of the CFR, ''Disclosure of Records and Information.'' Address such requests to: Chief Privacy Officer, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.

RECORD ACCESS PROCEDURES:

See ''Notification Procedures'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification Procedures'' above.

RECORD SOURCE CATEGORIES:

Information in this system is obtained directly from the individual who is the subject of these records, and/or the agency or organization that the individual represents; and the CFPB staff involved in the external affairs operations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2012–23756 Filed 9–26–12; 8:45 am]

BILLING CODE 4810–AM–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, October 3, 2012, 10 a.m.–12 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East-West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

Matters To Be Considered

Decisional Matters: 1. Bassinets and Cradles—Notice of Proposed Rulemaking. 2. Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products.

Briefing Matter: 1. Swings—Final Rule.

A live webcast of the Meeting can be viewed at *www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: September 25, 2012.

Todd A. Stevenson,

Secretary.

[FR Doc. 2012–23966 Filed 9–25–12; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2512–069; Project No. 14439–000]

Hawks Nest Hydro, LLC; Notice of Intent To File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the PAD and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 2512–069 and P–14439–000.

c. *Dated Filed:* July 24, 2012.

d. *Submitted By:* Hawks Nest Hydro, LLC.

e. *Name of Project:* Hawks Nest Hydroelectric Project (P–2512–069) and Glen Ferris Hydroelectric Project (P–14439–000)

f. *Location:* Hawks Nest Hydroelectric Project is on the New River in the vicinity of the Town of Gauley Bridge, and Glen Ferris Hydroelectric Project is on the Kanawha River in the vicinity of the Town of Glen Ferris, both within Fayette County, West Virginia. The projects do not affect federal lands.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Mr. David Barnhart, Director of Operations, Hawks Nest Hydro, LLC, Brookfield Renewable Energy Group, 326 Third Avenue, Suite 201, Montgomery, WV 25136–2200; at (304) 442–5120, ext. 7266.

i. *FERC Contact:* Monir Chowdhury at (202) 502–6736 or email at *monir.chowdhury@ferc.gov.*

j. *Cooperating agencies:* Federal, State, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Hawks Nest Hydro, LLC as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. Hawks Nest Hydro, LLC filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnline Support@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document (SD), as well as study requests. All comments on the PAD and SD, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. Documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

All filings with the Commission must include on the first page, the project name (Hawks Nest Hydroelectric Project and/or Glen Ferris Hydroelectric Project) and number (P–2512–069 and/or P–14439–000), and bear the appropriate heading: ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document,'' ''Request for Cooperating Agency Status,'' or ''Communications to and from Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD, and any agency requesting cooperating status must do so by November 21, 2012.

p. Although our current intent is to prepare an environmental assessment (EA), there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping

requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the projects at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Evening Scoping Meeting

Date: Wednesday, October 17, 2012
Time: 7 p.m. (e.s.t.)
Location: Hawks Nest State Park Lodge, 49 Hawks Nest Park Road, Ansted, WV 25812.
Phone: (304) 658–5212.

Daytime Scoping Meeting

Date: Thursday, October 18, 2012
Time: 10 a.m. (e.s.t.)
Location: Hawks Nest State Park Lodge, 49 Hawks Nest Park Road, Ansted, WV 25812.
Phone: (304) 658–5212.

The Scoping Document (SD), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of the SD will be available at the scoping meetings, or may be viewed on the web at *http://www.ferc.gov,* using the ''eLibrary'' link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a revised SD may be issued which may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Site Visit

The potential applicant and Commission staff will conduct a site visit of the projects on Wednesday, October 17, 2012, starting at 9 a.m. All participants should meet at 9 a.m. at the parking lot of Hawks Nest State Park Lodge, 49 Hawks Nest Park Road, Ansted, WV 25812. All participants are responsible for their own transportation. Anyone with questions about the site visit should contact Mr. David Barnhart at (304) 442–5120 (ext. 7266) or *David.Barnhart@brookfieldrenewable.com* on or before October 12, 2012.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public records of the projects.

Dated: September 20, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–23805 Filed 9–26–12; 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: ER12–2313–001.
Applicants: Laurel Hill Wind Energy, LLC.
Description: MBR Amendment to be effective 9/10/2012.
Filed Date: 9/19/12.
Accession Number: 20120919–5103.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2526–001.
Applicants: AEP Texas Central Company.
Description: Petronila Wind Farm PDA Amended & Restated to be effective 10/4/2012.
Filed Date: 9/19/12.
Accession Number: 20120919–5074.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2528–000.
Applicants: High Mesa Energy, LLC.
Description: High Mesa Energy, LLC submits this supplement to the Application for Order Authorizing Market-Based Rates and Request for Certain Waivers and Blanket Authorizations filed 8/27/12.
Filed Date: 9/19/12.
Accession Number: 20120919–5123.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2656–000.
Applicants: Tucson Electric Power Company.
Description: Tucson Electric Power Company submits tariff filing per 35.12: Certificate of Concurrence to Perrin Wind LGIA to be effective 10/21/2011.
Filed Date: 9/19/12.
Accession Number: 20120919–5054.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2657–000.
Applicants: AEP Texas Central Company.
Description: AEP Texas Central Company submits tariff filing per 35.13(a)(2)(iii): Javelina Wind Energy PDA to be effective 8/28/2012.
Filed Date: 9/19/12.
Accession Number: 20120919–5064.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2658–000.
Applicants: Pacific Gas and Electric Company.
Description: Tridam Project—Tulloch Powerhouse LGIA to be effective 3/31/2012.
Filed Date: 9/19/12.
Accession Number: 20120919–5075.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2659–000.
Applicants: Public Service Company of Colorado.
Description: 2012–9–19_WAPA_Richard Lk Mtr 308 NOC to be effective 11/19/2012.
Filed Date: 9/19/12.
Accession Number: 20120919–5104.
Comments Due: 5 p.m. ET 10/10/12.

Docket Numbers: ER12–2660–000.
Applicants: Northern States Power Company, a Minnesota Corporation.
Description: Northern States Power Company, a Minnesota Corporation submits Notice of Cancellation of Alternative Transmission Service Agreement with L&O Cooperative.
Filed Date: 9/19/12.
Accession Number: 20120919–5118.
Comments Due: 5 p.m. ET 10/10/12.

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 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: September 20, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–23785 Filed 9–26–12; 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: RP12–1050–000.
Applicants: Natural Gas Pipeline Company of America.
Description: Negotiated Rate—Tenaska to be effective 9/18/2012.
Filed Date: 9/18/12.
Accession Number: 20120918–5142.
Comments Due: 5 p.m. ET 10/1/12.

Docket Numbers: RP12–1051–000.
Applicants: Dominion Cove Point LNG, LP.
Description: Dominion Cove Point LNG, LP submits tariff filing per 154.203: DCP—2012 Revenue Crediting Report.
Filed Date: 9/20/12.
Accession Number: 20120920–5018.
Comments Due: 5 p.m. ET 10/2/12.

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 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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: September 20, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–23786 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR12–28–000]

Delta Air Lines, Inc., Continental Airlines, Inc., JetBlue Airways Corporation, United Air Lines, Inc., US Airways, Inc. v. Buckey Pipe Line Company, L.P.; Notice of Complaint

Take notice that on September 20, 2012, pursuant to sections 1(5), 8, 9, 13, 15 and 16 of the Interstate Commerce Act, 49 U.S.C. App. §§ 1(5), 8, 9, 13, 15 and 16; section 1803 of the Energy Policy Act of 1992 (Pub. L. 102–486, 106 Stat. 2772) (1992); Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206 (2012); and Rules 343.1(a) and 343.2(c) of the Commission's Procedural Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.1(a) and 343.2(c); Delta Air Lines, Inc., Continental Airlines, Inc., JetBlue Airways Corporation, United Air Lines, Inc., and US Airways, Inc. (collectively, Complainants) filed a formal complaint against Buckeye Pipe Line Company, L.P. (Respondent), challenging the lawfulness of the rates charged by the Respondent for transportation of jet or aviation turbine fuel on its interstate pipeline system. Complainants allege that the Respondent's rates are unjust and unreasonable, as more fully described in the complaint.

Complainants state that a copy of the Complaint has been served on the contact for the Respondent as listed on the Commission list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer, motions to intervene, and protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of protests and interventions to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket. For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on October 10, 2012.

Dated: September 21, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–23787 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–497–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Intent To Prepare an Environmental Assesment for the Proposed Brandywine Creek Replacement Project; Request for Comments on Environmental Issues; and Notice of Public Scoping Meeting

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Transcontinental Gas Pipe Line Company, LLC's (Transco) proposed Brandywine Creek Replacement Project (Project). The proposed project involves the replacement of existing interstate natural gas transmission pipeline in Chester County, Pennsylvania. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping period the Commission will use to gather input from the public and interested agencies about the project. Your input will help the Commission's staff determine what issues need to evaluated in the EA. Comments about the project may be submitted in writing or verbally at the public scoping meeting to be held as described below. To submit written comments, please see the public participation section of this notice.

FERC Public Scoping Meeting, Brandywine Creek Replacement Project, October 9, 2012/7 p.m., Sykes Auditorium, West Chester University, 110 West Rosedale Avenue, West Chester, PA 19383, Sykes Union Lobby: (610) 436–2984.

Please note that this scoping period will close on October 22, 2012.

The purpose of the scoping meeting is to provide the public information about Transco's proposal and the Commission's environmental review process, and to provide an opportunity for the public to verbally submit environmental comments about Transco's proposed project. Comments received at the scoping meeting will be recorded and entered in the public record. Transco representatives will also be present before and after the meeting to answer questions about its proposal.

This notice is being sent to the Commission's current environmental mailing list for this project and will be posted on the Commission's Web site. The Commission's staff encourages all recipients to share this notice with anyone they think might be interested in the project. Elected officials are also encouraged to notify their constituents of this project, and the public scoping meeting.

Summary of the Proposed Project

Transco proposes to remove approximately 2,167 feet of existing 30-inch-diameter natural gas pipeline and replace it with 42-inch-diameter natural gas pipeline in East Brandywine and East Caln Townships—Chester County, Pennsylvania. As proposed, this replacement would require the crossing of Brandywine Creek and two crossings of Ludwig's Run. The Struble Trail would also be temporarily closed, crossed and used for temporary workspace.

According to Transco, this project would enable the passage of internal inspection devices to collect pipeline integrity data; bring it in compliance with federal pipeline safety regulations (49 CFR 192.150); mitigate system reliability issues; remove a flow restriction, and provide efficient natural gas transportation service.

The general location of the project area is shown in appendix 1.[1]

Land Requirements for Construction

Removing the existing pipeline and installing the replacement pipeline would require the temporary use of approximately 13.1 acres of land. No land in addition to that already used for existing pipeline operations would be required to permanently operate the replacement pipeline. Of the 13.1 acres of land that would be temporarily required to remove and install the proposed pipeline, approximately 4.2 acres are currently used for existing pipeline operations, and approximately 4.3 acres would be used for workspace access and an offsite pipe storage/contractor staging yard.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss the impacts that could occur as a result of the project under these general headings:

- Geology and soils;
- Water resources and wetlands;
- Vegetation, wildlife, and fisheries;
- Endangered and threatened species;
- Land use and visual resources;
- Cultural resources;
- Air quality and noise;
- Reliability and safety; and
- Cumulative impacts.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section of this notice.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided in the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

[1] The appendices referenced in this notice will not appear in the **Federal Register.** Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before October 22, 2012.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP12–497–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

Copies of the EA will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP12–497). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: September 21, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–23803 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF12–7–000; Docket No. PF12–17–000]

Jordan Cove Energy Project LP; Pacific Connector Gas Pipeline LP; Notice of Additional Public Scoping Meetings for the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects

On October 9, 10, and 11, 2012, the Federal Energy Regulatory Commission (FERC or Commission) Office of Energy Projects staff, in cooperation with representatives of the U.S. Department of Agriculture Forest Service (Forest Service) and the U.S. Department of the Interior Bureau of Land Management (BLM), will hold three additional public scoping meetings to take comments on Jordan Cove Energy Project LP's (Jordan Cove) proposed liquefaction project in Coos County, Oregon, in Docket No. PF12–7–000, and Pacific Connector Gas Pipeline LP's (Pacific Connector) proposed pipeline project crossing portions of Klamath, Jackson, Douglas, and Coos Counties, Oregon, in Docket No. PF12–17–000. These meetings are part of our [1] pre-filing process prior to the production of an environmental impact statement (EIS) for these projects.

On August 2, 2012, the FERC issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Jordan Cove Liquefaction and Pacific Connector Pipeline Projects, Requests for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI). We previously held four public scoping meetings during the week of August 27–30, 2012 in Coos Bay, Roseburg, Klamath Falls, and Medford, Oregon. The BLM and Forest Service have issued their own separate supplemental NOI in the **Federal Register** on September 21, 2012, also announcing the three new public scoping meetings. The NOIs open the public scoping

[1] The pronouns ''we,'' ''us,'' and ''our'' refer to the staff of the FERC, BLM, and Forest Service working on these projects.

process, soliciting comments on the potential environmental impacts of the proposed projects. You may submit comments in written form or verbally at the public scoping meetings.[2] The FERC's NOI provided instructions on how to properly file written comments. Your comments will allow us to focus attention on environmental issues important to the public during preparation of the EIS. The scoping period will end on October 29, 2012.

The three new public scoping meetings are scheduled as follows:

Date and time	Location
Tuesday, October 9, 2012, 6:30 p.m.	Mill Casino-Hotel, 3201 Tremont Ave., North Bend, OR 97459.
Wednesday, October 10, 2012, 6:30 p.m.	Seven Feathers Casino Resort, 146 Chief Miwaleta Ln., Canyonville, OR 97417.
Thursday, October 11, 2012, 6:30 p.m.	Malin Community Park Hall, 2307 Front St., Malin, OR 97632.

This notice is being sent to the Commission's current environmental mailing list for these projects Additional information about the projects is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC internet Web site (*www.ferc.gov*). The FERC's eLibrary function provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings. On the FERC Web site, go to Documents & Filings, and click on the eLibrary link. Then click on ''General Search,'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF12–7 or PF12–17). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

All public meetings will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information. Please submit your comments prior to the end of scoping date of October 29, 2012.

Dated: September 21, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–23808 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14435–000]

Wills Creek Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On July 17, 2012, Wills Creek Hydro, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Wills Creek Dam Hydroelectric Project (Wills Creek Project or project) to be located at U.S. Army Corps of Engineers' (Corps) Wills Creek Dam on Wills Creek, near Coshocton, Coshocton County, Ohio. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The existing Corps facilities include: (1) The Wills Creek Lake which has a surface area of 11,450 acres at a normal lake elevation of 742 feet and a maximum storage capacity of 196,000 acre-feet; (2) a 1,950-foot-long, 87-foot-high earth fill dam; (3) a 100-foot-high, 75-foot-wide, 25-foot-long intake structure located at the west abutment; and (4) a 230-foot-long, 25-foot-wide, 25-foot-high concrete arch tunnel conduit.

The proposed project would consist of the following non-federal facilities: (1) A 30-foot-wide, 30-foot-high, 2-foot-thick concrete diversion wall with a crest elevation of 742 feet equipped with two slide gates to release flood waters; the diversion wall would be located at the end of the Corps' concrete arch tunnel; (2) a 30-foot-long, 106-inch-diameter steel penstock; (3) a 30-foot-wide, 25-foot-long, 20-foot-high powerhouse located near the west wing wall of the Corps' existing outlet channel and containing a pit/bulb propeller-type turbine/generator unit with a total capacity of 1 megawatt; (4) a 50-foot-long, 12.7-kilovolt transmission line connecting the project to an existing distribution line owned by Cincinnati Gas and Electric Company; and (5) appurtenant facilities. The project would be located entirely on federal lands managed by the Corps. The estimated annual generation of the Wills Creek Dam Project would be 5,728 megawatt-hours.

Applicant Contact: Mr. Mark Boumansour, 1035 Pearl Street, 4th Floor, Boulder, CO 80302; phone: (720) 295–3317.

FERC Contact: Sergiu Serban; phone: (202) 502–6211.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14435) in the docket number field to

[2] Verbal comments at the public scoping meetings will be transcribed by a court reporter and placed into the public record for these proceedings.

access the document. For assistance, contact FERC Online Support.

Dated: September 21, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–23802 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14241–000]

Alaska Energy Authority; Errata Notice

A typographical error was made in our September 17, 2012 *Notice of ''Extension of Time To File Comments on the Proposed Study Plan and the Revised Study Plan for the Susitna-Watana''* Project No. 14241. Comments on the proposed study plan are due November 14, 2012. All other dates in the notice are correct.

Dated: September 21, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–23809 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	Communication date	Presenter or requester
Prohibited:		
1. CP11–161–000	9–7–12	Jolie DeFeis [1].
2. CP11–161–000	9–12–12	Jolie DeFeis [2].
3. CP10–480–000	9–18–12	Lisa Ann Richlin.
4. EL12–8–000	9–18–12	Pierce Atwood LLP.
Exempt:		
1. P–1494–000	9–4–12	Hon. Dan Boren.
2. ER12–1698–000; ER12–1699–000	9–4–12	Guadalupe County Commission.
3. P–2079–069	9–12–12	LaShavio Johnson.
4. CP11–161–000	9–17–12	Pike County Commissioners.
5. CP11–161–000	9–19–12	Hon. Robert Menendez.

[1] Email record.
[2] Email record: two separate emails were received on September 12, 2012.

Dated: September 21, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–23784 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2524–018—Oklahoma Salina Pumped Storage Project]

Grand River Dam Authority; Notice of Revised Restricted Service List for a Programmatic Agreement

Rule 2010 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.2010, provides that, to eliminate unnecessary expense or improve administrative efficiency, the Secretary may establish a restricted service list for a particular phase or issue in a proceeding. The restricted service list should contain the names of persons on the service list who, in the judgment of the decisional authority establishing the list, are active participants with respect

to the phase or issue in the proceeding for which the list is established.

The Commission staff is consulting with the Oklahoma Historical Society (Oklahoma SHPO) and the Advisory Council on Historic Preservation (Advisory Council) pursuant to the Advisory Council's regulations, 36 CFR part 800, implementing section 106 of the National Historic Preservation Act, *as amended,* (16 U.S.C. 470 f), to prepare a programmatic agreement for managing properties included in, or eligible for inclusion in, the National Register of Historic Places that could be affected by issuance of a new license for the Salina Pumped Storage Project No. 2524.

The programmatic agreement, when executed by the Commission, the Oklahoma SHPO, and the Advisory Council, would satisfy the Commission's section 106 responsibilities for all individual undertakings carried out in accordance with the license until the license expires or is terminated (36 CFR 800.13(e)). On March 28, 2011, the Commission staff established a restricted service list for the Salina Pumped Storage Project. Because Dr. Timothy G. Baugh, Historical Archaeologist, Oklahoma Historical Society, retired, the restricted service list is revised to remove his name.

Dated: September 20, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–23804 Filed 9–26–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2012–0003; FRL–9362–7]

SFIREG EQI Working Committee; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Association of American Pesticide Control Officials (AAPCO)/ State FIFRA Issues Research and Evaluation Group (SFIREG), Pesticides Operations and Management (EQI) Working Committee will hold a 2-day meeting, beginning on October 15, 2012, and ending October 16, 2012. This notice announces the location and times for the meeting and sets forth the tentative agenda topics.

DATES: The meeting will be held on Monday, October 15, 2012, from 8:30 a.m. to 5 p.m. and 8:30 a.m. to noon on Tuesday, October 16, 2012.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at EPA, One Potomac Yard (South Bldg.) 2777 Crystal Dr., Arlington,VA, 1st Floor South Conference Room.

FOR FURTHER INFORMATION CONTACT: Ron Kendall, Field External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–5561; fax number: (703) 305–5884; email address: *kendall.ron@epa.gov* or Grier Stayton, SFIREG Executive Secretary, P.O. Box 466, Milford, DE 19963; telephone number: (302) 422–8152; fax: (302) 422–2435; email address: Grier Stayton at *aapco-sfireg@comcast.net.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are interested in pesticide regulation issues affecting States and any discussion between EPA and SFIREG on FIFRA field implementation issues related to human health, environmental exposure to pesticides, and insight into EPA's decision-making process. You are invited and encouraged to attend the meetings and participate as appropriate. Potentially affected entities may include, but are not limited to: Those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetics Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and those who sell, distribute, or use pesticides, as well as any non-government organization.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0003, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. Tentative Agenda Topics

1. Persistent herbicide residues in compost and plant materials.
2. Endangered Species Act update on activities in the Pacific Northwest and on Rozol for prairie dogs.
3. Disposal of treated seed—environmental impacts.
4. Reporting of bee kills—to and among states.
5. Hydro-fracking and the use of biocides in the process.
6. Endocrine disruptor screening update.
7. Human and aquatic health benchmarks.
8. 25(b) policy.

III. How can I request to participate in this meeting?

This meeting is open for the public to attend. You may attend the meeting without further notification.

List of Subjects

Environmental protection.

Dated: September 18, 2012.

Robert C. McNally,

Director, Field External Affairs Division, Office of Pesticide Programs.

[FR Doc. 2012–23824 Filed 9–26–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

[Public Notice 2012–0520]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 Million; 25 Day Comment Period

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of 25 day comment period regarding an application for final commitment for a long-term loan or financial guarantee in excess of $100 million.

Reason for Notice: This Notice is to inform the public, in accordance with Section 3(c)(10) of the Charter of the Export-Import Bank of the United States (''Ex-Im Bank''), that Ex-Im Bank has received an application for final commitment for a long-term loan or financial guarantee in excess of $100 million (as calculated in accordance with Section 3(c)(10) of the Charter). Comments received within the comment period specified below will be presented to the Ex-Im Bank Board of Directors prior to final action on this Transaction.

Reference: AP087476XX.

Purpose and Use

Brief description of the purpose of the transaction:

To support the export of U.S. manufactured aircraft being leased to an airline in Indonesia.

Brief non-proprietary description of the anticipated use of the items being exported:

To provide airline service between Indonesia and other countries.

To the extent that Ex-Im Bank is reasonably aware, the item(s) being exported are not expected to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties

Principal Supplier: The Boeing Company.

Obligor: BOC Aviation Pte. Ltd.

Guarantor(s): N/A.

Description of Items Being Exported

Boeing 737 aircraft.

Information On Decision: Information on the final decision for this transaction will be available in the ''Summary Minutes of Meetings of Board of Directors'' on *http://www.exim.gov/articles.cfm/board%20minute.*

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

DATES: Comments must be received on or before October 22, 2012 to be assured of consideration before final consideration of the transaction by the Board of Directors of Ex-Im Bank.

ADDRESSES: Comments may be submitted through *www.regulations.gov.*

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–23781 Filed 9–26–12; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States is in the process of reviewing its economic impact procedures. A draft of the proposed economic impact procedures can be accessed at the following location: *http://www.exim.gov/products/policies/proposed-econ-impact-procedures.cfm.*

The Bank is soliciting public comment on the draft document. Interested parties may submit comments on this document by email to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue NW., Room 440, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

James C. Cruse,

Senior Vice President, Policy and Planning.

[FR Doc. 2012–23866 Filed 9–26–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Registration of Mortgage Loan Originators

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, 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 renewal of an existing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). On July 24, 2012 (77 FR 43283), the FDIC solicited public comment for a 60-day period on renewal of the following information collection: Registration of Mortgage Loan Originators (OMB No. 3064–0171). No comments were received. Therefore, the FDIC hereby gives notice of submission of its request for renewal to OMB for review.

DATES: Comments must be submitted on or before October 29, 2012.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov.* Include the name of the collection in the subject line of the message.
- *Mail:* Leneta G. Gregorie (202–898–3719), Counsel, Room NYA–5050, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Leneta G. Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal To Renew the Following Currently Approved Collection of Information

Title: Registration of Mortgage Loan Originators.

OMB Number: 3064–0171.

Total Estimated Annual Burden: 608,867 hours with a breakdown as follows—

A. Financial Institution Policies and Procedures for Ensuring Employee-Mortgage Loan Originator Compliance with S.A.F.E. Act Requirements

Affected Public: FDIC-supervised institutions.

Estimated Number of Respondents: 4,080.

Frequency of Response: Annually.

Estimated Time per Response: 20 hours.

Estimated Annual Burden: 81,600 hours.

B. Financial Institution Procedures to Track and Monitor Compliance with S.A.F.E. Act Compliance

Affected Public: FDIC-supervised institutions.

Estimated Number of Respondents: 4,080.

Frequency of Response: Annually.

Estimated Time per Response: 60 hours.

Estimated Annual Burden: 244,800 hours.

C. Financial Institution Procedures for the Collection and Maintenance of Employee Mortgage Loan Originators Criminal History Background Reports

Affected Public: FDIC-supervised institutions.

Estimated Number of Respondents: 4,080.

Frequency of Response: Annually.

Estimated Time per Response: 20 hours.

Estimated Annual Burden: 81,600 hours.

D. Financial Institution Procedures for Public Disclosure of Mortgage Loan Originator's Unique Identifier

Affected Public: FDIC-supervised institutions.

Estimated Number of Respondents: 4,080.

Frequency of Response: Annually.

Estimated Time per Response: 25 hours.

Estimated Annual Burden: 102,000 hours.

E. Financial Institution Information Reporting to Registry

Affected Public: FDIC-supervised institutions.

Estimated Number of Respondents: 4,080.

Frequency of Response: Annually.

Estimated Time per Response: 15 minutes.

Estimated Annual Burden: 1,020 hours.

F. Financial Institution Procedures for the Collection of Employee Mortgage Loan Originator's Fingerprints

Affected Public: FDIC-supervised institutions.

Estimated Number of Respondents: 4,080.

Frequency of Response: Annually.

Estimated Time per Response: 4 hours.

Estimated Annual Burden: 16,320 hours.

G. Mortgage Loan Originator Initial and Annual Renewal Registration Reporting and Authorization Requirements

Affected Public: Employee Mortgage Loan Originators.

Estimated Number of Respondents: 59,292.

Frequency of Response: Annually.

Estimated Time per Response: 15 minutes.

Estimated Annual Burden: 14,823 hours.

H. Mortgage Loan Originator Registration Updates Upon Change in Circumstances

Affected Public: Employee Mortgage Loan Originators.

Estimated Number of Respondents: 29,646.

Frequency of Response: On occasion.

Estimated Time per Response: 15 minutes.

Estimated Annual Burden: 7,412 hours.

I. Mortgage Loan Originator Procedures for Disclosure to Consumers of Unique Identifier

Affected Public: Employee Mortgage Loan Originators.

Estimated Number of Respondents: 59,292.

Frequency of Response: Annually.

Estimated Time per Response: 1 hour.

Estimated Annual Burden: 59,292 hours.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, this 24th day of September 2012.

Robert Feldman,

Executive Secretary.

[FR Doc. 2012–23780 Filed 9–26–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS12–16]

Appraisal Subcommittee; Proposed Policy Statements

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of extension of comment period.

SUMMARY: On August 30, 2012, the Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council issued a proposal to revise ASC Policy Statements. The ASC has received a request to extend the comment period set in the proposal and has determined to extend the comment period for an additional 30 days.

DATES: Comments must now be received on or before November 29, 2012.

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

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-Mail: webmaster@asc.gov*. Include the docket number in the subject line of the message.
- *Fax:* (202) 289–4101. Include docket number on fax cover sheet.
- *Mail:* Address to Appraisal Subcommittee, Attn Lori Schuster, 1401 H Street NW., Suite 760, Washington, DC 20005.

All public comments will be made available on the ASC's Web site at *http://www.asc.gov* (follow link in ''What's New'') as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any personal identifying or contact information.

FOR FURTHER INFORMATION CONTACT: James R. Park, Executive Director, at (202) 595–7575, or Alice M. Ritter, General Counsel, at (202) 595–7577, via Internet email at *jim@asc.gov* and *alice@asc.gov*, respectively, or by U.S. Mail at Appraisal Subcommittee, 1401 H Street NW., Suite 760, Washington, DC 20005.

SUPPLEMENTARY INFORMATION: On August 30, 2012, the ASC issued a proposal to revise the ASC Policy Statements. The proposed Policy Statements are intended to provide States with the necessary information to maintain their Programs in compliance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (Title XI). Further, the proposed Policy Statements address the ASC's authority to evaluate a State Program for compliance with Title XI and to take sanctions against a State when its Program does not comply with Title XI. The proposal excludes provisions from the current Policy Statements that have become outdated or lack enforceability. Additionally, the proposal reflects consideration of recent amendments to the Uniform Standards of Professional Appraisal Practice (USPAP) and the AQB Real Property Appraiser Qualification Criteria. Proposed Policy Statements 1 thru 7 correspond with the seven categories evaluated during the ASC's Compliance

Review process and included in the ASC Compliance Review Report to a State. Proposed Policy Statement 8 sets forth procedures in the event the ASC imposes interim sanctions against a State. The proposal includes four appendices. The ASC requested comment on its proposal and set a 60-day comment period, originally scheduled to end on October 29, 2012. The ASC has received a request to extend the comment period. The ASC Board believes a 30-day extension will facilitate the submission of comments without causing undue delay to the implementation of proposed Policy Statements. Accordingly, the comment period is extended and comments must now be received by November 29, 2012.

* * * * *

By the Appraisal Subcommittee.

Dated: September 24, 2012.

Peter Gillispie,

Chairman.

[FR Doc. 2012–23782 Filed 9–26–12; 8:45 am]

BILLING CODE 6700–01–P

GENERAL SERVICES ADMINISTRATION

[Notice–MA–2012–03; Docket No. 2012–0002; Sequence 25]

The President's Management Advisory Board (PMAB); Notification of Upcoming Public Advisory Meeting

AGENCY: Office of Executive Councils, U.S. General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: The President's Management Advisory Board (PMAB), a Federal Advisory Committee established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C., App., and Executive Order 13538, will hold a public meeting on Friday, October 12, 2012.

DATES: *Effective date:* September 27, 2012.

Meeting date: The meeting will be held on Friday, October 12, 2012, beginning at 9 a.m. eastern time, ending no later than 1:30 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Winslow, Designated Federal Officer, President's Management Advisory Board, Office of Executive Councils, General Services Administration, 1776 G Street NW., Washington, DC 20006, at *scott.winslow@gsa.gov.*

SUPPLEMENTARY INFORMATION:

Background: The PMAB was established to provide independent advice and recommendations to the President and the President's Management Council on a wide range of issues related to the development of effective strategies for the implementation of best business practices to improve Federal Government management and operation.

Agenda: The purpose of this meeting is for the PMAB to discuss the adoption and implementation of recommendations for Improving Strategic Sourcing and Curbing Improper Payments. Additionally, PMAB will hear reports regarding the progress of implementing last year's recommendations that were aimed at improving Information Technology (IT) portfolio and project management, IT vendor performance management, Senior Executive Service (SES) leadership development and SES performance appraisal systems. More detailed information on the PMAB recommendations can be found on the PMAB Web site (see below).

Meeting Access: The PMAB will convene its meeting in the Eisenhower Executive Office Building, 1650 Pennsylvania Avenue NW., Washington, DC. Due to security, there will be no public admittance to the Eisenhower Building to attend the meeting.

However, the meeting is open to the public; interested members of the public may view the PMAB's discussion at *http://www.whitehouse.gov/live.* Members of the public wishing to comment on the discussion or topics outlined in the Agenda should follow the steps detailed in Procedures for Providing Public Comments below.

Availability of Materials for the Meeting: Please see the PMAB Web site (*http://www.whitehouse.gov/administration/advisory-boards/pmab*) for any available materials and detailed meeting minutes after the meeting. Detailed meeting minutes will be posted within 90 days of the meeting.

Procedures for Providing Public Comments: In general, public statements will be posted on the PMAB Web site (see above). Non-electronic documents will be made available for public inspection and copying in PMAB offices at GSA, 1800 F Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect statements by telephoning (202) 208–2387. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Any statements submitted in connection with the PMAB meeting will be made available to the public under the provisions of the Federal Advisory Committee Act.

The public is invited to submit written statements for this meeting until 12:30 p.m. eastern time on Thursday, October 11th, 2012, by either of the following methods:

Electronic Statements: Submit electronic statements to Mr. Winslow, Designated Federal Officer at *scott.winslow@gsa.gov.*

Paper Statements: Send paper statements in triplicate to Mr. Winslow at the PMAB GSA address above.

Dated: September 21, 2012.

Janet Dobbs,

Deputy Associate Administrator, Office of Asset and Transportation Management, General Services Administration.

[FR Doc. 2012–23750 Filed 9–26–12; 8:45 am]

BILLING CODE 6820–BR–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS–17378–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

ACTION: 60-day Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting that ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR. OS especially requests comments on (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.

Deadline: Comments on the ICR must be received within 60 days of the issuance of this notice.

ADDRESSES: Submit your comments, including the document identifier HHS–OS–17378–60D, to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162. Copies of the supporting statement and any related

forms for the ICR may also be requested through the above email or telephone number.

Information Collection Request Title: Evaluation of the National Partnership for Action to End Health Disparities.

Abstract: OMH in the Office of the Assistant Secretary for Health (OASH), Office of the Secretary (OS) is requesting approval from the Office of Management and Budget (OMB) for new data collection activities for the Evaluation of the National Partnership for Action to End Health Disparities (NPA). The NPA was officially launched in April 2011 to mobilize a nationwide, comprehensive, community-driven, and sustained approach to combating health disparities and to move the nation toward achieving health equity. Using an approach that vests those at the front line with the responsibility of identifying and helping to shape core actions, new approaches and new partnerships are being established to help close the health gap in the United States.

OMH proposes to conduct an evaluation of the NPA. The evaluation's goal is to determine the extent to which the NPA has contributed to the elimination of health disparities and attainment of health equity in our nation. The evaluation will accomplish this goal by (1) Determining the degree to which a structure (e.g., partnerships, programmatic reach, communications, committees) to implement the NPA goals and strategies has been established; (2) The collection, analysis, and summarization of baseline data for core indicators of immediate and intermediate outcomes (e.g., changes in policy, procedures, and practices to diversify workforce, promote cultural competency, affect social determinants, build leadership, and increase public support for ending health disparities and achieving health equity); (3) Developing criteria for promising practices for ending health disparities and identifying such practices; (4) Beginning to monitor data on social determinants of health and health outcomes using secondary sources.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
FIHET agency survey	Agency	48	1	.52	24.96
FIHET interviews	Agency	16	1	1.17	18.72
RHEC co-chairs interview	Individual	20	1	1.42	28.4
RHEC sub-chairs group interviews	Individual	50	1	1.5	75
Survey of all RHEC members	Individual	350	1	.67	234.5
Survey of key NPA partner organizations	Organizational	15	1	.44	6.6
Survey of State Minority Health Office Directors or Co-ordinators and officials from State Departments of Health	Agency	110	1	.48	52.8
Total		609			440.98

Keith A. Tucker,

Information Collection Clearance Officer, Department of Health and Human Services.

[FR Doc. 2012–23773 Filed 9–26–12; 8:45 am]

BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS 17371–30D]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, will submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. The ICR is for extension of the approved information collection assigned OMB control number 0990–0294, scheduled to expire on September 30, 2012. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

Deadline: Comments on the ICR must be received within 30 days of the issuance of this notice.

ADDRESSES: Submit your comments, including the OMB control number 0990–0294 and document identifier HHS–OS–17371–30D, to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806. Copies of the supporting statement and any related forms may be requested via email to *Information.Collection Clearance@hhs.gov* or by calling (202) 690–6162.

Information Collection Request Title: Standards for Privacy of Individually Identifiable Health Information and Supporting Regulations at 45 CFR Parts 160 and 164.

Abstract: The Privacy Rule implements the privacy requirements of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996. The regulations require covered entities (as defined in the regulations) to maintain strong protections for the privacy of individually identifiable health information; to use or disclose this information only as required or permitted by the Rule or with the express written authorization of the individual; to provide a notice of the entity's privacy practices; and to document compliance with the Rule.

Respondents are health care providers, health plans, and health care clearinghouses. The affected public includes individuals, public and private businesses, state and local governments.

Estimated Annualized Burden Table

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Section	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
160.204	Process for Requesting Exception Determinations (states or persons).	40	1	16	640
164.504	Uses and Disclosures—Organizational Requirements	764,799	1	5/60	63,733
164.508	Uses and Disclosures for Which Individual authorization is required.	764,799	1	1	764,799
164.512	Uses and Disclosures for which Consent, Individual Authorization, or Opportunity to Agree or Object is Not Required (or other specified purposes by an IRB or privacy board).	113,524	1	5/60	9,460
164.520	Notice of Privacy Practices for Protected Health Information (health plans).	10,570	1	3/60	529
164.520	Notice of Privacy Practices for Protected Health Information (health care providers—dissemination).	613,000,000	1	3/60	30,650,000
164.520	Notice of Privacy Practices for Protected Health Information (health care providers—acknowledgment).	613,000,000	1	3/60	30,650,000
164.522	Rights to Request Privacy Protection for Protected Health Information.	150,000	1	3/60	7,500
164.524	Access of individuals to Protected Health Information (disclosures).	150,000	1	3/60	7,500
164.526	Amendment of Protected Health Information (requests)	150,000	1	3/60	7,500
164.526	Amendment of Protected Health Information (denials)	50,000	1	3/60	2,500
164.528	Accounting for Disclosures of Protected Health Information	1,080,000	1	5/60	90,000
Total	.....	.....	.....	.....	62,254,161

Keith A. Tucker,

Information Collection Clearance Officer, Department of Health and Human Services.

[FR Doc. 2012–23774 Filed 9–26–12; 8:45 am]

BILLING CODE 4153–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–17264–30D]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request

ACTION: 30-day Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, will submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. The ICR is for renewal of the approved information collection assigned OMB control number 0990–0269, scheduled to expire on September 30, 2012. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

Deadline: Comments on the ICR must be received within 30 days of the issuance of this notice.

ADDRESSES: Submit your comments, including the OMB control number <OCN> and document identifier HHS–OS–17264–30D, to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806. Copies of the supporting statement and any related forms may be requested via email to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

Information Collection Request Title: Complaint Forms for Discrimination; Health Information Privacy Complaints.

Abstract: The Office for Civil Rights is seeking an extension on an approval for a 3-year clearance on a previous collection. Individuals may file written complaints with the Office for Civil Rights when they believe they have been discriminated against by programs or entities that receive Federal financial assistance from the Health and Human Service or if they believe that their right to the privacy of protected health information has been violated. Annual Number of Respondents frequency of submission is record keeping and reporting on occasion.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Civil Rights Complaint Form	Individuals or households, Not-for-profit institutions.	3,493	1	45/60	2,620
Health Information Privacy Complaint Form.	Individuals or households, Not-for-profit institutions.	10,286	1	45/60	7,715
Total	.....	.....	.....	.....	10,335

Keith A. Tucker,

Information Collection Clearance Officer, Department of Health and Human Services.

[FR Doc. 2012–23776 Filed 9–26–12; 8:45 am]

BILLING CODE 4153–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of Supplemental Funding for Cooperative Agreements to the New Mexico Department of Health, Office of Border Health; Arizona Department of Health Services, Office of Border Health; California Department of Public Health, Office of Binational Border Health; Texas Department of State Health Services, Office of Border Health to Improve the Health of Persons and Communities Along the U.S.-Mexico Border

AGENCY: Office of Global Affairs, Office of the Secretary, DHHS.

Announcement Type: Cooperative Agreement—FY 2012 Supplemental Funding Announcement. Non-competitive.

Catalog of Federal Domestic Assistance: 93.018.

Projects Period: September 30, 2012—August 31, 2013.

SUMMARY: The Office of Global Affairs (OGA) announces that up to $150,000.00 ($37,500.00 to each State) in fiscal year (FY) 2012 funds are being awarded for supplemental funding to existing cooperative agreements to the Department of Health Services of the states of New Mexico, Arizona, Texas and California, whom will work through the U.S.–Mexico Border Health Commission, to improve the health of persons and communities along the U.S.-Mexico border. This initiative addresses Border Binational Health Week; Prevention and Health Promotion among Vulnerable Populations on the U.S.-Mexico Border; U.S.-Mexico Border Tuberculosis Consortium and Legal Issues Forum; Border Binational Obesity Prevention Summit; Border Health Research Forum, Work Group and Expert Panel Meeting; Healthy Border 2010/2020 Strategic Plan; the Outreach Office Planning Meeting, and programmatic and administrative support to the members and staff of the U.S.-Mexico Border Health Commissions. The budget period will be one year with a project period of five years for a total of $150,000.00 (including indirect costs).

I. Funding Opportunity Description

Under the authority of 22 U.S.C. 290n, OGA announces the allocation of fiscal year (FY) 2012 funds as supplemental funding to already existing cooperative agreements to the New Mexico Department of Health, Office of Border Health; Arizona Department of Health Services, Office of Border Health; California Department of Public Health, Office of Binational Border Health; Texas Department of State Health Services, Office of Border Health to strengthen the binational public health projects and programs along the U.S.-Mexico border. Activities to be addressed through the cooperative agreement will relate to the following topic areas: (1) Border Binational Health Week; (2) Prevention and Health Promotion among Vulnerable Populations on the U.S.-Mexico Border; (3) U.S.-Mexico Border Tuberculosis Consortium and Legal Issues Forum; (4) Border Binational Obesity Prevention Summit; (5) Border Health Research Forum, Work Group and Expert Panel Meeting; (6) Healthy Border 2010/2020 Strategic Plan; and (7) the Outreach Office Planning Meeting.

This assistance will support current, on-going and proposed public health initiatives in this border region, under ongoing, cooperative agreements already awarded to the border health offices in the States of California, Arizona, New Mexico, and Texas. that support the goals and objectives of the U.S.-Mexico Border Health Commission, serve to strengthen access to health care, disease prevention, and public health along the U.S.-Mexico border.

Background: The U.S.-Mexico Border Health Commission (USMBHC), in collaboration with the U.S. Department of Health and Human Services, works toward creating awareness about the U.S.-Mexico border, its people, and its environment. It educates others about the unique challenges at the border through outreach efforts, data collection and analysis, and joint collaborative efforts with public and private partners in the border health community. The USMBHC serves as a rallying point for shared concerns about the U.S.-Mexico border and as a catalyst for action to develop plans directed toward solving specific health related problems. Outreach offices of the USMBHC work with the border states to address public health concerns and needs affecting the border region. The Department of Health Services of the states of New Mexico, Arizona, Texas and California will work with their Mexican counterparts to promote and strengthen binational health initiatives along the U.S.-Mexico border.

Purpose: The overall objective of the five-year cooperative agreements with the Offices of Border Health in California, Arizona, New Mexico and Texas, initiated in 2011, is to support and coordinate the USMBHC's objectives and the development of the outreach health activities along the U.S. and Mexico border. The cooperative agreements focus on time-limited, product-oriented, and measurable outputs that may contribute to and help to inform the binational dialogue at local, state, and federal levels, regarding mutual challenges in border health, including tuberculosis; obesity/diabetes; infectious disease and public health emergencies; strategic planning; access to care; and research, data collection, and academic alliances.

Activities: Each state will use these supplemental funds in support of the goals of the Commission, to expand and enhance ongoing activities. Specifically:

- Arizona will expand participation in the Leaders Across Borders Program, which addresses major public health problems along the border through developing leadership skills and facilitating collaborative partnerships among U.S. and Mexico health officials.

• California will increase the number of participants attending the Border Health Research Forum and will host a stakeholders meeting in support of the Prevention and Health Promotion among Vulnerable Populations on the U.S.-Mexico Border Initiative.

• Texas will increase the number of participants attending the Border Binational Obesity Prevention Summit, to share knowledge and best practices regarding a critical problem affecting border populations.

• New Mexico will plan, coordinate, and execute Phase IV of the Healthy Border 2010/2020 Strategic Plan, and will increase the number of regional activities of the Prevention and Health Promotion among Vulnerable Populations on the U.S.-Mexico Border Initiative, to improve health outcomes of vulnerable populations living on the U.S.-Mexico Border.

II. Award Information

The administrative and funding instrument to be used for this program will be cooperative agreements in which substantial OGA/HHS scientific and/or programmatic involvement is anticipated during the performance of these projects. Under the cooperative agreements, OGA/HHS will support and/or stimulate awardees activities by working with them in a non-directive partnership role. Awardees will also be expected to work directly with and in support of the U.S.-Mexico Border Health Commission and its stated goals and initiatives as outlined in the submitted work plan.

Approximately $150,000.00 ($37,500.00 to each State) in fiscal year (FY) 2012 funds are available as supplemental funding to the already existing agreements. The anticipated start date is September 30, 2012 through August 31, 2013. There will only be four awards made from this announcement.

III. Justification for the Exception to Competition

The supplemental funding is for ongoing, cooperative agreements already awarded to the border health offices in the States of California, Arizona, New Mexico, and Texas. The purpose of the activities of the cooperative agreements is to accomplish the goals and objectives of the US-Mexico Border Health Commission. State border health offices have both extensive experience working with the Border Health Commission, and have existing relationships and ongoing initiatives with Mexican border states. This experience and relationships make the offices unique in helping the Commission carry out its binational health initiatives and activities along the border.

The supplemental funds are to provide additional support for several key activities of the cooperative agreements. Because the activities are ongoing, and being planned and carried out by the State border health offices, awarding the funds to the border health offices is the only practicable way to accomplish the objectives of enhancing and extending the activities.

IV. Agency Contacts

For programmatic requirements, please contact: Craig Shapiro MD, Office of Global Affairs, DHHS, Mary E. Switzer Building, 330 C Street, SW., Washington, DC 20201, Phone: (202) 260–0399.

For administrative requirements please contact: Alice Bettencourt, Director, Office of Grants Management, Office of the Assistant Secretary for Health, 1101 Wotton Parkway, Suite 550, Rockville, MD 20852, Telephone: (240) 453–8822.

Dated: September 20, 2012.

Jimmy Kolker,

Principal Deputy Director.

[FR Doc. 2012–23722 Filed 9–26–12; 8:45 am]

BILLING CODE 4150–38–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0190]

Determination That ENDURON (methyclothiazide) Tablets and Six Other Drug Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that the seven drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to these drug products, and it will allow FDA to continue to approve ANDAs that refer to the products as long as they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Mark Geanacopoulos, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6206, Silver Spring, MD 20993–0002, 301–796–6925.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA sponsors must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. Sponsors of ANDAs do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, drugs are withdrawn from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under 314.161(a) (21 CFR 314.161(a)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved, (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved, and (3) when a person petitions for such a determination under 21 CFR 10.25(a) and 10.30. Section 314.161(d) provides that if FDA determines that a listed drug was removed from sale for safety or effectiveness reasons, the Agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

As requested by the applicants, FDA withdrew approval of NDA 012524 for Enduron (methyclothiazide) Tablets and NDA 017577 for Ditropan (oxybutynin chloride) Tablets in the **Federal Register** of March 19, 2012 (77 FR 16039). In addition, FDA has become aware that

the other drug products listed in the table in this document are no longer being marketed.

Application No.	Drug	Applicant
NDA 012524	ENDURON (methyclothiazide) Tablets, 2.5 milligrams (mg) and 5 mg.	Abbott Laboratories, 100 Abbott Park Rd., Abbott Park, IL 60064–3500.
NDA 016949	LIMBITROL and LIMBITROL DS (amitriptyline hydrochloride; chlordiazepoxide) Tablets, equivalent to (EQ) 12.5 mg (base), 5 mg, and EQ 25 mg (base), 10 mg.	Valeant Pharmaceuticals International, Inc., 4787 Levy St., Montreal, Quebec H4R 2P9, Canada.
NDA 017577	DITROPAN (oxybutynin chloride) Tablets, 5 mg	Janssen Pharmaceuticals, Inc., 1125 Trenton-Harbourton Rd., P.O. Box 200, Titusville, NJ 08560.
NDA 017950	WESTCORT (hydrocortisone valerate) Cream, 0.2%	Ranbaxy Laboratories, Ltd., 600 College Road East, suite 2100, Princeton, NJ 08540.
NDA 018763	TOPICORT (desoximetasone) Ointment, 0.25%	Taro Pharmaceuticals, Inc., 3 Skyline Dr., Hawthorne, NY 10532.
NDA 020036	AREDIA (pamidronate disodium) Injection, 30 mg/vial	Novartis Pharmaceuticals Corporation, One Health Plaza, East Hanover, NJ 07936–1080.
NDA 020038	FLUDARA (fludarabine phosphate) Injection, 50 mg/vial	Genzyme Corporation, 1850 K St. NW., suite 650, Washington, DC 20006.

FDA has reviewed its records and, under 314.161, has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the Agency will continue to list the drug products listed in this document in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness.

Approved ANDAs that refer to the NDAs listed in this document are unaffected by the discontinued marketing of the products subject to those NDAs. Additional ANDAs that refer to these products may also be approved by the Agency if they comply with relevant legal and regulatory requirements. If FDA determines that labeling for these drug products should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: September 24, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–23779 Filed 9–26–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Food Defense; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Southwest Regional Office (SWRO), in co-sponsorship with Oklahoma State University (OSU), Robert M. Kerr Food & Agricultural Products Center (FAPC), is announcing a public workshop entitled ''Food Defense Workshop.'' This public workshop is intended to provide information about food defense as it relates to food facilities such as farms, manufacturers, processors, distributors, retailers, and restaurants.

Date and Time: This public workshop will be held on November 7 and 8, 2012, from 7:45 a.m. to 4:15 p.m.

Location: The public workshop will be held at the Robert M. Kerr Food & Agricultural Products Center, Oklahoma State University, 148 FAPC, Stillwater, OK 74078–6055.

Contact: For information regarding the workshop: David Arvelo, Food and Drug Administration, Southwest Regional Office, 4040 North Central Expressway, suite 900, Dallas, TX 75204, 214–253–4952, Fax: 214–253–4970, email: *david.arvelo@fda.hhs.gov.*

For information on accommodations: Karen Smith or Andrea Graves at the Robert M. Kerr Food & Agricultural Products Center, Oklahoma State University, 148 FAPC, Stillwater, OK 74078–6055, 405–744–6277, Fax: 405–744–6313, or email: *karenl.smith@okstate.edu* or *andrea.graves@okstate.edu.* More information is also available online at *http://www.fapc.biz/fooddefense2012.html.*

Registration: You are encouraged to register by October 31, 2012. The workshop has a registration fee to cover the cost of facilities, materials, speakers, and breaks. The registration fee is $350 for companies with 10 or more employees or $250 for companies with less than 10 employees. Seats are limited; please submit your registration as soon as possible. To register, please complete the online registration form at *http://www.fapc.biz/fooddefense2012.html.* The workshop will be filled in order of receipt of registration. Those accepted into the workshop will receive confirmation. Registration will close after the workshop is filled. Registration at the site is not guaranteed but may be possible on a space available basis on the day of the public workshop beginning at 7:45 a.m. Make checks payable to: ''FAPC.'' If you need special accommodations due to a disability, please contact Karen Smith (see *Contact*) at least 7 days in advance. There are no registration fees for FDA employees.

Transcripts: Transcripts of the public workshop will not be available due to the format of this workshop. Course handouts may be requested after the date of the public workshop by contacting Karen Smith or Andrea Graves (see *Contact*) at cost plus shipping.

SUPPLEMENTARY INFORMATION: This public workshop is being held in response to the large volume of food defense inquiries from food manufacturers originating from the area covered by the FDA Dallas District Office. The Southwest Regional Office presents this workshop to help achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which include working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. This is consistent with the purposes of the

Small Business Representative Program, which are, in part, to respond to industry inquiries, develop educational materials, and sponsor workshops and conferences to provide firms, particularly small businesses, with firsthand working knowledge of FDA's guidance. This workshop is also consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), as outreach activities by Government Agencies to small businesses.

The goal of this public workshop is to present information that will enable regulated industry to better comply with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), and to better understand FDA's food defense guidance, especially in light of growing concerns about food protection. Information presented will be based on Agency position as articulated through regulation, guidance, and information previously made available to the public. Topics to be discussed at the workshop include the following:

- Food defense awareness and definitions,
- FDA food defense tools such as ALERT and Employees FIRST,
- Regulations mandated by the Bioterrorism Act,
- Food Defense Guidance from the Food Safety and Inspection Service,
- Investigating food-related incidents effectively,
- Physical plant security,
- Crisis management, and
- A food related emergency exercise bundle (FREE–B) tabletop exercise on food defense.

For more information, please visit *http://www.fapc.biz/fooddefense2012.html.* FDA expects that participation in this public workshop will provide regulated industry with greater understanding of the Agency's regulatory and policy perspectives on food protection, increase compliance with FDA regulations, and heighten food defense awareness.

Dated: September 21, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–23778 Filed 9–26–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing—Clinical Trials & Translational Research.

Date: October 19, 2012.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Christine A. Livingston, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Vestibular—Clinical Trials.

Date: October 23, 2012.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Christine A. Livingston, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Chemosensory Fellowship Application Review.

Date: October 24, 2012.

Time: 10:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Rockville, MD 20892, (301) 496–8683, *kellya2@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Auditory—CNS Stimulation & Prostheses Clinical Trials.

Date: October 25, 2012.

Time: 9 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Christine A. Livingston, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892 (301) 496–8683, *livingsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: September 21, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–23751 Filed 9–26–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute On Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA AA–1 Member Conflict Applications.

Date: October 9, 2012.

Time: 2:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: NIAAA, Rockville, MD, (Telephone Conference Call).

Contact Person: Richard A Rippe, Ph.D., Scientific Review Officer, National Institute

on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Room 2109, Rockville, MD 20852, 301–443–8599, *rippera@mail.nih.gov.*

This meeting was scheduled late due to reviewer availability.

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs; National Institutes of Health, HHS)

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–23752 Filed 9–26–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Cancer Institute Board of Scientific Advisors.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Cancer Institute Board of Scientific Advisors.

Date: November 5, 2012.

Time: 9 a.m. to 5 p.m.

Agenda: Report of the Director, NCI; Ongoing and New Business; Reports of Program Review Group(s); and Budget Presentation; Reports of Special Initiatives; RFA and RFP Concept Reviews; and Scientific Presentations.

Place: National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, Conference Rm. 10, Bethesda, MD 20892.

Contact Person: Paulette S. Gray, Ph.D., Executive Secretary, Director, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Rm. 8001, Bethesda, Md 20892, 301–496–5147, *grayp@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/bsa/bsa.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 21, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–23753 Filed 9–26–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Projects for Assistance in Transition From Homelessness (PATH) Program Annual Report (OMB No. 0930–0205)—Revision

The Center for Mental Health Services awards grants each fiscal year to each of the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands from allotments authorized under the PATH program established by Public Law 101–645, 42 U.S.C. 290cc-21 *et seq.,* the Stewart B. McKinney Homeless Assistance Amendments Act of 1990 (section 521 *et seq.* of the Public Health Service (PHS) Act). Section 522 of the PHS Act requires that the grantee States and Territories must expend their payments under the Act solely for making grants to political subdivisions of the State, and to non-profit private entities (including community-based veterans' organizations and other community organizations) for the purpose of providing services specified in the Act. Available funding is allotted in accordance with the formula provision of section 524 of the PHS Act.

This submission is for a revision of the current approval of the annual grantee reporting requirements. Section 528 of the PHS Act specifies that not later than January 31 of each fiscal year, a funded entity will prepare and submit a report in such form and containing such information as is determined necessary for securing a record and description of the purposes for which amounts received under section 521 were expended during the preceding fiscal year and of the recipients of such amounts and determining whether such amounts were expended in accordance with statutory provisions.

The proposed changes to the PATH Annual Report Survey are as follows:

1. Format

To create a PATH report that is easier to read, the formatting has been modified to be more table driven. In addition, the language has been made more concise. Although the online form and report is close in flow to the previous report, it is necessary to thoroughly read all reporting instructions to insure proper data entry.

2. Estimated Counts

The new PATH report does not include entry of estimated counts. Only actual counts should be entered.

3. Homelessness Management Information System (HMIS) Data Integration

The Data section of the report is expected to be propagated from the local HMIS when providers use HMIS. This includes client counts, services, referrals, and demographics. This data will be automatically aggregated from client-level data.

4. Demographic Responses

In order to facilitate integration of PATH data into HMIS, all data responses have been modified to fully align with valid HMIS responses. For example, the ''Hispanic'' response has been separated from ''Race'' and placed in ''Ethnicity.''

5. Additional Data Items

The PATH report now tracks demographic data for persons contacted, as well as those enrolled. For services and referrals, in addition to gathering the number of enrolled persons receiving the service or referral, there is a total count of the number of times that particular service was provided or referral made.

6. Voluntary Outcome Measures

The data previously entered as voluntary outcome measures has now been moved to the referral section of the report and are no longer considered ''voluntary.''

The estimated annual burden for these reporting requirements is summarized in the table below.

Respondents	Number of respondents	Responses/ respondent	Burden per response (hrs.)	Total burden
States	56	1	19	1,064
Local provider agencies	503	1	34	17,102
Total	559			18,166

Written comments and recommendations concerning the proposed information collection should be sent by October 29, 2012 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov*. Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202–395–7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

Summer King,

Statistician.

[FR Doc. 2012–23788 Filed 9–26–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2012 Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of intent to award a Single Source Grant to the Education Development Center, Inc., Waltham, Massachusetts.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) intends to award approximately $485,780 (total costs) per year for one year to the Education Development Center, Inc. Waltham, Massachusetts. This is not a formal request for applications. Assistance will be provided only to the Education Development Center, Inc. based on the receipt of a satisfactory application that is approved by an independent review group.

Funding Opportunity Title: SM–12–012.

Catalog Of Federal Domestic Assistance (CFDA) Number: 93.243

Authority: Section 520A of the Public Health Service Act, as amended.

Justification: The purpose of the Technical Assistance Center for Mental Health Promotion and Youth Violence Prevention Center (TA Center) is to support the federally funded Safe Schools/Healthy Students (SS/HS) and Linking Actions for Unmet Needs in Children's Health (Project LAUNCH) grant programs.

The Safe Schools/Healthy Students grant program provides funds to local educational agencies to plan, implement, evaluate and sustain a comprehensive plan of programs, activities, services and curricula to foster resilience, promote mental health, prevent substance abuse, youth violence, and mental and behavioral disorders. The SS/HS program is grounded in the belief that people's lives can be enhanced through effective interventions that foster well-being and resilience at the individual, family and community levels. Structurally, the SS/HS program brings together representatives from many diverse stakeholder groups seeking cooperation from an array of public health, mental health, education, law enforcement, justice and social service systems, as well as families and youth, to work towards the mutual goals of promoting safety, well-being, and healthy development.

The purpose of this supplemental funding is to expand and enhance current grant activities by broadening the current focus to bring lessons learned to scale. The TA Center will engage local, state, and Federal agencies, through collaborative partnerships, to strengthen the mental health promotion, mental illness prevention, and substance abuse prevention efforts across the country.

Eligibility for this funding opportunity is limited to the Education Development Center, Inc. As the current grantee for the Technical Assistance Center for Mental Health Promotion and Youth Violence, Education Development Center, Inc. has the infrastructure already in place to immediately begin to implement the activities under the this supplemental funding, thereby serving to maximize efficiencies created under the current services infrastructure.

Contact: Cathy Friedman, M.A., Substance Abuse and Mental Health Services Administration, 1 Choke Cherry Road, Room 8–1097, Rockville, MD 20857; Email: *Cathy.Friedman@samhsa.hhs.gov.*

Cathy Friedman,

Public Health Analyst, SAMHSA.

[FR Doc. 2012–23817 Filed 9–26–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2012–0053]

Homeland Security Science and Technology Advisory Committee (HSSTAC)

AGENCY: Science and Technology Directorate, DHS.

ACTION: Committee management; notice of Federal Advisory Committee meeting.

SUMMARY: On September 13, 2012, the Department of Homeland Security announced in the **Federal Register** at FRN 77, Number 178, 56662–56663 that the Homeland Security Science and Technology Advisory Committee (HSSTAC) would meet on September 27–28, 2012 in Washington, DC. This notice supplements that original meeting notice.

DATES: The HSSTAC will meet Thursday, September 27, 2012 9 a.m.–4:30 p.m. and Friday, September 28, 2012 9 a.m.–3:30 p.m. The meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held at the Department of Homeland Security (DHS), Science and Technology Directorate, 1120 Vermont Avenue NW., (Room 5–212), Washington DC.

All visitors must pre-register in order to gain entrance to the building. To register, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, below. Alternatively, you may register via this Web site: *https://*

www.signup4.net/Public/ap.aspx?EID=20124214E. Please provide your name, citizenship, organization (if any), title (if any), email address (if any), and telephone number.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the person listed under **FOR FURTHER INFORMATION CONTACT**, below.

The materials that are provided to committee members will also be provided to the public. Materials that are sent to committee members in advance will be posted on the public Web site below at the same time. Materials that are provided to committee members at the meeting will be made available to any members of the public present at the same time, and also posted to the public Web site below as soon as possible after the meeting. Check this Web site after Sept. 12: *http://www.dhs.gov/homeland-security-science-and-technology-advisory-committee-hsstac.*

To facilitate public participation, we invite public comment on the issues to be considered by the committee as listed in the ''Supplementary Information'' below. Comments may be submitted orally or in writing, or both. If submitting in writing, please include the docket number (DHS–2012–0053) and submit by one of these methods before September 25:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: mary.hanson@hq.dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–254–6176.
- *Mail:* Mary Hanson, HSSTAC Executive Director, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket or to read background documents or comments received by the HSSTAC, go to *http://www.regulations.gov.*

A period is allotted for oral public comment on September 28 after DHS officials provide briefings on each issue listed below and prior to the members making their recommendations. Speakers are asked to pre-register as such, and to limit their comments to three minutes or less. Please note that the public comment period may end before the time indicated, following the last call for comments. To register as a speaker, contact the person listed below.

FOR FURTHER INFORMATION CONTACT: Mary Hanson, HSSTAC Executive Director, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528, 202–254–5866 (O) 202–254–5823 (F), *mary.hanson@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Pub. L. 92–463). The HSSTAC was established and operates in accordance with the provisions of the FACA. The committee addresses areas of interest and importance to the Under Secretary for Science and Technology, such as new developments in systems engineering, cyber-security, knowledge management and how best to leverage related technologies funded by other Federal agencies and by the private sector. It also advises the Under Secretary on policies, management processes, and organizational constructs as needed.

The HSSTAC will meet for the purpose of receiving introductory and administrative briefings and to receive briefings on the following issues: How Technology can Address Homeland Security Challenges; Accelerating Innovation Through Systems Analysis; and Leveraging Industry for Impact. Members will discuss and deliberate various approaches and responses, hear comments from the public, the recommend next steps to address these issues. At the end of the meeting and following input from the committee, Department officials will prioritize the issues discussed and provide direction to the committee.

The Federal Advisory Committee Act requires that notices of meetings of advisory committees be announced in the **Federal Register** 15 days prior to the meeting date. A notice of the meeting of the Homeland Security Science and Technology Advisory Committee was published in the **Federal Register** on September 13, 2012, 14 days prior to the meeting. This one-day delay in notification was caused by an unusual and unanticipated delay in inter-office mail.

Although the meeting notice was published in the **Federal Register** one day late, committee members and other expected attendees were notified directly through phone calls and emails.

Dated: September 21, 2012.

Mary Hanson,

Executive Director, Homeland Security Science and Technology Advisory Committee.

[FR Doc. 2012–23821 Filed 9–26–12; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2012–0804]

Finding of Equivalence; Alternate Pressure Relief Valve Settings on Certain Vessels Carrying Liquefied Gases in Bulk

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of CG–ENG Policy Letter 04–12, ''Alternative Pressure Relief Valve Settings on Vessels Carrying Liquefied Gases in Bulk in Independent Type B and Type C Tanks.'' Existing Coast Guard regulations regarding the allowable stress factors for type B and type C independent cargo tanks are more stringent than the International Maritime Organization (IMO) standards for such cargo tanks. Materials, manufacturing, and inspections have advanced since the Coast Guard first promulgated regulations on allowable stress factors on May 3, 1979. CG–ENG Policy Letter 04–12 establishes that for certain type B and type C independent cargo tanks that are designed and manufactured using advanced techniques, the IMO standards for allowable stress factors provide a level of safety protection equivalent to the standards in 46 CFR 154.447 and 46 CFR 154.450.

DATES: CG–ENG Policy Letter 04–12 is effective as of September 27, 2012.

ADDRESSES: This notice and the documents referenced within are available in the docket and can be viewed by going to *www.regulations.gov*, and using ''USCG–2012–0804'' as your search term. CG–ENG Policy Letter 04–12 is also available at *www.uscg.mil* and can be viewed by clicking the link to the Office of Design and Engineering Standards (CG–ENG) under the ''Units,'' ''USCG Headquarters Organization,'' and ''CG–5P'' tabs, and scrolling down to ''Policy Documents.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Cynthia A. Znati, CG–ENG–5, U.S. Coast Guard; telephone (202) 372–1412, email *Cynthia.A.Znati@uscg.mil.*

If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The IMO first adopted the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code) on November 12, 1975. The current version of the IGC Code is the 1993 Edition, as amended through December 5, 1996. On May 3, 1979, the Coast Guard promulgated regulations based largely on the IGC Code, but adopted the stricter standards of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPVC) Section VIII with respect to allowable stress factors. Coast Guard regulations in 46 CFR 154.447 and 154.450 regarding allowable stress factors for type B and type C independent cargo tanks have remained unchanged since May 3, 1979.

Coast Guard regulations in 46 CFR 154.447 and 154.450 require that self-propelled ships carrying liquefied bulk gases in type B and type C tanks use stress factors that are higher than those in the IGC Code. The higher stress factors lead to lower maximum allowable relief valve settings (MARVS) than are allowed by the IGC code. Accordingly, ships with type B or type C tanks that travel from international waters to U.S. territorial waters must have two pressure relief valve (PRV) settings per tank, and they must switch PRV settings upon entering U.S. territorial waters. We believe that in many cases, switching between these two PRV settings is not necessary for safety purposes.

Finding of Equivalence

According to 46 CFR 154.32, vessels may meet an alternate standard if the Commandant determines that the alternate standard provides an equivalent or greater level of protection for the purpose of safety. We recognize that advances have been made with respect to materials, manufacturing, and inspection since we first promulgated 46 CFR 154.447 and 154.450. Therefore, as specified in CG–ENG Policy Letter 04–12 and below, we have determined that for tanks designed and manufactured with advanced techniques, the stress factors in the IGC Code provide a level of safety equivalent to current Coast Guard regulations.

Tanks manufactured consistent with certain conditions are considered to meet the level of safety required in 46 CFR 154.447 and 154.450. Tanks that meet the following two requirements may use the MARVS as determined by the IGC Code:

(1) The tank must be designed and built according to the IGC code, 1993 Edition, including all amendments through December 5, 1996; and

(2) The classification society that certified the tank must be authorized to issue an International Certificate of Fitness for the Carriage of Liquefied Gases in Bulk (Certificate of Fitness) and must be authorized to participate in the Coast Guard's Alternate Compliance Program. See *http://www.uscg.mil/hq/cg5/acp/* for further information.

Tanks that do not meet both of these requirements must comply with current Coast Guard regulations in 46 CFR 154.447 or 154.450. Alternatively, persons may request approval from the Commandant (CG–ENG–5, formerly CG–522) to use an alternate pressure relief valve setting for such tanks. Equivalency requests must include the information required in 46 CFR 154.32(b) and should also include a copy of the Certificate of Fitness.

The guidance in this notice and CG–ENG Policy Letter 04–12 is not a substitute for applicable legal requirements, nor is in itself a regulation. It is not intended to nor does it impose legally-binding requirements on any party. It represents the Coast Guard's current thinking on this topic and may assist industry, mariners, the general public, and the Coast Guard, as well as other federal and state regulators, in applying U.S. statutory and regulatory requirements.

This notice is issued under authority of 46 U.S.C. 3703, 46 U.S.C. 9101, 5 U.S.C. 552(a), 46 CFR 154.32, and 33 CFR 1.05–1.

Dated: September 13, 2012.

J.G. Lantz,

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

[FR Doc. 2012–23772 Filed 9–26–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0023]

Agency Information Collection Activities: Application To Register Permanent Residence or Adjust Status, Form I–485 and Supplements A, C, and E, Revision of a Currently Approved Collection; Comment Request

ACTION: 30-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. An information collection notice was previously published in the **Federal Register** on July 25, 2012, at 76 FR 43608, allowing for a 60-day public comment period. USCIS did not receive any comments on the 60-day notice.

DATES: This notice allows an additional 30 days for public comments. Comments are encouraged and will be accepted until October 29, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to DHS, and to the Office of Information and Regulatory Affairs, OMB, USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Coordination Division, Office of Policy and Strategy, 20 Massachusetts Avenue, Washington, DC 20529–2140. Comments may also be submitted to DHS via email at *USCISFRComment@dhs.gov* or via the Federal eRulemaking Portal at *www.regulations.gov* under e-Docket ID number USCIS–2009–0020, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov.* All submissions received must include the agency name and e-Docket ID. When submitting comments by email please make sure to add 1615–0023 in the subject box.

All submissions received must include the agency name, OMB Control Number and Docket ID. Regardless of the method used for submitting comments or material, all submissions

will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including 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 Request:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Application to Register Permanent Residence or Adjust Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–485 and Supplements A, C, and E; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The information collected is used to determine eligibility to adjust status under section 245 of the Immigration and Nationality Act. USCIS will be combining The Haitian Refugee Immigration Fairness Act (HRIFA) Instructions for Form I–485, Supplement C; OMB Control No. 1615–0024, in Form I–485 instructions under OMB Control No. 1615–0023.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Form I–485—580,133 responses at 6 hours and 15 minutes (6.25) per response; Supplement A—3,888 responses at 13 minutes (.216) per response; Supplement C—386 responses at 30 minutes (.50) per response; Supplement E—31,000 responses at 1 hour per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,657,863 annual burden hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140; Telephone 202–272–1470.

Dated: September 24, 2012.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–23814 Filed 9–26–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0063]

Agency Information Collection Activities: National Interest Waivers, Supplemental Evidence to I–140 and I–485, Form Number No Form; Extension, Without Change, of a Currently Approved Collection

ACTION: 30-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on June 1, 2012, at 77 FR 32660, allowing for a 60-day public comment period. USCIS did receive one comment in connection with the 60-day notice. The comment received was the writer's statement that the USCIS Form I–140 should be discontinued and that USCIS Form I–145 should have the associated fee raised. USCIS will not be discontinuing the form I–130 and a fee study was done to determine the appropriate fee amount for the I–145; no change will be made based upon the comment received.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until October 29, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to DHS, and to the OMB USCIS Desk Officer. Comments may be submitted to: DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via email at *uscisfrcomment@dhs.gov*, to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov* and via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2008–0003. When submitting comments by email, please make sure to add [Insert OMB Control Number] in the subject box.

All submissions received must include the agency name, OMB Control Number and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of

your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do*, or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including 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 Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* National Interest Waivers, Supplemental Evidence to I–140 and I–485.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Form; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The supplemental documentation will be used by the U.S. Citizenship and Immigration Services to determine eligibility for national interest waiver requests for physicians and to finalize the request for adjustment to lawful permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 8,000 respondents responding an estimated 2 times per year with an estimated hour burden per response of 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 16,000.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: September 24, 2012.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–23813 Filed 9–26–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties. For the calendar quarter beginning October 1, 2012, the interest rates for overpayments will be 2 percent for corporations and 3 percent for non-corporations, and the interest rate for underpayments will be 3 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and Customs and Border Protection personnel.

DATES: *Effective Date:* October 1, 2012.

FOR FURTHER INFORMATION CONTACT: Ron Wyman, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614–4516.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2012–23, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2012, and ending on December 31, 2012. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (1%) plus one percentage point (1%) for a total of two percent (2%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). These interest rates are subject to change for the calendar quarter beginning January 1, 2013, and ending March 31, 2013.

For the convenience of the importing public and Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	123112	3	3	2

Dated: September 21, 2012.

David V. Aguilar,

Deputy Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2012–23822 Filed 9–26–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2012–N126; BAC–4311–K9–S3]

Great Bay National Wildlife Refuge, Rockingham County, NH; Final Comprehensive Conservation Plan and Finding of No Significant Impact

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Great Bay National Wildlife Refuge (NWR, refuge) in Newington, New Hampshire, which includes the Karner blue butterfly conservation easement in Concord, New Hampshire. Great Bay NWR is administered by Parker River NWR in Newburyport, Massachusetts. In this final CCP, we describe how we will manage the refuge and Karner blue butterfly conservation easement for the next 15 years.

ADDRESSES: You may view or obtain copies of the final CCP and FONSI by

any of the following methods. You may request a hard copy or a CD–ROM.

Agency Web site: Download a copy of the document at *http://www.fws.gov/northeast/planning/Great%20bay/ccphome.html.*

Email: Send requests to *northeastplanning@fws.gov.* Include ''Great Bay Refuge CCP'' in the subject line of your email.

Mail: Nancy McGarigal, Natural Resource Planner, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035.

Fax: Attention: Nancy McGarigal, 413–253–8468.

In-Person Viewing or Pickup: Call 978–465–5753 to make an appointment during regular business hours at the Parker River NWR office, 6 Plum Island Turnpike, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Graham Taylor, Refuge Manager, Parker River NWR, 6 Plum Island Turnpike, Newburyport, MA 01950; 978–465–5753 (phone); 978–465–2807 (fax); *fw5rw_prnwr@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Great Bay NWR. We started this process through a notice of intent in the **Federal Register** (74 FR 28722) on June 17, 2009. We announced the release of the draft CCP/environmental assessment (EA) to the public and requested comments in a notice of availability in the **Federal Register** (77 FR 7176) on February 10, 2012.

The Service established Great Bay NWR in 1992 to protect the natural diversity of fish, wildlife, and plants within its boundaries, protect federally listed species, preserve and enhance water quality and aquatic habitats, and fulfill the United State's international treaty obligations relating to fish and wildlife resources. The refuge is located in the town of Newington in southeastern New Hampshire, on the eastern shore of the tidally influenced Great Bay Estuary. Prior to its establishment, refuge lands were part of the former Pease Air Force Base. The 1,103-acre refuge is the largest parcel of protected land on Great Bay Estuary, and includes a rich diversity of habitat types including oak-hickory forests, grasslands, shrub thickets, freshwater and saltwater wetlands, open water, and rocky shoreline.

Great Bay NWR also includes the Karner blue butterfly conservation easement in Concord, New Hampshire. The 29-acre conservation easement is managed for the federally endangered Karner blue butterfly, and also supports other rare moths and butterflies. It primarily consists of a mix of open pitch pine/scrub oak, pine-hardwood, and other shrubland habitat.

We announce our decision and the availability of the FONSI for the final CCP for Great Bay NWR in accordance with National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft CCP/EA.

The CCP will guide us in managing and administering Great Bay NWR for the next 15 years. Alternative B, as described for the refuge in the draft CCP/EA, and with the modifications described below, is the foundation for the final CCP.

Background

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–68ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each NWR. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing to the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years, in accordance with the Refuge Administration Act.

CCP Alternatives, Including the Selected Alternative

Our draft CCP/EA (77 FR 7176) addressed several key issues, including:

- Managing a diversity of habitat types, including grasslands, shrublands, wetlands, and forest to benefit Federal and State species of concern.
- Protecting the water quality of the Great Bay Estuary.
- Providing more public access opportunities on Great Bay NWR.
- Balancing the protection of historic resources with wildlife and habitat conservation.

To address these issues and develop a plan based on the refuge's establishing purposes, vision, and goals, we evaluated three alternatives for Great Bay NWR in the draft CCP/EA. These alternatives have some actions in common, such as controlling invasive species, monitoring wildlife diseases, protecting the rocky shore, reducing impacts from climate change, protecting cultural resources, and distributing refuge revenue sharing payments to the town of Newington, New Hampshire. There are other actions that differ among the alternatives. The draft CCP/EA describes each alternative in detail and relates them to the issues and concerns that arose during the planning process. Below, we provide summaries for the three Great Bay alternatives evaluated in the draft CCP/EA.

Management Alternatives

Alternative A (Current Management)

This alternative is the ''No Action'' alternative required by NEPA (42 U.S.C. 4321 *et seq.*). It describes our current management activities, including those planned, funded, or underway, and serves as the baseline against which to compare alternatives B and C. Alternative A would continue to emphasize our current biological program priorities, including maintaining impoundments for migratory birds and managing grasslands for grassland-dependent species of concern. The refuge would remain unstaffed and we would continue to rely on volunteers to help with seasonal activities. Our visitor services program would continue to focus on wildlife observation and photography, and we would continue to provide a 2-day fall deer hunt. On the Karner blue butterfly easement, we would continue to actively manage habitat for Karner blue butterflies in partnership with New Hampshire Fish and Game (NHFG).

Alternative B (Habitat Diversity and Focal Species Emphasis)

This is the Service-preferred alternative. It combines the actions we believe would best achieve the refuge's purposes, vision, and goals, and is consistent with the intent of NWRS policy on Biological Integrity, Diversity, and Environmental Health (601 FW 3). This alternative would also best respond to the issues that arose during the planning process.

Alternative B would improve our management of refuge habitats to benefit species of conservation concern in the Great Bay area and coastal New Hampshire. In particular, we would emphasize habitat for priority species such as migratory waterfowl, wading birds, forest-dependent songbirds, New

England cottontails, and forest bats. We would also manage estuarine and aquatic species of concern, including shellfish and migratory fish. We would also remove the Lower Peverly Pond Dam to restore approximately 1,100 feet of stream habitat, while maintaining the dams at Upper Peverly Pond and Stubbs Pond to benefit a range of fish and wildlife species of conservation concern. We would also expand our conservation, research, and management partnerships to help restore and conserve the Great Bay estuarine ecosystem.

This alternative would enhance our visitor services programs. We would improve our trails, create new interpretive materials, expand on the existing volunteer program, and offer visitors more opportunities to learn about the refuge's history, its resources, and its surrounding area. We would also evaluate an expansion of hunting opportunities to include wild turkey and a fall bow season for deer. These expanded programs would be possible through increased staffing and a new refuge headquarters/visitor contact facility.

On the Karner blue butterfly easement, we would enhance our partnership with NHFG to help manage habitat on the easement to support this species' recovery. We would also expand the easement's visitor services program by installing new interpretive signs and trails, offering guided walks, and updating our Web site.

Alternative C (Emphasis on Natural Processes)

Alternative C primarily relies on ecosystem processes, such as natural disturbances, to affect the diversity and integrity of refuge habitats. In particular, we would no longer maintain much of the grasslands and shrublands on the refuge, allowing them to naturally transition to forest. We would remove all three of the refuge's impoundments on Peverly Brook and restore these areas to native stream habitat. We would also expand our visitor services program by creating new trails and opening up more of the refuge to public use. Under this alternative, management of the Karner blue butterfly easement would be similar to alternative B.

Comments

We solicited comments on the draft CCP/EA for Great Bay NWR from February 10 to March 19, 2012 (77 FR 7176). During the comment period, we received 25 written responses. We evaluated all of the substantive comments we received, and include a summary of those comments and our responses to them, as appendix K in the final CCP.

Selected Alternative

After considering the comments we received on our draft CCP/EA, we have made several minor changes to alternative B, including adding or revising several management strategies. These changes are described in the FONSI (appendix L in the final CCP) and in our response to public comments (appendix K in the final CCP).

We have selected alternative B to implement for Great Bay NWR, with these minor changes, for several reasons. Alternative B comprises a mix of actions that, in our professional judgment, work best towards achieving the refuge's purposes, vision, and goals, NWRS policies, and the goals of other State and regional conservation plans. We also believe that alternative B most effectively addresses key issues raised during the planning process. The basis of our decision is detailed in the FONSI (appendix L in the final CCP).

Public Availability of Documents

You can view or obtain the final CCP, including the FONSI, as indicated under **ADDRESSES**.

Dated: August 29, 2012.

Deborah Rocque,

Acting Regional Director, Northeast Region.

[FR Doc. 2012–23799 Filed 9–26–12; 8:45 a.m.]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2012–N177; FF08E00000–FXES11120800000F2–123–F2]

Application From Marys River Ranch, Elko County, NV, for an Enhancement of Survival Permit; Safe Harbor Agreement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: In response to an application from Marys River Ranch (applicant), the Fish and Wildlife Service (we, the Service) is considering issuance of an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA). The enhancement of survival permit application includes a proposed safe harbor agreement (SHA) between the applicant and the Service. The proposed SHA provides for voluntary habitat restoration, maintenance, or enhancement activities to facilitate the repatriation and recovery of Lahontan cutthroat within the enrolled property. The proposed duration of both the SHA and permit is 50 years. The Service has made a preliminary determination that the proposed SHA and permit application are eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). The basis for this determination is contained in an environmental action statement, which also is available for public review.

DATES: Written comments must be received by 5 p.m. on October 29, 2012.

ADDRESSES: Written comments should be sent to Edward D. Koch, State Supervisor, by U.S. mail; or hand delivered to the Nevada Fish and Wildlife Office, U.S. Fish and Wildlife Service, 1340 Financial Boulevard, Suite 234, Reno, NV 89502; or faxed to 775–861–6301 (for further information and instructions on the reviewing and commenting process, see *Availability of Documents* section below).

FOR FURTHER INFORMATION CONTACT: Chad Mellison, Fish and Wildlife Biologist, at the address shown above or by telephone at 775–861–6300. If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Individuals wishing copies of the permit application, the environmental action statement, or the full text of the proposed SHA, including a map of the proposed permit area, references, and description of the proposed permit area, should contact the office and personnel listed in the **ADDRESSES** section. Documents also will be available for public inspection, by appointment, during normal business hours at this office (see **ADDRESSES**).

Background Information

Under a safe harbor agreement, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the ESA (16 U.S.C. 1531 *et seq.*). Safe harbor agreements, and the subsequent enhancement of survival permits that are issued pursuant to section 10(a)(1)(A) of the ESA, encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners that they will not be subjected to increased property use restrictions as a result of their efforts to attract listed species to their property, or to increase the numbers or

distribution of listed species already on their property. Application requirements and issuance criteria for enhancement of survival permits through safe harbor agreements are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22(c) and 17.32(c). An enhancement of survival permit allows any necessary future incidental take of species above the mutually agreed upon baseline conditions for the species, as long as the take is in accordance with the terms and conditions of the permit and accompanying agreement.

Proposed Safe Harbor Agreement for Lahontan cutthroat trout

The primary objective of this proposed SHA is to encourage voluntary habitat restoration, maintenance, or enhancement activities to benefit Lahontan cutthroat trout (*Oncorhynchus clarkii henshawi*). The SHA would cover conservation activities to create, maintain, restore, or enhance habitat for Lahontan cutthroat trout and achieve species' recovery goals. These actions, where appropriate, could include (but are not limited to): (1) Restoration of riparian habitat and stream form and function; (2) variation of stocking rates for livestock (number/density of animals per unit area); (3) repair or installation of fences to protect existing or created habitat from livestock disturbance; (4) control of nonnative fish species; and (5) installation of screens on irrigation diversions as well as facilitation of the implementation of other objectives recommended by the Lahontan Cutthroat Trout Recovery Plan (Service 1995). The overall goal of the SHA is to produce conservation measures that are mutually beneficial to the applicant and the long-term existence of Lahontan cutthroat trout. Based upon the probable species' response time for Lahontan cutthroat trout, the Service estimates it will take 5–10 years of implementing the planned conservation measures to fully reach a net conservation benefit; some level of benefit would likely occur within a shorter time period. After maintenance of the restored/created/enhanced Lahontan cutthroat trout habitat on the property for the agreed-upon term, the applicant may then conduct otherwise lawful activities on the property that result in the partial or total elimination of the habitat improvements and the taking of Lahontan cutthroat trout. However, the restrictions on returning a property to its original baseline condition include: (1) The applicant must demonstrate that baseline conditions were maintained during the term of the SHA and the conservation measures necessary for achieving a net conservation benefit were carried out; and (2) the Service will be notified a minimum of 60 days prior to the activity and given the opportunity to capture, rescue, and/or relocate any Lahontan cutthroat trout.

The Service has made a preliminary determination that approval of the proposed SHA qualifies for a categorical exclusion under NEPA (23 CFR 771.117), as provided by the Department of Interior Manual (516 DM 2, Appendix 1 and 516 DM 6, Appendix 1). We explain the basis for this determination in an environmental action statement that is available for public review. Based upon this preliminary determination, we do not intend to prepare further NEPA documentation. The Service will consider public comments in making its final determination on whether to prepare such additional documentation.

Public Review and Comments

We specifically request information, views, and opinions from the public on the proposed Federal action of issuing a permit, including the identification of any aspects of the human environment not already analyzed in our environmental action statement. Further, we specifically solicit information regarding the adequacy of the SHA as measured against our permit issuance criteria found in 50 CFR 17.22(c).

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.

The Service provides this notice pursuant to section 10(c) of the ESA and pursuant to implementing regulations for NEPA (40 CFR 1506.6). We will evaluate the permit application, the proposed SHA, and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the ESA and NEPA regulations. If the requirements are met, the Service will sign the proposed SHA and issue an enhancement of survival permit under section 10(a)(1)(A) of the ESA to the applicant for take of the Lahontan cutthroat trout incidental to otherwise lawful activities of the project. The Service will not make a final decision until after the end of the 30-day comment period and will fully consider all comments received during the comment period.

References Cited

A complete list of all references cited in this document is available from the Nevada Fish and Wildlife Office (see **ADDRESSES**).

Dated: September 4, 2012,

Edward D. Koch,

State Supervisor, Nevada Fish and Wildlife Office, Reno, Nevada.

[FR Doc. 2012–23783 Filed 9–26–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO320000 L13300000.PP0000 12X]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management, Interior.

ACTION: 60-day notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act, the Bureau of Land Management (BLM) is announcing its intention to request approval to continue the collection of information regarding leases of solid minerals other than coal and oil shale. The Office of Management and Budget (OMB) has assigned control number 1004–0121 to this information collection.

DATES: Please submit comments on the proposed information collection by November 26, 2012.

ADDRESSES: Comments may be submitted by mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: to Jean Sonneman at 202–245–0050.

Electronic Mail: *Jean_Sonneman@blm.gov.*

Please indicate ''Attn: 1004–0121'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Vince Vogt, at 202–912–7125. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, to leave a message for Mr. Vogt.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act, 44 U.S.C. 3501–3521, require that interested members of the public and affected agencies be given an opportunity to comment on information

collection and recordkeeping activities (see 5 CFR 1320.8 (d) and 1320.12(a)). This notice identifies an information collection that the BLM plans to submit to OMB for approval. The Paperwork Reduction Act provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

The BLM will request a 3-year term of approval for this information collection activity. Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany our submission of the information collection requests to OMB.

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.

The following information is provided for the information collection:

Title: Leasing of Solid Minerals Other Than Coal and Oil Shale (43 CFR Parts 3500, 3580, and 3590).

OMB Control Number: 1004–0121.

Abstract: This control number enables the BLM to fulfill its responsibilities regarding prospecting permits, exploration licenses, leases, the exchange of leases, use permits, and the regulation of mining activities for solid minerals other than coal or oil shale. The information activities currently approved under control number 1004–0121 include requirements that an applicant, a permittee or a lessee submit information that enables the BLM to:

- Determine if applicants, permittees, and lessees meet qualification criteria;
- Assure compliance with various other legal requirements relating to the leasing of solid minerals other than coal or oil shale;
- Gather data needed to determine the environmental impacts of developing solid leasable minerals other than coal or oil shale;
- Maintain accurate leasing records; and
- Oversee and manage the leasing of solid minerals other than coal or oil shale.

Frequency of Collection: On occasion.

Description of Respondents: Applicants for, and holders of, the following items in connection with solid minerals other than coal or oil shale:

- Prospecting permits;
- Exploration licenses;
- Leases; and
- Use permits.

Estimated Annual Responses: 473.

Estimated Annual Burden Hours: 16,346.

Jean Sonneman,

Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. 2012–23811 Filed 9–26–12; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[COF000–LLCOF00000–L19900000–XZ0000]

Notice of Meeting, Front Range Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Front Range Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held on November 14, 2012, from 9:15 a.m. to 4:15 p.m.

ADDRESSES: BLM Front Range District Office, 3028 East Main Street, Cañon City, CO 81212.

FOR FURTHER INFORMATION CONTACT: Denise Adamic, Front Range RAC Coordinator, BLM Front Range District Office, 3028 E. Main St., Cañon City, CO 81212. Phone: (719) 269–8553. Email: *dadamic@blm.gov*.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in the BLM Front Range District, which includes the Royal Gorge Field Office and the San Luis Valley Field Office, Colorado. Planned topics of discussion include: introductions of new RAC members and BLM staff, recognition of service for outgoing RAC members, an ethics presentation for new members, a presentation on the history of the Garden Park fossil area and a field trip to the Garden Park fossil area. The public is encouraged to make oral comments to the Council at 9:45 a.m. or written statements may be submitted for the Council's consideration. Summary minutes for the RAC meetings will be maintained in the Royal Gorge Field Office and will be available for public inspection and reproduction during regular business hours within thirty (30) days following the meeting. Previous meeting minutes and agendas are available at: *www.blm.gov/co/st/en/BLM_Resources/racs/frrac/co_rac_minutes_front.html*.

Dated: September 19, 2012.

Helen M. Hankins,

BLM Colorado State Director.

[FR Doc. 2012–23796 Filed 9–26–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–DCOSPOL–11327; 0004–SYP]

Meeting of the National Park System Advisory Board; November 28–29, 2012

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act, 5 U.S.C. Appendix, and Parts 62 and 65 of title 36 of the Code of Federal Regulations, that the National Park System Advisory Board will meet November 28–29, 2012, in Fort Monroe, Virginia. The agenda will include the review of proposed actions regarding the National Historic Landmarks Program and the National Natural Landmarks Program. Interested parties are encouraged to submit written comments and recommendations that will be presented to the Board. Interested parties also may attend the board meeting and upon request may address the Board concerning an area's national significance.

DATES: Written comments regarding any proposed National Historic Landmarks matter or National Natural Landmarks matter listed in this notice will be accepted by the National Park Service until November 26, 2012. The Board will meet on November 28–29, 2012.

ADDRESSES: The meeting will be held at Fort Monroe National Monument in the Casemate Room of the Bay Breeze

Conference Center, 490 Fenwick Road, Fort Monroe, Virginia 23651; telephone (757) 722–3678.

Agenda: On November 28, 2012, the Board will convene its business meeting at 8:30 a.m., and adjourn for the day at 5 p.m. The Board will reconvene at 8:30 a.m., on November 29, 2012, and adjourn at 2:30 p.m. During the course of the two days, the Board will be addressed by National Park Service Director Jonathan Jarvis; briefed by other National Park Service officials regarding education, leadership development and science; deliberate and make recommendations concerning National Historic Landmarks Program and National Natural Landmarks Program proposals; and receive status briefings on matters pending before committees of the Board. On the afternoon of November 29, 2012, the Board will tour Fort Monroe National Monument.

FOR FURTHER INFORMATION CONTACT: For information concerning the National Park System Advisory Board or to request to address the Board, contact Shirley Sears Smith, Office of Policy, National Park Service, 1201 I Street NW., 12th Floor, Washington, DC 20005, telephone (202) 354–3955, email *Shirley_S_Smith@nps.gov.* To submit a written statement specific to, or request information about, any National Historic Landmarks matter listed below, or for information about the National Historic Landmarks Program or National Historic Landmarks designation process and the effects of designation, contact J. Paul Loether, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service, 1849 C Street NW. (2280), Washington, DC 20240, email *Paul_Loether@nps.gov.* To submit a written statement specific to, or request information about, any National Natural Landmarks matter listed below, or for information about the National Natural Landmarks Program or National Natural Landmarks designation process and the effects of designation, contact Dr. Margaret Brooks, Program Manager, National Natural Landmarks Program, National Park Service, 225 N. Commerce Park Loop, Tucson, Arizona 85745, email *Margi_Brooks@nps.gov.*

SUPPLEMENTARY INFORMATION: Matters concerning the National Historic Landmarks and National Natural Landmarks Program matters will be considered by the Board as follows:

A. National Historic Landmarks (NHL) Program

NHL Program matters will be considered at the morning session of the business meeting on November 28, 2012, during which the Board may consider the following:

Nominations for New NHL Designations

Alabama

- Edmund Pettus Bridge, Dallas County, AL.

Connecticut

- Harriet Beecher Stowe House, Hartford, CT.

Illinois

- Second Presbyterian Church, Chicago, IL.

Kentucky

- Camp Nelson Historic and Archeological District, Jessamine County, KY.
- George T. Stagg Distillery, Frankfort, KY.

Maine

- Camden Amphitheatre and Public Library, Camden, ME.

New Hampshire

- Epic of American Civilization Murals, Baker Library, Hanover, NH.

New Jersey

- Hinchliffe Stadium, Paterson, NJ.

New York

- Yaddo, Saratoga Springs, NY.

Oklahoma

- Honey Springs Battlefield, McIntosh and Muskogee Counties, OK.

Puerto Rico

- Casa Dra. Concha Meléndez Ramírez, San Juan, PR.
- Old San Juan Historic District (Distrito Histórico del Viejo San Juan), San Juan, PR.

Virginia

- Pear Valley, Eastville, VA.

Proposed Amendments to Existing NHL Designations.

- Ocean Drive Historic District, Newport, RI (updated documentation).
- Pennsylvania State Capitol Complex, Harrisburg, PA (boundary expansion and updated documentation).

C. National Natural Landmarks (NNL) Program

NNL Program matters will be considered at the morning session of the business meeting on November 28, 2012, during which the Board may consider the following:

Nominations for New NNL Designations

Georgia

- Wade Tract, Thomas County, GA.

Oregon

- Zumwalt Prairie, Wallowa County, OR.

Proposed Amendment to Existing NNL Designation

Colorado

- Garden Park Fossil Area, Fremont County, CO (boundary expansion).

The board meeting will be open to the public. The order of the agenda may be changed, if necessary, to accommodate travel schedules or for other reasons. Space and facilities to accommodate the public are limited and attendees will be accommodated on a first-come basis. Anyone may file with the Board a written statement concerning matters to be discussed. The Board also will permit attendees to address the Board, but may restrict the length of the presentations, as necessary to allow the Board to complete its agenda within the allotted time. Before including your address, telephone 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.

Draft minutes of the meeting will be available for public inspection about 12 weeks after the meeting in the 12th floor conference room at 1201 I Street NW., Washington, DC 20005.

Dated: September 21, 2012.

Alma Ripps,

Acting Chief, Office of Policy.

[FR Doc. 2012–23812 Filed 9–26–12; 8:45 am]

BILLING CODE 4310–EE–P

DEPARTMENT OF LABOR

Office of the Secretary

Notice of Publication of 2012 Update to the Department of Labor's List of Goods From Countries Produced by Child Labor or Forced Labor

AGENCY: Bureau of International Labor Affairs, Department of Labor.

ACTION: Announcement of public availability of updated list of goods.

SUMMARY: This notice announces the publication of an updated list of

goods—along with countries of origin—that the Bureau of International Labor Affairs (ILAB) has reason to believe are produced by child labor or forced labor in violation of international standards (List). ILAB is required to develop and make available to the public the List pursuant to the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA).

FOR FURTHER INFORMATION CONTACT: Director, Office of Child Labor, Forced Labor, and Human Trafficking, Bureau of International Labor Affairs, U.S. Department of Labor at (202) 693–4843 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Bureau of International Labor Affairs (ILAB) announces the publication of the fourth edition of the *List of Goods Produced by Child Labor or Forced Labor* (List), pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. ILAB published the initial List on September 10, 2009, and has since published updated editions annually. The 2012 edition adds four goods (baked goods, beef, fish and thread/yarn), from 3 countries (South Sudan, Suriname and Vietnam), to the List.

Section 105(b) of the TVPRA of 2005 mandated that ILAB develop and publish a list of goods from countries that ILAB ''has reason to believe are produced with child labor or forced labor in violation of international standards.'' ILAB's Office of Child Labor, Forced Labor, and Human Trafficking (OCFT) carries out this mandate. The primary purposes of the List are to raise public awareness about the incidence of child labor and forced labor in the production of goods in the countries listed and to promote efforts to eliminate such practices. A full report, including the updated List and a discussion of the List's context, scope, methodology, and limitations, as well as Frequently Asked Questions and a bibliography of sources, are available on the DOL Web site at: *http://www.dol.gov/ilab/programs/ocft/tvpra.htm.*

Signed at Washington, DC, this 17th day of September, 2012.

Carol Pier,

Acting Deputy Undersecretary for International Affairs.

[FR Doc. 2012–23402 Filed 9–26–12; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Notice of Initial Determination Revising the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126

AGENCY: Bureau of International Labor Affairs (ILAB), Department of Labor.

ACTION: Request for comments.

SUMMARY: This initial determination proposes to revise the list required by Executive Order No. 13126 (''Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor'') in accordance with the Department of Labor's ''Procedural Guidelines for the Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor.'' Under the procurement regulations implementing this Executive Order, federal contractors who supply products on the list published by the Department of Labor must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the products listed. This notice proposes to add 6 new line items to the list (dried fish from Bangladesh, gold from the Democratic Republic of Congo, Wolframite from the Democratic Republic of Congo, cattle from South Sudan, garments from Vietnam and fish from Ghana) that the Department of Labor preliminarily believes might have been mined, produced or manufactured by forced or indentured child labor. The Department of Labor invites public comment on this initial determination. The Department will consider all public comments prior to publishing a final determination revising the list of products, made in consultation and cooperation with the Department of State and the Department of Homeland Security.

DATES: Information should be submitted to the Office of Child Labor, Forced Labor and Human Trafficking (OCFT) via one of the methods described below by 5 p.m., November 27, 2012.

To Submit Information, or For Further Information Contact: Information submitted to the Department should be submitted directly to OCFT, Bureau of International Labor Affairs, U.S. Department of Labor at (202) 693–4843 (this is not a toll free number). Comments, identified as ''Docket No. DOL–2012–0005,'' may be submitted by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. The portal includes instructions for submitting comments. Parties submitting responses electronically are encouraged not to submit paper copies.

Facsimile (fax): OCFT at 202–693–4830.

Mail, Express Delivery, Hand Delivery, and Messenger Service (2 copies): Rachel Rigby/Charita Castro at U.S. Department of Labor, OCFT, Bureau of International Labor Affairs, 200 Constitution Avenue NW., Room S–5317, Washington, DC 20210.

Email: EO13126@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Information Sought

The Department is requesting public comment on the revisions to the List proposed below, as well as any other issue related to the fair and effective implementation of Executive Order (EO) 13126. This notice is a general solicitation of comments from the public. All submitted comments will be made a part of the public record and will be available for inspection on *http://www.regulations.gov.*

In conducting research for this initial determination, the Department considered a wide variety of materials based on its own research or originating from other U.S. Government agencies, foreign governments, international organizations, non-governmental organizations (NGOs), U.S. Government-funded technical assistance and field research projects, academic and other independent research, media and other sources. The Department of State and U.S. embassies and consulates abroad also provide important information by gathering data from contacts, conducting site visits and reviewing local media sources. For this initial determination, the Department also sought additional information from the public through a call for information published in the **Federal Register** on February 16, 2012.

In developing the revised List, the Department's review focused on information concerning the use of forced or indentured child labor that was available from the above sources. A lack of information does not, by itself, establish that forced or indentured child labor is not being used in a particular country or for a particular product. The Department's ability to gather relevant information is constrained by available resources and information about working conditions in some countries is difficult or impossible to obtain, for a variety of reasons. For example, some governments are unable or unwilling to cooperate with international efforts or with the efforts of NGOs to uncover and address labor exploitation such as forced or indentured child labor. Institutions or organizations that might

uncover such information, such as independent news media, trade unions and NGOs may not exist or may not be able to operate freely.

As outlined in the Procedural Guidelines, several factors were weighed in determining whether or not a product should be placed on the revised list: The nature of the information describing the use of forced or indentured child labor; the source of the information; the date of the information; the extent of corroboration of the information by other sources; whether the information involved more than an isolated incident; and whether recent and credible efforts are being made to address forced or indentured child labor in a particular country or industry.

This notice constitutes the initial determination to revise the EO 13126 list issued April 3, 2012.

Based on recent, credible and appropriately corroborated information from various sources, the Departments of Labor, State, and Homeland Security have preliminarily concluded that there is a reasonable basis to believe that the following products, identified by their countries of origin, might have been mined, produced, or manufactured by forced or indentured child labor:

Product	Country
Cattle	South Sudan.
Dried Fish	Bangladesh.
Fish	Ghana.
Garments	Vietnam.
Gold	Democratic Republic of Congo.
Wolframite	Democratic Republic of Congo.

The Department invites public comment on whether these products (and/or other products, regardless of whether they are mentioned in this Notice) should be included or removed from the revised List of products requiring federal contractor certification as to the use of forced or indentured child labor. To the extent possible, comments provided should address the criteria for inclusion of a product on the List contained in the Procedural Guidelines discussed above. The Department is also interested in public comments relating to whether products initially determined to be on the List are designated with appropriate specificity and whether alternative designations would better serve the purposes of EO 13126.

The documents and sources providing the preliminary basis for adding these goods and countries to the List are available on the Internet at *http://www.dol.gov/ILAB/regs/eo13126/main.htm*.

Following receipt and consideration of comments on the additions to the List set out above, the Department of Labor, in consultation and cooperation with the Departments of State and Homeland Security, will issue a final determination in the **Federal Register**. The Department of Labor intends to continue to revise the List periodically to add and/or delete products as warranted by the receipt of new and credible information.

II. Background

On June 12, 1999 President Clinton signed EO 13126, which was published in the **Federal Register** on June 16, 1999 (64 FR 32383). EO 13126 declared that it was ''the policy of the United States Government that the executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part by forced or indentured child labor.'' Pursuant to EO 13126, and following public notice and comment, the Department of Labor published in the January 18, 2001 **Federal Register** a list of products (the ''List''), along with their respective countries of origin, that the Department, in consultation and cooperation with the Departments of State and Treasury (whose relevant responsibilities are now within the Department of Homeland Security), had a reasonable basis to believe might have been mined, produced or manufactured with forced or indentured child labor (66 FR 5353). The Department also published the ''Procedural Guidelines for Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor'' (Procedural Guidelines) on January 18, 2001, which provide procedures for the maintenance, review and, as appropriate, revision of the List (66 FR 5351).

The Procedural Guidelines provide that the List may be revised through consideration of submissions by individuals and on the Department's own initiative. When proposing a revision to the List, the Department of Labor must publish in the **Federal Register** a notice of initial determination, which includes any proposed alteration to the List. The Department will consider all public comments prior to the publication of a final determination of a revised list, which is made in consultation and cooperation with the Departments of State and Homeland Security.

On January 18, 2001, pursuant to Section 3 of the EO 13126, the Federal Acquisition Regulatory Council published a final rule to implement specific provisions of EO 13126 that requires, among other things, that federal contractors who supply products that appear on the List certify to the contracting officer that the contractor, or, in the case of an incorporated contractor, a responsible official of the contractor, has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of forced or indentured child labor. See 48 CFR Subpart 22.15.

On September 11, 2009, the Department of Labor published an initial determination in the **Federal Register** proposing to revise the List to include 29 products from 21 countries. The Notice requested public comments for a period of 90 days. Public comments were received and reviewed by all relevant agencies and a final determination was issued on July 20, 2010.

On December 16, 2010, The Department of Labor published an initial determination in the **Federal Register** proposing to revise the List to add one product to the List and remove one product from the List. The Notice requested public comments for a period of 60 days. Public comments were received and reviewed by all relevant agencies, and a final determination was issued on May 31, 2011 that included all revisions proposed in the initial determination.

On October 4, 2011 DOL published an initial determination in the **Federal Register** proposing to add three products from two countries to the List. The Notice requested public comments for a period of 60 days. Public comments were received and reviewed by all relevant agencies, and a final determination was issued on April 3, 2012 that included all revisions proposed in the initial determination. With this final determination, the List is comprised of 31 products from 23 countries.

The current List and the Procedural Guidelines can be accessed on the Internet at *http://www.dol.gov/ILAB/regs/eo13126/main.htm* or can be obtained from: OCFT, Bureau of International Labor Affairs, Room S–5317, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–4843; fax (202) 693–4830.

III. Definitions

Under Section 6(c) of EO 13126:

''Forced or indentured child labor'' means all work or service—

(1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or

(2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

Signed at Washington, DC, this 17th day of September, 2012.

Carol Pier,

Acting Deputy Undersecretary for International Affairs.

[FR Doc. 2012–23395 Filed 9–26–12; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

164th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 164th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on October 30–31, 2012.

The meeting will take place in C5521 Room 4, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 on October 30, from 1 p.m. to approximately 5 p.m. On October 31, the meeting will start at 8:30 a.m. and conclude at approximately 4 p.m., with a break for lunch. The morning session on October 31 will be in C5521 Room 1. The afternoon session on October 31 will take place in Room S–2508 at the same address. The purpose of the open meeting on October 30 and the morning of October 31 is for the Advisory Council members to finalize the recommendations they will present to the Secretary. At the October 31 afternoon session, the Council members will receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) and present their recommendations.

The Council recommendations will be on the following issues: (1) Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans; (2) Examining Income Replacement During Retirement Years in a Defined Contribution Plan System; and (3) Managing Disability Risks in an Environment of Individual Responsibility. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site at *http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html*.

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before October 22, 2012 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue NW., Washington, DC 20210. Statements also may be submitted as email attachments in text or pdf format transmitted to *good.larry@dol.gov*. It is requested that statements not be included in the body of an email. Statements deemed relevant by the Advisory Council and received on or before October 22 will be included in the record of the meeting and made available in the EBSA Public Disclosure Room. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by October 22, 2012 at the address indicated.

Signed at Washington, DC, this 20th day of September 2012.

Michael L. Davis,

Deputy Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2012–23744 Filed 9–26–12; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection; Pell Grants and the Payment of Unemployment Benefits to Individuals in Approved Training; Extension Without Change

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, ETA is soliciting comments on the renewal of the information collection required for state notification to individuals about the opportunity for Pell Grants and the payment of unemployment benefits to individuals in approved training.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before November 26, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

To enable more individuals to obtain job training while receiving unemployment benefits so they can develop their skills while the economy recovers, states are strongly encouraged to widen their definitions of the types of training and the conditions under which education or training are considered ''approved training'' for purposes of the state's UI law.

States are also encouraged to notify unemployed individuals of their potential eligibility for Pell Grants and to assist individuals with applications. Pell Grants are awarded based on financial need and other factors. Many Unemployment Insurance (UI) beneficiaries are potentially eligible for

Pell Grants, and the Department of Education is currently undertaking a major effort to encourage student financial aid administrators to use the discretion available to them in determining if UI beneficiaries are eligible for Pell Grants. Through information dissemination, the Department is encouraging state UI agencies to notify UI beneficiaries that they may qualify for Pell Grants and to give them information about how to apply. States are strongly encouraged to determine if their approved training requirements are appropriate to the current economy. Post-secondary education and training are increasingly important for success in the job market. Periods of unemployment, particularly in the current economic climate, provide opportunities for laid-off workers to develop new skills, so that employers will benefit from a skilled workforce when the economy recovers. In particular, states are asked to consider approval of courses at community colleges with significant job skills components, courses leading to general equivalency degrees, courses in adult basic education, language courses, or other courses of study, including degree and certificate courses that are likely to increase the individual's long-term employability.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes

Title: Pell Grants and the Payment of Unemployment Benefits to Individuals in Approved Training

OMB Number: 1205–0473

Affected Public: State Workforce Agencies.

Total Respondents: 53

Frequency of Collection: Once per year

Total Responses: 53

Average Time per Respondent: 40 hours

Estimated Total Burden Hours: 2120

Total Annual Costs Burden: $0

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: Signed in Washington, DC, this 20th day of September, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–23810 Filed 9–26–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Veterans' Employment and Training Service

Agency Information Collection Activities; Continued Collection; Comment Request: Vocational Rehabilitation and Employment Tracking Report; Jobs for Veterans State Grant Budget Information Summary; Jobs for Veterans State Grant Expenditure Detail Report; Jobs for Veterans State Grant Staffing Directory; Extension Without Revisions

AGENCY: Veterans' Employment and Training Service, U.S. Department of Labor.

ACTION: Notice.

SUMMARY: The Veterans' Employment and Training Service (VETS) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on five (5) separate collections of information: (1) VETS 201 entitled ''Vocational Rehabilitation and Employment (Chapter 31) Tracking Report'' and identified by VETS ICR No. 1293–0009 and OMB Control No. 1293–0009; (2) VETS 401 entitled ''Jobs for Veterans State Grant Budget Information Summary'' and identified by VETS ICR No. 1293–0009 and OMB Control No. 1293–0009; (3) VETS 402A/B entitled ''Jobs for Veterans State Grant Expenditure Detail Report'' and identified by VETS ICR No. 1293–0009 and OMB Control No. 1293–0009; and (4) VETS 501 entitled ''Jobs for Veterans State Grant Staffing Directory'' and identified by VETS ICR No. 1293–0009 and OMB Control No. 1293–0009. The information collection contained in this notice is an extension without revision. VETS is soliciting comments on the continuation of the approved information collections.

DATES: Submit written or electronic comments on the collection of information by November 26, 2012.

ADDRESSES: Submit comments on this collection of information by any of the following methods:

- *By mail to:* Joel H. Delofsky, Office of National Programs, U.S. Department of Labor, VETS, 230 South Dearborn, Suite 1064, Chicago, Illinois 60604–1777.
- *Electronically to: delofsky.joel@dol.gov.*
- *By fax to:* (312) 353–4943 (not a toll free number).

All comments should be identified with the OMB Control Number 1293–0009. Written comments should be limited to 10 pages or fewer. Receipt of comments will not be acknowledged but the sender may request confirmation that a submission has been received by telephoning VETS at (312) 353–4942 or via fax at (312) 353–4943.

FOR FURTHER INFORMATION CONTACT: Joel H. Delofsky, Office of National Programs, U.S. Department of Labor, VETS, 230 South Dearborn, Suite 1064, Chicago, Illinois 60604–1777, by email at *delofsky.joel@dol.gov* or by phone at (312) 353–4942. Copies of the proposed data collection instruments can be obtained from the contact listed above.

SUPPLEMENTARY INFORMATION:

I. With respect to the continuation of the approved collection of information, VETS is particularly interested in comments on these topics:

(1) Whether the continued collection of information is necessary for the proper performance and oversight of the Jobs for Veterans State Grant, including whether the information will have practical utility;

(2) The accuracy of the VETS' estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on respondents, including through the use

of automated collection techniques, when appropriate and other forms of information technology.

II. Comments are requested on one or more of the following ICRs:

(1) *Title:* Vocational Rehabilitation and Employment (Chapter 31) Tracking Report (VETS 201).

ICR numbers: VETS ICR No. 1293–0009, OMB Control No. 1293–0009.

ICR status: This ICR is for a continued information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for VETS information collections are displayed on the applicable data collection instrument.

Abstract: VETS and the Department of Veterans Affairs Vocational Rehabilitation and Employment (VA VR&E) share a mutual responsibility for the successful readjustment of disabled veterans into the civilian workforce. Since August 1995, the two Federal Agencies have worked together under a Memorandum of Understanding to cooperate and coordinate services provided to veterans and transitioning service members referred to or completing a program of vocational rehabilitation authorized under Title 31, United States Code (hereinafter referred to as the Chapter 31 program).

To help Congress understand the status of new initiatives in the Department of Veterans Affairs, the Government Accountability Office (GAO) conducted a study and released Report Number GAO–07–0120: Disabled Veterans' Employment—Additional Planning, Monitoring, and Data Collection Efforts Would Improve Assistance. One of the findings encouraged the two agencies ''to collect and assess complete information on the progress of the states in implementing the agreement using well-designed and appropriate methodology * * *.''

As a result of the GAO recommendations, a Joint Work Group was formed to establish and standardize processes to ensure disabled veterans participating in the Chapter 31 program achieve the ultimate goal of successful career transition and suitable long-term employment. The Joint Work Group refined processes and strengthened the team approach to serving these disabled veterans. Both Agencies jointly implemented the partnership nationally by issuing a Technical Assistance Guide that included a new data collection instrument.

The Vocational Rehabilitation & Employment (Chapter 31) Tracking Report (VETS 201) is designed to respond to the GAO finding by compiling information on disabled veterans jointly served by the VA, VETS and Jobs for Veterans State Grant recipients. All partners agree to share information exclusively to facilitate job development and placement services for participating veterans. The information is collected only with documented consent from veterans in accordance with the Privacy Act of 1974 and other applicable regulations and each agency will provide practical and appropriate safeguards to protect Personally Identifiable Information in accordance with applicable regulations and laws, including the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973 and reauthorizations, and Title VII of the Civil Rights Act of 1964.

The information is collected by the Jobs for Veterans State grant recipient and submitted to the state Director for Veterans' Employment and Training (DVET) once per Federal fiscal quarter.

(2) *Title:* Jobs for Veterans State Grant Budget Information Summary (VETS 401).

ICR numbers: VETS ICR No. 1293–0009, OMB Control No. 1293–0009.

ICR status: This ICR is for continued information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for VETS information collections are displayed on the applicable data collection instrument.

Abstract: This form is used by Jobs for Veterans State Grant applicants to forecast annual grant spending by subprogram and by Federal fiscal year quarter. The one-page form illustrates a grantee's annual planned costs across the programs funded under the Jobs for Veterans State Grants. The proposed extension of the single form currently in use accommodates forecasted costs for all programs by Object Class Category and cash needs for each program by quarter.

The continued use of this data collection instrument is designed to streamline the collection of data needed and to reduce the current reporting burden on grantees. The information is required to be submitted once per Federal fiscal year as a condition of receiving Jobs for Veterans State Grant funds. Grant recipients are required to submit a revised form to request a modification to their existing grant if the modification affects funding of any program covered by the Jobs for Veterans State Grant.

(3) *Title:* Jobs for Veterans State Grant Expenditure Detail Report (VETS 402A or B).

ICR numbers: VETS ICR No. 1293–0009, OMB Control No. 1293–0009.

ICR status: This ICR is for a continued information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for VETS information collections are displayed on the applicable data collection instrument.

Abstract: 38 U.S.C. 4102A(b)(5) requires the Assistant Secretary of Labor for Veterans' Employment and Training (ASVET) to make funds available to each State to staff and support multiple programs under the Jobs for Veterans State Grant: DVOP, LVER, and Performance Incentive Awards. The ASVET is also legislatively required to monitor and supervise the distribution and use of these funds on a continuing basis.

The Expenditure Detail Report (EDR) (VETS 402A or B) is used by Jobs for Veterans State Grant recipients to detail total expenditures by funding source to supplement the quarterly Federal Financial Report (FFR) which is used to report total grant spending and draw down of funds. To accommodate differences in States' accounting systems, two separate versions of the self-calculating EDR allow States to report either quarterly (VETS 402A) or cumulative expenditures (VETS 402B) each quarter. The EDR (VETS 402A or B) effectively cross-walks to both the FFR and the Jobs for Veterans State Grant Budget Information Summary (VETS 401) that details projected funding needs for each separate program awarded to States through the Jobs for Veterans State Grant.

VETS collects and compiles the EDR (VETS 402A or B) information to effectively monitor the use of Jobs for Veterans State Grant funds for each separate program purpose in accordance with the regulations at Title 29, § 97.41 a.3. The EDR requires States to report total expenditures for each funding source as well as the amounts expended for Personal Services and Personnel Benefits for each program. As a condition of receiving Jobs for Veterans State Grant funds, grantees are required to submit the EDR (VETS 402A or B) once per Federal fiscal quarter, including a fifth quarter if funds are obligated or expended in the quarter following the end of the fiscal year (when authorized in the annual appropriation). Any adjustments needed to reconcile funds reported for that

quarter may be submitted separately in a final VETS 402 report due the following quarter.

(4) *Title:* Jobs for Veterans State Grant Staffing Directory (VETS 501).

ICR numbers: VETS ICR No. 1293–0009, OMB Control No. 1293–0009.

ICR status: This ICR is for a continued information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for VETS information collections are displayed on the applicable data collection instrument.

Abstract: Jobs for Veterans State Grant applicants and grantees use the Jobs for Veterans State Grant Staffing Directory (VETS 501) to satisfy two grant requirements. First, grant applicants satisfy an assurance required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, §§ 85.605 and 85.610 by listing the locations where grant-funded staff will be assigned. Second, grantees fulfill a requirement set forth in 38 U.S.C. Chapter 41 as amended by Section 103(a) of Public Law 111–275 by providing the name, assignment as a DVOP specialist or LVER, assignment as half-time or full-time, and date appointed to current position for all staff funded in whole or in part by the Jobs for Veterans State Grant. As amended, the statute requires each DVOP specialist and LVER to complete specialized training provided by the National Veterans' Training Institute (NVTI) within 18 months of assignment if appointed on or after October 13, 2010.

The proposed data collection instrument is designed to streamline the requirement for staffing information and to minimize the reporting burden on grantees. The information is required to be submitted once per Federal fiscal year as a condition of receiving Jobs for Veterans State Grant funds. Grantees will identify changes to staff assignments, if applicable, for each of the four Federal fiscal quarters and when requesting a modification to their existing grant if the modification affects staffing assignments.

Affected Public: Jobs for Veterans State Grant Applicants/Recipients (54); DVOP specialists and LVER staff (2,034)

Estimated Annual Burden:

(a) VETS 201: 16,000 Hours
(b) VETS 401: 79.5 Hours
(c) VETS 402A/B: 1,168 Hours
(d) VETS 501: 106 Hours

Estimated Average Burden per Respondent:

(a) VETS 201 (Proposed): 2 Hours, Range 1–3 Hours
(b) VETS 401 (Proposed): 1.5 Hours, Range 1–2 Hours
(c) VETS 402A or B (Proposed): 2 Hours, Range 1–3 Hours
(d) VETS 501 (Proposed): 2 Hours, Range 1–3 Hours

Frequency of Response: Annually and/or Quarterly.

Estimated Number of Respondents:

(a) VETS 201: 57
(b) VETS 401: 54
(c) VETS 402A or B: 54
(d) VETS 501: 54

Total Annualized Capital/startup costs: $0.

Total Initial Annual Costs: $0.

Comments submitted in response to this notice will be summarized and included in the agency's request for OMB approval of the information collection request. Comments will become a matter of public record.

Dated in Washington, DC, this 24th day of September 2012.

Ruth M. Samardick,

Director of National Programs.

[FR Doc. 2012–23836 Filed 9–26–12; 8:45 am]

BILLING CODE 4510–79–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67902; File No. SR–NYSEMKT–2012–23]

Self-Regulatory Organizations; NYSE MKT LLC; Order Granting Approval of a Proposed Rule Change Amending the Members' Schedule of NYSE Amex Options LLC in Order To Reflect Changes to the Capital Structure of the Company

September 21, 2012.

I. Introduction

On July 25, 2012, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Members' Schedule (as defined herein) of NYSE Amex Options LLC to reflect changes to the capital structure of the company. The proposed rule change was published for comment in the **Federal Register** on August 7, 2012.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NYSE Amex Options LLC (''Company'') was formed as a joint venture between NYSE MKT [4] and its corporate parent NYSE Euronext, and seven firms, for the purpose of operating an options platform as a facility of NYSE MKT. The seven firms, which are referred to in the joint venture's operating documents as ''Founding Firms,'' are: Banc of America Strategic Investments Corporation (''BAML''), Barclays Electronic Commerce Holdings Inc. (''Barclays''), Citadel Securities LLC (''Citadel''), Citigroup Financial Strategies, Inc. (''Citigroup''), Goldman, Sachs & Co. (''Goldman Sachs''), Datek Online Management Corp. (''TD Ameritrade'') and UBS Americas Inc. (''UBS'').

Collectively, NYSE MKT and the Founding Firms are ''Members'' of the Company. Their respective ownership interests are set forth in a schedule (''Members' Schedule'') to the Company's LLC Agreement, dated as of June 29, 2011.[5] The amount of each Member's ownership is represented by limited liability interests in the Company (''Common Interests''). The LLC Agreement designates two types of Member, Class A Member and Class B Member, and the different classes of Members hold corresponding classes of Interests, *i.e.,* Class A Common Interests and Class B Common Interests. Although both classes of Common Interests entitle Members to some measure of voting and economic entitlements, the two classes of Common Interests are not fungible. Members' voting and economic entitlements are determined by reference to: (1) Each Member's holdings of Common Interests, and (2) the aggregate economic and voting power of the Class A Members relative to the Class B Members.

Under the Members' Schedule attached to the LLC Agreement dated as of June 29, 2011, NYSE MKT was the only Class A Member and therefore the only Member that held Class A Common Interests. The Founding Firms were designated Class B Members, each

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67569 (August 1, 2012), 77 FR 47138.

[4] At the time it entered into the joint venture, NYSE MKT was referred to as NYSE Amex LLC. On May 14, 2012, NYSE Amex LLC filed a proposed rule change under Section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A), to change its name to NYSE MKT LLC. *See* Securities Exchange Act Release No. 67037 (May 21, 2012), 77 FR 31415 (May 25, 2012) (SR–NYSEAmex–2012–32).

[5] In addition to the LLC Agreement, the Company is governed by an agreement among the Members, the Company and NYSE Euronext (''Members Agreement''), also dated as of June 29, 2011.

holding Class B Common Interests. According to this schedule, NYSE MKT owned Class A Common Interests amounting to an equity interest of 47.20% in the Company, while the Founding Firms collectively owned Class B Common Interests amounting to an equity interest of the remaining 52.80% in the Company.

The Exchange proposes to amend the Members' Schedule to reflect changes to the capital structure of the Company based on three transactions that have occurred or will occur since the Commission approved the Exchange's proposal relating to the formation of the Company.[6] The first transaction relates to the admission of NYSE Market, Inc. (''NYSE Market''), an affiliate of NYSE MKT, on September 19, 2011, as a Member with an equity ownership interest in the Company. The second transaction relates to the issuance of additional Common Interests to Class B Members of the Company on February 29, 2012, pursuant to an annual incentive program as set forth in the Members Agreement. The third transaction relates to the expected transfer of Common Interests on or around September 25, 2012, from the Founding Firms to NYSE Market. These transactions are described in greater detail below.

Admission of NYSE Market as a Member

Each Founding Firm has the right, pursuant to Section 3.2 of the Members Agreement and subject to certain conditions and limitations, to cause NYSE MKT (or an affiliate designated by NYSE MKT) to purchase a portion of the Founding Firm's Common Interests. All of the Founding Firms exercised this right on September 19, 2011, thereby causing an aggregate equity interest of 5.28% in the Company to be transferred from the Founding Firms to NYSE Market, the NYSE MKT affiliate that NYSE MKT designated to receive the ownership interest. As a result of the transaction, NYSE MKT continued to own an equity interest of 47.20% in the Company, NYSE Market owned an equity interest of 5.28% in the Company, and the Founding Firms collectively owned the remaining equity interest of 47.52% in the Company.

Several provisions of the LLC Agreement impact the terms of this transfer. Because NYSE Market is an affiliate of NYSE MKT, pursuant to Section 11.2(c) of the LLC Agreement, Common Interests transferred from Founding Firms to NYSE Market automatically convert from Class B Common Interests to Class A Common Interests. Also, under Sections 10.4 and 11.1, upon receiving the transfer of Common Interests and satisfying certain other conditions, and subject to amendment of the Member's Schedule, NYSE Market became a Class A Member of the Company.

NYSE MKT represented that, notwithstanding the transfer of Common Interests to NYSE Market, the Company's governance structure did not change. NYSE MKT continues to appoint a majority (7 of 13) of the Company's Board of Directors, and NYSE Market has no right to appoint a separate director. According to NYSE MKT, this transaction was structured as a transfer of Common Interests to NYSE Market, rather than NYSE MKT, for non-substantive business reasons relating to the corporate structure of NYSE MKT. NYSE MKT also noted that, as a Member, NYSE Market is bound by all of the provisions of the LLC Agreement and the Members Agreement.

Issuance of Annual Incentive Shares

The Members Agreement provides that each year, until 2015, unless extended by the Company's Board of Directors, the Company must issue a specified amount of Annual Incentive Shares to be allocated among eligible Class B Members. Pursuant to Section 2.1 of the Members Agreement, the Company must issue a number of Class B Common Interests equal to 30% of the then-outstanding Class B Common Interests as Annual Incentive Shares, and such shares are to be allocated among Class B Members based on each Class B Member's contribution to the volume of the Exchange relative to volume targets specified for the Members. While the issuance of Annual Incentive Shares may change the relative economic and voting rights of and among Class B Members, by its terms it cannot impact the aggregate economic and voting rights of Class B Members in relation to Class A Members.

On February 29, 2012, the Company issued a total of 14.2560 Annual Incentive Shares to the Founding Firms. Because each Founding Firm achieved or exceeded its specified volume target, each Founding Firm's economic and voting interests remained the same in relation to the other Class B Members. The Exchange proposes to amend the Members' Schedule to reflect this issuance of Class B Common Interests.

Expected Transfer From Founding Firms to NYSE Market

Article XI of the LLC Agreement and Section 3.1 of the Members Agreement provide that a Member may transfer Common Interests to another Member or to a third party in accordance with the conditions and limitations set forth therein. In its proposal, NYSE MKT noted that the Founding Firms collectively intend to transfer an aggregate equity interest of 5.28% in the Company to NYSE Market. As with the first transaction noted above, the Founding Firms' Class B Common Interests will automatically convert to Class A Common Interests upon their transfer to NYSE Market. As a result of this transfer, NYSE MKT will continue to own an equity interest of 47.20% in the Company, NYSE Market will own an equity interest of 10.56% in the Company, and the Founding Firms, collectively, will own the remaining equity interest of 42.24% in the Company. The Exchange proposes, upon consummation of this transfer by the Founding Firms, to amend the Members' Schedule to reflect this transfer.

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,[8] which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations promulgated thereunder, and the rules of the Exchange.

The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in

[6] *See* Securities Exchange Act Release No. 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011).

[7] In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78(f)(b)(1).

[9] 15 U.S.C. 78(f)(b)(5).

regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

As the Commission noted when it approved the Exchange's proposal relating to the formation of the Company, while the Company does not carry out any regulatory functions, all of its activities must be consistent with the Act.[10] The Company's LLC Agreement and Members Agreement must be reasonably designed to enable the Company to operate in a manner that is consistent with the principle that the Company is not solely a commercial enterprise, but rather an integral part of an SRO that is registered pursuant to the Act and therefore subject to obligations imposed by the Act.[11] In addition, under Section 4.9 of the LLC Agreement, because the transactions described in the proposal result in NYSE Market, a ''Permitted Transferee'' of NYSE MKT,[12] together with NYSE MKT, owning more than 19.9% of outstanding Common Interests, the transfer and corresponding amendment to the Member's Schedule are subject to receipt of Commission approval pursuant to the rule filing process under Section 19(b) of the Exchange Act.

The Commission notes that the addition of NYSE Market as a Member of the Company, and the proposed amendments to the Members' Schedule to reflect the changes in ownership interest percentages as a result of the three transactions described above, do not significantly alter the governance structure of the Company. The result of the three transactions is to increase the equity ownership interest in the Company of NYSE MKT, together with its affiliate NYSE Market, from 47.20% of the Company to 57.76% of the Company and add NYSE Market as a Member of the Company. The Commission notes that, NYSE Market, as a new Member of the Company, is subject to, and bound by, all provisions of the LLC Agreement and Members Agreement. The Commission notes further that the provisions in the LLC Agreement and Members Agreement that are designed to preserve the independence of the Exchange's regulatory functions and its ability to fulfill the Exchange's regulatory oversight obligations are unaffected by the proposed rule change.

For the reasons discussed above, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–NYSEMKT–2012–23) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23763 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

[10] *See supra* note 6, 76 FR at 38439.

[11] *See id.*

[12] ''Permitted Transferee'' is defined in Sections 1.1 and 11.4(a) of the LLC Agreement.

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67905; File No. SR–BATS–2012–038]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

September 21, 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 September 10, 2012, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change 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 the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the ''Options Pricing'' section of its fee schedule effective September 10, 2012, in order to modify pricing related to executions that occur on the NASDAQ Options Market (''NOM''). NOM implemented certain pricing changes effective September 4, 2012,[6] including: (i) Modification of the fee charged to participants classified by NOM as professionals, customers and market makers to remove liquidity in penny pilot options, and (ii) the adoption of specific fees for NOM ''Specified Symbols,'' as described below. In order to maintain routing fees that approximate the routing costs to NOM, the Exchange proposes to modify pricing for Professional,[7] Firm, and Market Maker[8] orders routed to NOM in non-Specified Symbols and to adopt pricing for orders routed to NOM in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] *See* Nasdaq Options Trader Alert #2012–54, *NOM and PHLX Update Pricing, Effective September 4, 2012* (August 31, 2012) (the ''NOM Notice'').

[7] The term ''Professional'' is defined in Exchange Rule 16.1 to mean any person or entity that (A) is not a broker or dealer in securities, and (B) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[8] As defined on the Exchange's fee schedule, the terms ''Firm'' and ''Market Maker'' apply to any transaction identified by a member for clearing in the Firm or Market Maker range, respectively, at the Options Clearing Corporation (''OCC'').

Specified Symbols. In addition to these changes, the Exchange also proposes renumbering a footnote associated with Physical Connection Charges from 8 to 9.

The Exchange currently charges certain flat rates for routing to other options exchanges that have been placed into three groups based on the approximate cost of routing to such venues. The grouping of away options exchanges is based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (i.e., clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, ''Routing Costs''). For routing to options exchanges in the Exchange's highest price grouping, the Exchange currently assesses fees of $0.50 per contract for Customer orders and $0.55 per contract for orders on behalf of all other participants. With the recent change by NOM to charge non-Customer executions a rate of $0.47 per contract for penny pilot options, the Exchange believes NOM no longer fits in this category. This is due, in part, to the fact that NOM charges $0.50 per contract for non-Customer orders in non-penny pilot options, and the Exchange incurs various Routing Costs in addition to this fee. Accordingly, the Exchange proposes to adopt a new category for NOM under which it will charge a fee of $0.57 per contract for Professional, Firm, or Market Maker orders routed to and executed at NOM in options other than Specified Symbols, which are described in further detail below. This fee will help the Exchange to recoup clearing and transaction charges incurred by the Exchange, as well as other Routing Costs, in connection with routing to NOM.

NOM also recently implemented specific fees for options on specified securities that the Exchange proposes to identify as ''NOM Specified Symbols.'' [9] Such NOM Specified Symbols, as announced by NOM, will originally include options on Facebook (''FB''), Google (''GOOG'') and Groupon (''GRPN''). As announced by NOM, the fee to remove liquidity in NOM Specified Symbols is $0.79 per contract for NOM customer and NOM market maker orders and $0.85 per contract for all other participant capacities. As noted above, the Exchange generally imposes routing fees that approximate the fee to remove liquidity from other options exchanges as well as associated Routing Costs. Accordingly, the Exchange proposes to charge $0.90 for Customer orders and $0.95 for Professional, Firm, or Market Maker orders routed to and executed at NOM in Specified Symbols. In addition, the Exchange currently charges a flat fee of $0.60 per contract for any Directed ISO routed to any options exchange. In order to cover the cost of removing liquidity in Specified Symbols at NOM, including Routing Costs, the Exchange proposes to charge $0.95 per contract for Directed ISOs to NOM in NOM Specified Symbols.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[10] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[11] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive.

The Exchange believes that the proposed modifications to routing fees applicable for orders routed to and executed at NOM is fair, equitable and reasonable because the fees are an approximation of the cost to the Exchange for routing orders to NOM. The Exchange believes that its flat fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at groups of away options exchanges. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for orders routed to and executed at NOM. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to NOM. Specifically, the Exchange believes that the proposed routing fees will enable the Exchange to recover the remove fees assessed for the Exchange's routing to NOM, plus other Routing Costs associated with the execution of orders that have been routed to NOM. The Exchange also believes that its increase to fees for Directed ISO's to NOM in Specified Symbols to $0.95 per contract (from the current charge of $0.60 per contract for all other Directed ISO's) is fair, equitable and reasonable because the fees are also an approximation of the cost to the Exchange for routing orders to NOM in Specified Symbols. The Exchange also believes that the proposed fee structure for orders routed to and executed at NOM, including Directed ISOs in Specified Symbols, is not unreasonably discriminatory, again, because it is based on and intended to approximate the cost of routing to NOM.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the change to routing fees will assist the Exchange in recouping costs for routing orders to NOM on behalf of its participants, and absent such change, the Exchange would be subsidizing routing to NOM by Exchange participants. The Exchange also notes that Users may choose to mark their orders as ineligible for routing to avoid incurring routing fees.[12]

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act[13] and Rule 19b–4(f)(2) thereunder,[14] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

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

[9] *See* NOM Notice, supra note 4 [sic].

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] *See* BATS Rule 21.1(d)(8) (describing ''BATS Only'' orders for BATS Options) and BATS Rule 21.9(a)(1) (describing the BATS Options routing process, which requires orders to be designated as available for routing).

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f)(2).

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–BATS–2012–038 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–BATS–2012–038.* 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–BATS–2012–038* and should be submitted on or before October 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23765 Filed 9–26–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67908; File No. SR–MSRB–2012–06]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change To Amend Rule G–34 on CUSIP Numbers, New Issue, and Market Information Requirements

September 21, 2012.

I. Introduction

On June 28, 2012, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change consisting of amendments to Rule G–34 on CUSIP numbers, new issue, and market information requirements. The proposed rule change was published for comment in the **Federal Register** on July 10, 2012.[3] The Commission received three comment letters regarding the proposed rule change.[4] On August 23, 2012, the MSRB granted an extension of time for the Commission to act on the filing until September 14, 2012. On September 11, 2012, the MSRB granted a second extension of time until September 21, 2012. On September 17, 2012, the MSRB submitted a response to the comment letters.[5] This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The MSRB proposes to add new subsection (iv) to Rule G–34(a) to prohibit any broker, dealer, or municipal securities dealer from using the term ''not reoffered'' or other comparable term or designation (*e.g.,* ''NRO'') without also including the applicable price or yield information about the securities in any of its written communications, electronic or otherwise, sent by it or on its behalf from and after the time of initial award of a new issue of municipal securities.[6] For purposes of MSRB Rule G–34(a)(iv), the ''time of initial award'' means the earlier of (A) the ''Time of Formal Award'' as defined in MSRB Rule G–34(a)(ii)(C)(1)(a),[7] or (B) if applicable, the time at which the issuer initially accepts the terms of a new issue of municipal securities subject to subsequent formal award. The prohibition would not apply to communications occurring prior to the time of initial award of a new issue of municipal securities.[8] According to the MSRB, the proposed rule change will prohibit certain communications that hinder price and market transparency, as well as facilitate new issue price discovery.[9]

MSRB Rules G–32 and G–34 set forth the reporting requirements for new issues of municipal securities. MSRB Rule G–32 requires underwriters to submit to the MSRB's Electronic Municipal Market Access (''EMMA®'') system certain information about the new issue, including the initial offering price or yield of all maturities, on or prior to the date of first execution.[10] This information becomes available to the public on the EMMA Web site and to information vendors and other market participants through subscription services immediately upon submission

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67344 (July 3, 2012), 77 FR 40668 (''Notice'').

[4] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Susan Gaffney, Director, Federal Liaison Center, Government Finance Officers Association, dated August 7, 2012 (''GFOA Letter''); and Web comments from Arthur Sinkler, dated July 8, 2012 (''Sinkler Letter''); and Shelly Frank, dated July 10, 2012 (''Frank Letter''). The comments received by the Commission are available at *http://www.sec.gov/comments/sr-msrb-2012–06/msrb201206.shtml.*

[5] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Karen Du Brul, Associate General Counsel, MSRB, dated September 17, 2002 (''MSRB's Response'').

[6] *See* Proposed MSRB Rule G–34(a)(iv).

[7] MSRB Rule G–34(a)(ii)(C)(1)(a) defines ''Time of Formal Award'' as ''for competitive issues, the later of the time the issuer announces the award or the time the issuer notifies the underwriter of the award, and for negotiated issues, the later of the time the contract to purchase the securities from the issuer is executed or the time the issuer notifies the underwriter of its execution.''

[8] *See* Notice, *supra* note 3, at 40668. The MSRB also proposes to delete existing subsection (e)(iii) of MSRB Rule G–34, which includes provisions for compliance by dealers with certain registration and testing requirements previously applicable with respect to the start-up phase in 2008 of the New Issue Information Dissemination System (''NIIDS'') operated by the Depository Trust and Clearing Corporation (''DTCC''). The MSRB believes this amendment will streamline Rule G–34 by eliminating language from the Rule that no longer has any effect. *See id.* at 40669.

[9] *See id.* at 40669.

[10] *See* MSRB Rule G–32(b)(vi)(C)(1)(a).

and typically by the end of the date of first execution.[11] MSRB Rule G–34 requires underwriters, with certain exceptions, to report to NIIDS certain information about new issues of municipal securities within two hours following the Time of Formal Award,[12] including the initial price or yield at which each maturity of the new issue of municipal securities was sold.[13]

While MSRB Rules G–32 and G–34 require underwriters to provide initial offering price or yield for all maturities, including those that are not reoffered, and prohibit underwriters from using the designation of NRO in their submissions, the rules do not prevent underwriters or other parties acting on the underwriters' behalf from substituting the designation of NRO for the initial offering price or yield for applicable maturities when sending information regarding a new issue directly to third-party vendors.[14] According to the MSRB, the proposed rule change would result in information about the initial offering prices or yields for NRO maturities being included in any communication to or from third-party venders from and after the time of initial award.[15]

III. Summary of Comments Received and the MSRB's Response

The Commission received three comment letters on the proposed rule change.[16] One commenter generally supported the proposed rule change but stated that underwriters should be required to provide yield information.[17] The other two commenters raised issues that were not directly on point with the subject of the proposed rule change. Accordingly, the concerns raised in those comment letters are not addressed here.[18]

As stated above, one commenter opined that there should be mandatory reporting of yield data.[19] The commenter reasoned that reporting just the maturity's price data requires issuers and investors to calculate the corresponding yield, which makes the information less useful to issuers and investors.[20] According to the commenter, the MSRB would take positive steps toward transparency and a more efficient market by requiring yield data.[21]

In its response, the MSRB stated that it is not requiring yield, rather than price or yield, because such a stipulation would create an inconsistency with other MSRB rules and the MSRB's information systems.[22] The MSRB stated that it would be inconsistent to require yield when underwriters voluntarily provide such information to the public but permit price *or* yield when underwriters provide such information pursuant to mandatory reporting requirements, including submissions to EMMA and NIIDS, in connection with new issue underwritings or on customer confirmations.[23] The MSRB acknowledged the value of having both price and yield data available for investors and also stated that, in the context of the MSRB's existing process outlined in its Long-Range Plan for Market Transparency Products (''MSRB Long-Range Plan''),[24] it would consider as a potential next step whether to undertake a more universal approach to price and yield information for new issues of municipal securities.[25]

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, as well as the comment letters received and the MSRB's response, and finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.[26] In particular, the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act, which provides that the MSRB's rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.[27]

The Commission believes that the proposed rule change is reasonably designed to remove impediments to and perfect the mechanism of a free and open market in municipal securities by prohibiting certain communications that hinder price and market transparency and by facilitating new issue price discovery. The proposed rule change would require underwriters to include the initial offering price or yield in any written communication it sends to any party from and after the time of initial award, including for those maturities that are not reoffered. Although MSRB Rules G–32 and G–34 require the initial offering price or yield for all maturities, including those that are not reoffered, and prohibit underwriters from using the designation of NRO in their submissions, this information may not be readily available until the end of the date of first execution. Accordingly, the Commission believes the proposed rule change should cause issuers, investors, and other market participants to receive more timely information about initial offering prices or yields (*i.e.,* prior to the submission deadlines of MSRB Rules G–32 and G–34). This should aid issuers in pricing their own same-day transactions and benefit investors and other market participants seeking more contemporaneous price information.

The Commission also believes the proposed rule change could reduce pricing inefficiencies in the municipal securities market by providing timelier price or yield information to a larger universe of market participants. Currently, market participants have different levels of access to price or

[11] *See* Notice, *supra* note 3, at 40669. In addition, while MSRB Rule G–14 requires dealers, with limited exceptions, to report the actual prices at which municipal securities are sold to the MSRB's Real-time Transaction Reporting System within 15 minutes of the time of trade, in many cases initial trades by syndicate or selling group members executed on the first day of trading at the published list offering price may be reported by the end of the day. *See id.* at 40669 n.4.

[12] *See supra* note 7.

[13] *See* MSRB Rule G–34(a)(ii)(C). DTCC disseminates this information to its subscribers, including market participants and information vendors, upon submission by underwriters for dissemination, typically within two hours following the Time of Formal Award. *See* Notice, *supra* note 3, at 40669.

[14] *See id.* at 40669. Third-party vendors may then disseminate the new issue information, including the NRO designation without accompanying initial offering price or yield, to their subscribers shortly after receipt, and frequently before the complete initial offering price or yield information becomes available through NIIDS or the EMMA system. *See id.*

[15] *See id.*

[16] *See supra* note 4.

[17] *See* GFOA Letter.

[18] For instance, the Frank and Sinkler Letters, as well as the GFOA Letter, stated that the timeframe for submitting pricing information should be shorter. Moreover, the Frank and Sinkler Letters encouraged release of scales before the pricing of a new issue is final and for retail investors to be able to purchase municipal securities at the issue price. Although the comments are not addressed here, those comments, as well as the MSRB's Response, are available at *http://www.sec.gov/comments/sr-msrb-2012-06/msrb201206.shtml.*

[19] *See* GFOA Letter.

[20] *See id.*

[21] *See id.*

[22] *See* MSRB Letter at 2.

[23] *See id.*

[24] *See* MSRB Notice 2012–06 (February 23, 2012).

[25] *See* MSRB Letter at 2, 3.

[26] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[27] 15 U.S.C. 78*o*–4(b)(2)(C).

yield information about new issues of municipal securities, which could contribute to differences in prices for similar securities. The Commission believes price transparency is vital for assuring that markets are fair and efficient, and that the proposed rule change should help enhance price transparency and lead to greater price discovery in the primary market.[28]

With respect to the comment that reporting of yield data should be mandatory, the Commission recognizes that other MSRB rules do not require reporting of yield, but rather allow reporting of yield *or* price, and that requiring yield in the context of voluntary submissions in the instant proposed rule change would be inconsistent with existing mandatory reporting requirements under other MSRB rules. The Commission, however, notes that the MSRB has acknowledged the value of having both price and yield data available to investors and understands that, in connection with the MSRB's Long-Range Plan, it would consider a more universal approach to reporting of price and yield information for new issues of municipal securities.[29]

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB and, in particular, Section 15B(b)(2)(C)[30] of the Exchange Act. The proposal will become effective on the first calendar day of the next succeeding month beginning at least twenty-eight calendar days after the date of the Commission's order approving the proposed rule change.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[31] that the proposed rule change (SR–MSRB–2012–06) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23767 Filed 9–26–12; 8:45 am]

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[28] The Commission also believes that the MSRB's proposal to delete existing subsection (e)(iii) of MSRB Rule G–34 is consistent with the Act as it would eliminate language from the Rule that no longer has any effect.

[29] *See* Notice, *supra* note 3, at 20670. *See also* MSRB's Response at 2, 3.

[30] 15 U.S.C. 78*o*–4(b)(2)(C).

[31] 15 U.S.C. 78s(b)(2).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67910; File No. SR–EDGX–2012–42]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 13.9

September 21, 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 September 19, 2012, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 is filing with the Commission a proposed rule change to amend Rule 13.9, which provides a new market data product to Members[3] and non-Members of the Exchange. The text of the proposed rule change is available on the Exchange's 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 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

In SR–EDGX–2012–37 (the ''Filing''),[4] the Exchange introduced a new market data product, Edge Routed Liquidity Report (''Edge Routed Liquidity Report'' or the ''Service'') to Members and non-Members of the Exchange (collectively referred to as ''Subscribers''). The Edge Routed Liquidity Report is a data feed that contains historical order information for orders routed to away destinations by the Exchange. The Filing stated that Edge Routed Liquidity Report is offered as either a standard report (the ''Standard Report'') or a premium report (the ''Premium Report'') (the Standard Report and the Premium Report shall be collectively referred to as the ''Reports'').

The purpose of this proposed rule change is to amend Rule 13.9 to provide additional information regarding the features of the Standard Report and the Premium Report. The Filing noted that both the Standard Report and the Premium Report provide a view of all marketable orders that are routed to away destinations by the Exchange. The Reports are available to the Subscribers on the morning of the following trading day (T + 1) and include limit price, routed quantity, symbol, side (bid/offer), time of routing, and the National Best Bid and Offer (NBBO) at the time of routing.

However, [the] Premium Report also identifies various categories of routing destinations. First, the Premium Report identifies whether the routing destination is either directed to a destination that is not an exchange (''Non-Exchange Destination'') or directed to another exchange. If the order is routed to a Non-Exchange Destination, the Premium Report will then also specify one of the following Non-Exchange Destination categories: Regular, Fast, Superfast and Midpoint (collectively, the ''Categories''). The Category is determined by the applicable routing strategy associated with the relevant order, based on responsiveness of the destination (i.e. latency), number of destinations, and/or type of execution (i.e. midpoint). For example, a routing strategy that leverages many dark pools for low-cost, low impact executions, which takes a greater amount of time to fill an order may be categorized as ''Regular'' in the

[4] Securities Exchange Act Release No. 67766 (August 31, 2012), 77 FR 55251 (September 7, 2012) (SR–EDGX–2012–37).

Premium Report, whereas a destination specific strategy that has fewer Non-Exchange Destinations and responds more quickly may be categorized as ''Superfast'' in the Premium Report. Notwithstanding the foregoing, the Premium Report will not identify the specific destination.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act[6] in particular, which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of an additional market data feed, which will provide market participants with the opportunity to obtain additional data in furtherance of their investment decisions. The proposed rule change will contribute to providing such additional information and afford Subscribers transparency by categorizing routed liquidity to various Non-Exchange Destinations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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 its Members or other interested parties.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

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)[7] of the Act and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)(iii)[10] 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. The Exchange notes that waiver of these requirements will allow the Exchange to offer the Edge Routed Liquidity Report, with the revised and clarified distinction of the features available in each of the Reports, on or about the Filing's operative date. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would immediately provide additional information necessary for the operation of the Exchange's rules regarding the Edge Routed Liquidity Report. For this reason, the Commission designates the proposed rule change to be operative upon the operative date of the Filing.[11]

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.

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 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. The Exchange has satisfied this requirement.

[10] *Id.*

[11] For the 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).

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–2012–42 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2012–42. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2012–42 and should be submitted on or before October 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23769 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67906; File No. SR–OCC–2012–14]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice Relating to the Clearance and Settlement of Over-the-Counter Options

September 21, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4(n)(1)(i),[2] notice is hereby given that on August 30, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the advance notice described in Items I, II, and III below, which Items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The proposed changes contained in the advance notice will permit OCC to provide central clearing of index options on the S&P 500 that are negotiated bilaterally in the over-the-counter market and submitted to OCC for clearance.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. 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 these statements.[3]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

The purpose of this proposed rule change and advance notice is to allow OCC to provide central clearing of OTC index options on the S&P 500 Index. The proposed rule change replaces a previously proposed rule change which was withdrawn by OCC.[4] OCC will clear the proposed OTC options in a manner that is highly similar to the manner in which it clears listed options, with only such modifications as are appropriate to reflect the unique characteristics of OTC options.

OTC Options

OCC has entered into a license agreement with Standard & Poor's Financial Services LLC (''S&P'') that allows OCC to clear OTC options on three equity indices published by the S&P: the S&P 500 Index, the S&P MidCap 400 Index and the S&P Small Cap 600 Index. The initial OTC options to be cleared by OCC will consist of options on the S&P 500 Index. OCC may clear OTC options on other indices and on individual equity securities in the future, subject to Commission approval of one or more additional rule filings. The current rule filing defines ''OTC option'' and ''OTC index option'' generically in order to simplify future amendments to provide for additional underlying interests. OTC options will have predominantly common terms and characteristics, but also include unique terms negotiated by the parties. Transactions in OTC options will not be executed through the facilities of any exchange, but will instead be entered into bilaterally and submitted to OCC for clearance through one or more providers of trade affirmation services.[5]

OTC options will be similar to exchange-traded standardized equity index options called ''FLEX Options'' that are currently traded on certain options exchanges.[6] FLEX Options are exchange-traded put and call options that allow for customization of certain terms. For example, FLEX index Options traded on the Chicago Board Options Exchange have six customizable terms: (1) Underlying index, (2) put or call, (3) expiration date, (4) exercise price, (5) American or European exercise style, and (6) method of calculating settlement value. OCC is the issuer and guarantor of FLEX Options and clears FLEX Options traded on multiple exchanges.

Similar to FLEX Options, OTC options will allow for customization of a limited number of variable terms with a specified range of values that may be assigned to each as agreed between the buyer and seller. Parties submitting transactions in OTC options for clearing by OCC will be able to customize six discrete terms: (1) Underlying index;[7] (2) put or call; (3) exercise price; (4) expiration date; (5) American or European exercise style; and (6) method of calculating exercise settlement value on the expiration date.[8] The variable terms and permitted values will be specified in the proposed Section 6 of Article XVII of the By-Laws. With respect to future OTC options accepted for clearing, OCC intends that such future OTC options will conform to the general variable terms and limits on the variable terms set forth in proposed Section 6 of the By-Laws, and will either amend the Interpretations and Policies thereunder to specify additional requirements for specific OTC options or publish such requirements on OCC's Web site.

Clearing of OTC Options

OCC proposes to clear OTC options subject to the same basic rules and procedures used for the clearance of listed index options. The proposed rules require that the counterparties to the OTC options must be eligible contract participants (''ECPs''), as defined in Section 3a(65) of the Securities Exchange Act of 1934,[9] as amended (the ''Exchange Act'') and Section 1a(18) of the Commodity Exchange Act,[10] as amended (the ''CEA''). Because an OTC option will be a ''security'' as defined in

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4(n)(i).

[3] The Commission has modified the text of the summaries prepared by OCC.

[4] Securities Exchange Act Release No. 34–66090 (January 3, 2012), 77 FR 1107 (January 9, 2012) (SR–OCC–2011–19).

[5] The initial provider of the trade affirmation services in connection with the OTC options will be MarkitSERV.

[6] Note that FINRA Rule 2360(a)(16) refers to FLEX Options as ''FLEX Equity Options,'' which it defines as ''any options contract issued, or subject to issuance by, The Options Clearing Corporation whereby the parties to the transaction have the ability to negotiate the terms of the contract consistent with the rules of the exchange on which the options contract is traded.'' OCC does not believe this definition would capture OTC options as they are not traded on any exchange. Nevertheless, as discussed below, OCC is working with FINRA to amend certain of FINRA's rules to clarify the proper application of such rules to OTC options.

[7] Initially, however, the S&P 500 Index will be the only permitted underlying index.

[8] The expiration date of an OTC option must fall on a business day. The method of determining the exercise settlement value of an OTC option on its expiration date may be either the opening settlement value or the closing settlement value of the underlying index (calculated by S&P using the opening or closing price, as applicable, in the primary market of each component security of the underlying index on the specified expiration date), in each case as reported to OCC by CBOE.

[9] 15 U.S.C. 78c(a)(65).

[10] 7 U.S.C. 1a(18).

the Exchange Act, the proposed rules also require that the transactions be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or one of the small number of clearing members that are ''non-U.S. securities firms'' as defined in OCC's By-Laws. OCC is not proposing to require clearing members to meet any different financial standards for clearing OTC options. However, clearing members must be specifically approved by OCC to clear OTC options pursuant to new Interpretation and Policy .11 to Section 1 of Article V in order to assure the operational readiness of such clearing members to clear OTC options. Clearing members seeking to clear OTC options will be required to submit a business expansion request and complete an operational review. The operational review consists of an initial meeting with the clearing member's staff to evaluate the staff's experience, confirm the staff's familiarity with current OCC systems and procedures, complete an operational questionnaire, perform a high level review of the clearing member's systems and processing capabilities, and review other pertinent operational information. Successful testing of messaging capability between the clearing member, MarkitSERV and OCC is also necessary. These procedures will determine whether the firm is operationally ready to clear OTC Index Options.

Exercise of an OTC option will be settled by payment of cash by the assigned writer and to the exercising holder through OCC's cash settlement system on the business day following exercise in exactly the same manner as is the case with exercise settlement of listed index options. As in the case of listed index options, the exercise-settlement amount will be equal to the difference between the current value of the underlying interest and the exercise price of the OTC option, times the multiplier that determines the size of the OTC option. In the case of OTC index options on the S&P 500, the multiplier will be fixed at 1. The multipliers for additional OTC index options that OCC may in the future clear may be fixed at such value as OCC determines and provides for in its By-Laws and Rules.

OCC will calculate clearing margin for the OTC options using its STANS margin system on the same basis as for listed index options and will otherwise apply the same risk management practices to both OTC options and listed index options, including new risk modeling enhancements for longer-tenor options discussed below under ''Risk Management Enhancement for Longer-Tenor Options.'' Because OCC currently clears listed options on all three of the underlying indexes on which OCC is currently licensed to clear OTC options, and because the customizable terms of these OTC options are relatively limited and the range of values that customizable terms may be given is limited, OCC does not believe that valuation and risk management for these OTC options present challenges that are different from those faced in the listed options market. Nevertheless, as discussed further below, OCC is proposing special OTC Options Auctions to be used in the unlikely event that OCC would be unable to close out positions in OTC options of a failed clearing member through other means.

OTC options may be carried in a clearing member's firm account, in market-maker accounts or in its securities customers' account, as applicable. Although customer positions in OTC options will be carried in the securities customers' account (an omnibus account), OCC will use a ''customer ID'' to identify positions of individual customers based on information provided by clearing members.[11] However, positions are not presently intended to be carried in individual customer sub-accounts, and positions in OTC options will be margined at OCC in the omnibus customers' account on the same basis as listed options. If a clearing member takes the other side of a transaction with its customer in an OTC option, the transaction will result in the creation of a long or short position (as applicable) in the clearing member's customers' account and the opposite short or long position in the clearing member's firm account. The positions could also be includable in the internal cross-margining account, subject to any necessary regulatory approvals.

The trade data for an OTC option trade will be entered into the system of MarkitSERV or another trade confirmation/affirmation vendor approved by OCC for this purpose (the ''OTC Trade Source'').[12] While MarkitSERV will be the only OTC Trade Source at launch, OCC will permit additional OTC Trade Sources in the future in response to sufficient market demand from OCC's clearing members and subject to the ability of any such OTC Trade Source to meet OCC's requirements for operational readiness and interoperability with OCC's systems, as well as requirements with respect to relevant business experience and reputation, adequate personnel and expertise, financial qualification and such other factors as OCC deems relevant. OCC will receive confirmed trades from the OTC Trade Source. It will be permissible for parties to submit trades for clearance that were entered into bilaterally at any time in the past, provided that the eligibility for clearance will be determined as of the date the trade is submitted to OCC for clearance.[13] The OTC Trade Source will process the trade and submit it as a confirmed trade to OCC for clearing. If the trade meets OCC's validation requirements, OCC will so notify the OTC Trade Source, which will notify the submitting parties. Customers of clearing members may have direct access to the OTC Trade Source for purposes of entering or affirming trade data and receiving communications regarding the status of transactions, in which case mechanisms will be put in place for a clearing member to authorize a customer to enter a trade for the clearing member's customers' account or for the clearing member to affirm a trade once entered.

In order for a clearing member to be approved for clearing OTC options, the clearing member must enter into a standard agreement with MarkitSERV (or another OTC Trade Source with which the clearing member intends to enter trade data, if and when OCC enters into arrangements with other OTC Trade Sources). At launch, OTC options will not be subject to the same clearing member trade assignment rules and procedures through which exchange-traded options can be cleared by a clearing member other than the executing clearing member. This functionality may be added at a later date. OCC and MarkitSERV will adopt procedures to permit a customer that

[11] Such customer IDs are necessary in order to allow OCC to comply with certain terms of OCC's license agreement with S&P. As described further below, customer IDs will be used for other purposes as well.

[12] MarkitSERV, LLC is owned by Markit Group Limited, Markit Group Holdings Limited and The Depository Trust & Clearing Corporation. MarkitSERV Limited is a wholly-owned U.K. subsidiary of MarkitSERV, LLC. MarkitSERV, LLC and MarkitSERV Limited (collectively, ''MarkitSERV'') provide derivatives transaction processing, electronic confirmation, portfolio reconciliation services, and other related services for firms that conduct business in the over-the-counter derivatives markets through a variety of electronic systems, including the MarkitWire system. MarkitWire, owned by MarkitSERV Limited, is an OTC derivatives electronic confirmation/affirmation service offered by MarkitSERV as part of its post-trade processing suite of products. The role of MarkitSERV and MarkitWire in OCC's clearing of OTC options is described in further detail below.

[13] OCC's license agreement with S&P imposes certain requirements relating to minimum time remaining to expiration of an OTC option.

has an account with Clearing Member A (''CM A'') to enter into an OTC option transaction with Clearing Member B (''CM B'') and have the position included in its account at CM A and cleared in CM A's customers' account at OCC.

OTC options will be fungible with each other to the extent that there are OTC options in the system with identical terms. However, OCC will not treat OTC options as fungible with index options listed on any exchange, even if an OTC option has terms identical to the terms of the exchange-listed option.

Clearing members that carry customer positions in cleared OTC options will be subject to all OCC rules governing OCC-cleared options generally, as well as all applicable rules of the Commission and of any self-regulatory organization, including the Financial Industry Regulatory Authority (''FINRA''), of which they are a member. Section 8 of Article III of OCC's By-Laws provides that, subject to the By-Laws and Rules, ''the Board of Directors may suspend Clearing Members and may prescribe and impose penalties for the violation of the By-Laws or the Rules of the Corporation, and it may, by Rule or otherwise, establish all disciplinary procedures applicable to Clearing Members and their partners, officers, directors and employees.'' As a condition to admission, Section 3(c) of Article V of the By-Laws provides that a clearing member must agree, among other things, to ''pay such fines as may be imposed on it in accordance with the By-Laws and Rules.'' Rule 305 permits OCC to impose restrictions on the clearing activities of a clearing member if it finds that the financial or operational condition of the clearing member makes it necessary or advisable to do so for the protection of OCC, other clearing members, or the general public. Rule 1201(a) provides that OCC ''may censure, suspend, expel or limit the activities, functions or operations of any Clearing Member for any violation of the By-Laws and Rules or its agreements with the Corporation.'' In addition to, or in lieu of, such actions, OCC is permitted under the same paragraph to impose fines. Rule 1202(b) establishes procedures for taking any such disciplinary actions. The foregoing provisions are sufficient to permit OCC to fine or otherwise discipline a clearing member that fails to abide by OCC's By-Laws and Rules applicable to OTC options, or to prohibit such clearing member from continuing to clear such options.

Regulatory Status of the OTC Options

An OTC option will be a ''security'' as defined in both the Securities Act of 1933, as amended (the ''Securities Act'') and, as noted above, the Exchange Act. OCC will be the ''issuer'' of the OTC options. The OTC options will be neither ''swaps'' nor ''security-based swaps'' for purposes of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank'').[14]

Most of OCC's clearing members are members of FINRA and subject to FINRA's rules, which have different provisions for ''listed'' and ''OTC options'' and contain various definitions distinguishing between the two. In some cases, OTC options would fall into neither category under FINRA's definitions and in other cases, they would fall within what OCC perceives to be the wrong category. FINRA and OCC are working together to implement appropriate amendments to FINRA rules to clarify the proper application of such rules to cleared OTC options.

MarkitSERV Trade Submission Mechanics

MarkitSERV provides an interface to OCC that allows OCC to receive messages containing details of transactions in OTC options submitted for clearing by clearing members with access to MarketWire and also allows OCC to transmit messages to MarkitWire participants identifying the status of submitted transactions. MarkitWire applications use product-specific templates to simplify deal entry and negotiations. The templates specify the data required for a given product and also the business validation rules for each field. MarkitSERV has included OCC's validation requirements for OTC options in its trade templates.

The trade data for each OTC option transaction must be entered into MarkitWire. MarkitSERV will use a ''confirmation/affirmation'' procedure in which one party to the trade enters the trade data to the MarkitWire platform, which issues a confirmation to the counterparty to be affirmed, rejected or requested to be revised. If the trade details are confirmed, the trade will then be submitted to OCC for clearance and MarkitSERV will affirm such submission to both parties. OCC then validates the trade information for compliance with applicable requirements, such as the identification of an account of an eligible clearing member in which each side of the trade will be cleared, that the variable terms are within permissible ranges, and that minimum size requirements under OCC's license agreement with S&P are met. This validation will be completed by OCC immediately upon submission. OCC's clearing system will automatically accept the trade if it passes the validation process and will otherwise reject it.[15] A trade that is rejected by OCC may be corrected and submitted as a new transaction. Clearing members and customers with access to MarkitSERV will be able to determine whether a trade has been accepted or rejected both through MarkitSERV and, in the case of clearing members, through their interface with OCC's clearing system.

MarkitSERV's Regulatory Status [16]

MarkitSERV is not registered as a clearing agency under the Exchange Act, and the Commission staff has asked OCC to consider whether MarkitSERV would be required to so register in order to provide the proposed services to the OTC options market. OCC believes that no such registration is necessary based upon relevant interpretive guidance issued by the Commission.

Section 3(a)(23)(A) of the Exchange Act [17] defines a ''clearing agency'' broadly. The definition includes, in relevant part, ''any person who * * * provides facilities for comparison of data respecting the terms of settlement of securities transactions[.]'' In 1998, the Commission issued a release entitled ''Confirmation and Affirmation of Securities Trades; Matching'' (the ''Matching Release'').[18] In the Matching Release, the Commission published ''its interpretation that a 'matching' service that compares securities trade information from a broker-dealer and the broker-dealer's customer is a

[14] Section 1a(47)(A)(i) of CEA, 7 U.S.C. 1a(47)(A)(i), as added by Section 721(a)(21) of Dodd-Frank, defines ''swaps'' broadly to include options on indices. However, Section 1a(47)(B)(iii) of the CEA, 7 U.S.C. 1a(47)(B)(iii), excludes from the ''swap'' definition any option on any index of securities that is subject to the Securities Act and the Exchange Act. A contract that is excluded from the definition of a ''swap'' under Section 1a(47)(B) of the CEA, 7 U.S.C. 1a(47)(B) (other than Section 1a(47)(B)(x), 7 U.S.C 1a(47)(B)(x)) is not a ''security-based swap'' for purposes of Section 3a(68) of the Exchange Act, 15 U.S.C. 78c(a)(68).

[15] Once accepted, a trade is guaranteed by OCC. Note, however, that OTC options for which the premium payment date communicated by MarkitSERV to OCC is prior to the business day on which the OTC option is submitted to OCC for clearing (referred to as a ''Backloaded OTC Option'') will not be accepted and guaranteed until the selling clearing member has met its initial morning cash settlement obligations to OCC on the following business day.

[16] MarkitSERV offers different services in different markets, and this discussion is addressed only to the ''confirmation/affirmation'' procedure to be used in submitting trades to OCC.

[17] 15 U.S.C. 78c(a)(23)(A).

[18] Securities Exchange Act Release No. 34–39829 (April 13, 1998), 63 FR 17943 (April 13, 1998).

clearing agency function.'' The Matching Release distinguishes between such a matching service and a ''confirmation/affirmation service'' where the ''vendor intermediary will only transmit information between the parties to a trade, and the parties will confirm and affirm the accuracy of the information.'' The Commission noted that ''matching'' constitutes the ''comparison of data respecting the terms of settlement of securities transactions'' and that such services therefore trigger status as a clearing agency, while confirmation/affirmation services would not, by themselves, constitute such a data comparison. The Commission concluded in the Matching Release that ''an intermediary that captures trade information from a buyer and a seller of securities and performs an independent reconciliation or matching of that information is providing facilities for the comparison of data within the scope of Exchange Act Section 3(a)(23).'' The Commission stated that ''matching'' is ''so closely tied to the clearance and settlement process that it is different not only in degree but also different in kind from the * * * confirmation and affirmation process.'' The Matching Release goes on to state: ''A vendor that provides confirmation/affirmation services only will exchange messages between a broker-dealer and its institutional customer. The broker-dealer and its institutional customer will compare the trade information contained in those messages, and the institution itself will issue the affirmed confirmation.'' This is precisely what occurs when a counterparty to a trade affirms the trade data through MarkitSERV and requests submission to OCC for clearance. MarkitSERV transmits messages only; it does not ''compare'' or ''match'' trade data submitted by two parties.

The ''confirmation/affirmation'' functionality (as described above) to be provided by MarkitSERV (through MarkitWire) with respect to OTC options is functionally identical to the confirmation/affirmation service described in the Matching Release and OCC believes such service would not be a ''matching'' service within the meaning of the release. OCC believes that MarkitSERV will not be a ''clearing agency'' with respect to the services to be provided in connection with OTC options. The confirmation/affirmation service described in the Matching Release referred ''to the transmission of messages among broker-dealers, institutional investors, and custodian banks regarding the terms of a trade executed for the institutional investor.'' MarkitWire's confirmation/affirmation process will allow for the transmission of messages among OCC's clearing members (most of which are registered broker-dealers), their customers (all of whom will be ECPs and will therefore be large and financially sophisticated market participants) and OCC, which is itself registered and subject to the Commission's oversight as a clearing agency.

By contrast, the ''matching'' services contemplated in the Matching Release would involve ''the process whereby an intermediary compares the broker dealer's trade data submission * * * with the institution's allocation instructions * * * to determine whether the two descriptions of the trade agree.'' MarkitWire performs no such comparison. Under the confirmation/affirmation procedure, trade data is entered into MarkitWire by one party and such data is made available to the counterparty to be affirmed, rejected or requested to be revised. MarkitWire merely facilitates the transfer of information between the parties sufficient to allow the comparison to be made. A binding transaction (*i.e.,* an ''affirmed confirmation'' in the language of the Matching Release) is not produced through any action of MarkitSERV, but is instead created by the completion, by the counterparty, of an affirmation of the trade data entered by the first party. MarkitWire provides no ''independent reconciliation or matching'' of trade data. Rather MarkitWire is providing essentially a messaging service among OCC and the parties to trades in OTC Options. The Matching Release is clear as to the distinction between a matching service and a confirmation/affirmation service, and OCC believes that there is no ambiguity that the services to be provided by MarkitWire with respect to OTC options fall into the latter, rather than the former, category.

Risk Management Enhancements for Longer-Tenor Options

Although OCC's license agreement with S&P allows OCC to clear OTC options with tenors of up to fifteen years, OCC has elected at this time to clear only OTC options on the S&P 500 index with tenors of up to five years. However, OCC currently clears FLEX Options on the S&P 500 with tenors of up to 15 years. While OCC believes that its current risk management practices are adequate for current clearing activity, OCC is in the process of implementing risk modeling enhancements with respect to longer-tenor options, including OTC options. The enhancements are part of OCC's ongoing efforts to test and improve its risk management operations with respect to all longer-tenor options that OCC currently clears. These procedures will be submitted for review in a separate ''advance notice'' filing and OCC will not commence clearing of OTC options until such procedures have been approved and implemented.

The proposed enhancements are as follows:

- First, OCC will introduce indicative over-the-counter quotations into the daily dataset of prices used to risk manage OCC-cleared products. These quotations will be obtained from a service provider that will collect OTC dealer polling information on a daily basis and provide such data to OCC.
- Second, OCC will introduce variations in the implied volatilities used in the modeling of all cleared options whose residual tenors are at least three years. To date, OCC's margin methodology has assumed that implied volatilities of option contracts are static over the two-day risk horizon. While OCC's backtesting has identified few exceedances related to implied volatility shocks, such shocks could occur and taking them into account in OCC's margin model will allow more robust risk management. OCC proposes to achieve this result by incorporating into the risk factors included in OCC's models time series of proportional changes in implied volatilities for a range of representative volatilities.
- Third, OCC will introduce a valuation adjustment into its calculation of portfolio net asset value. This adjustment will be based on the aggregate sensitivity of the longer-tenor options in a portfolio to the overall level of implied volatilities at three and five years, and to the implied volatility skew.

A review of individual S&P 500 Index put and call options positions that are in the money by varying amounts and have expiration dates between four and nine years out indicates that the inclusion of modeled implied volatilities tends to result in less margin being held against short call positions and more being held against short put positions. These results are consistent with what would be expected given the strong negative correlation that exists between changes in implied volatility and market returns. On average, OCC observed a decrease in the margin requirement of approximately 24% on the nine call options tested and a 63% increase associated with the nine put options.

Proposed By-Law and Rule Changes

The specific proposed changes to OCC's By-Laws and Rules to provide for the clearing of OTC options relate primarily to: (i) Specification of customizable terms; (ii) procedures for submission and acceptance of trades for clearance; and (iii) specification of criteria for eligibility of clearing members to clear transactions in OTC options and limitation of the types of customers for whom clearing members may effect transactions in OTC options. Otherwise, the currently proposed OTC options will be cleared and settled under the same provisions applicable to clearance of listed index options. Many of the proposed amendments are self-explanatory, and OCC has therefore attempted to confine the following discussion to a broad overview with specific explanation only where the reasons for the change may be less obvious.

Article I of the By-Laws contains defined terms used throughout the By-Laws and Rules. OCC proposes to modify certain existing definitions and include certain new definitions in order to incorporate OTC options into existing rules and facilitate the creation of new provisions unique to OTC options. Throughout the By-Laws and Rules, OCC proposes to replace the term ''Exchange transaction,'' which is currently defined in Article I, in relevant part, as ''a transaction on or through the facilities of an Exchange for the purchase, writing or sale of a cleared contract'' with the term ''confirmed trade'' so as to make the relevant portions of the By-Laws and Rules applicable to transactions in OTC options as well as listed options, without causing confusion about the role of the OTC Trade Source in OCC's clearing of OTC options. ''Confirmed trade'' is proposed to be defined in Article I to include transactions ''effected on or through the facilities of an exchange'' or ''affirmed through the facilities of an OTC Trade Source'' in order to include transactions in both listed options and OTC options. The current definition of ''confirmed trade'' in Rule 101 is proposed to be deleted as unnecessary given the new definition. Much of the length of this rule filing is attributable to the fact that the term ''Exchange transaction'' is used so many places in the rules. OCC has entered into agreements in the past which reference the term ''Exchange transaction'' or ''exchange transaction.'' OCC is also proposing to add an Interpretation and Policy to the new definition of ''confirmed trade'' in order to avoid any ambiguity concerning how such terms should be interpreted in any such agreement.

OCC proposes to add a new Interpretation and Policy .11 to Section 1 of Article V of the By-Laws, providing the additional criteria that must be met by a clearing member in order to clear OTC index options. Among these new criteria are that clearing members seeking to clear OTC index options on underlying indices published by Standard & Poor's Financial Services LLC (''S&P'') must execute and maintain in effect a short-form license agreement in such form as specified from time to time by S&P. The current form of S&P short-form index license agreement is attached hereto as Exhibit 3.

The Interpretations and Policies under Section 1, Article VI allow clearing members to adjust their positions with OCC for certain enumerated reasons. OCC proposes to amend the Interpretations and Policies to clarify that adjustment of positions in OTC options will be effected through a manual process (as opposed to the electronic process available to post-trade adjustments in listed options), to the extent permitted by OCC. For the same reason, OCC is proposing to amend Rule 403 to prohibit clearing member trade assignment (''CMTA'') transactions in OTC options. Trade ''give-ups'' that are effected through the CMTA process in the case of listed options will, in the case of OTC options, be effected through MarkitSERV before the trades are submitted to OCC for clearing.

Article XVII of the By-Laws governs index options in general and OCC is proposing amendments to Article XVII in order to set forth the terms applicable to the initial OTC options proposed to be cleared by OCC—options on the S&P 500 Index—and to differentiate OTC index options from other index options cleared by OCC. For example, certain amendments to the definitions are necessary because OTC options will be permitted to have a much wider range of expiration dates than exchange-traded options (other than FLEX Options). Additional definitional amendments ensure that OTC index options will constitute a separate class of options from other cash-settled index options even if both index options have the same terms and cover the same underlying interest.

Section 3 of Article XVII provides for adjustment of the terms of outstanding index options as necessary to reflect possible changes in the underlying index—such as those creating a discontinuity in the level of the index—that could theoretically make an adjustment necessary to protect the legitimate expectations of holders and writers of options on the index. Pursuant to paragraph (g) of Section 3, most but not all such adjustments would be made, in the case of listed index options, by an adjustment panel consisting of representatives of the exchanges on which the options are traded. In the case of OTC options, any such adjustments will be made by OCC in its sole discretion. However, in exercising that discretion, OCC may take into consideration adjustment made by the adjustment panel with respect to exchange-traded options covering the same underlying index.[19]

OCC proposes to add a new Section 6 to Article XVII to set forth certain provisions unique to OTC index options, including the variable terms allowed for OTC index options and the general limitations on such variable terms. In general, all OTC index options must conform to the terms and limitations set forth in Section 6, and additional specific requirements applicable to specific OTC index options will either be set forth in the Interpretations and Policies under Section 6 or published separately on OCC's Web site. Section 6 also makes clear that although OTC index options are not fungible with exchange-traded index options, OTC index options of the same series (*i.e.,* options having identical terms) will be fungible with each other. In addition to the terms and limitations applicable to OTC index options, Section 6 will establish that clearing members will be deemed to have made a number of representations and warranties in connection with their activities in OTC options each time they affirm a confirmed trade entered into an OTC Trade Source.

OCC has submitted a rulemaking petition to the Commission[20] seeking an amendment to Commission Rule 238[21] that would exempt the OTC Options from most provisions of the Securities Act. Unless another exemption from the registration requirements of the Securities Act is available, OCC intends to rely upon Rule 506 of Regulation D[22] under the Securities Act, which is a safe harbor under the Securities Act exemption in Section 4(a)(2)[23] for offerings by an issuer not involving a public offering. OCC intends to satisfy

[19] Because index options, unlike options on individual stocks, rarely, if ever, require adjustments, allocation of the adjustment authority may have little practical significance.

[20] *See* SEC File No. 4–644 (Submitted January 13, 2012), available at *http://www.sec.gov/rules/petitions/2012/petn4-644.pdf.*

[21] 17 CFR 230.238.

[22] 17 CFR 230.506.

[23] 15 U.S.C. 77d(a)(2).

the conditions of Rule 506 of Regulation D as in effect at the time OCC relies upon the safe harbor. Participants in the existing markets for OTC equity options offered and sold in the United States commonly rely on the private offering exemption under these provisions and such reliance is therefore consistent with existing practice. OTC Options will be available for purchase only by highly sophisticated investors that are both ''eligible contract participants,'' as defined in Section 3a(65) of the Exchange Act,[24] and ''accredited investors,'' as defined in Rule 501(a) under Regulation D.[25] Section 6(f) of Article XVII includes representations of clearing members necessary to ensure that there is no general solicitation or general advertising in connection with the offer or sale of the OTC Options until such time as OCC notifies clearing members that such restriction no longer applies.

Chapter IV of the Rules sets forth the requirements for reporting of confirmed trades to OCC, and Rule 401 thereunder governs reporting of transactions in listed options by participant Exchanges. OCC is proposing to add new Rule 404 to govern the details of reporting of confirmed trades in OTC options by an OTC Trade Source.

As discussed above, positions in OTC options will generally be margined in the same manner as positions in listed options using STANS and pursuant to Chapter VI of the Rules. However, OCC proposes to amend Rule 611 to establish different procedures for the segregation of long positions in OTC options for margining purposes. Long positions in listed options are held in a clearing member's customers' account or firm non-lien account and by default are deemed to be ''segregated,'' meaning that they are not subject to OCC's lien and are given no collateral value when determining the margin requirement in the account. Such positions may be unsegregated only when a clearing member instructs OCC to unsegregate a long position and represents to OCC that the long position is part of a spread transaction carried for a single customer whose margin requirement on the corresponding short position has been reduced in recognition of the spread. OCC will then unsegregate the long position and so reduce OCC's margin requirement. However, in case of long positions in OTC options that are carried in a clearing member's customers' account and for which OCC has received a customer ID, OCC proposes that it will automatically unsegregate such long positions if OCC identifies a qualifying short position in OTC options carried under the same customer ID. Clearing members will not be required to give an affirmative instruction to OCC to unsegregate a long position in OTC options or make a separate representation regarding the spread transaction. Instead, by carrying a qualifying spread position in a customer account, clearing members are deemed to have represented to OCC that the customer's margin has been reduced in recognition of the spread. Based on discussion with the clearing members, it is OCC's understanding that, in practice, broker-dealers reduce customers' margin requirements to reflect spread positions. Therefore, OCC believes that automatic recognition of such spreads by OCC together with the deemed representation will greatly increase operational efficiency while providing equal assurance that long positions in OTC options will be unsegregated only if an identified customer will receive the benefit of the reduced margin required for spread transactions.

Rule 1001 sets forth the amount of the contribution that each clearing member is required to make to the clearing fund. OCC proposes to amend Rule 1001(c) so that, for purposes of calculating the daily average number of cleared contracts held by a clearing member in open positions with OCC during a calendar month (which number is used in turn to determine the clearing member's contribution to the clearing fund), open positions in OTC options will be adjusted as needed to account for any differences between the multiplier or unit of trading with respect to OTC options relative to non-OTC options covering the same underlying index or interest so that OTC options and non-OTC options are given comparable weight in the computation.[26]

In general, the rules in Chapter XI governing the suspension of a clearing member will apply equally to clearing members that transact in OTC options. Rule 1104 provides broad authority for OCC to liquidate a suspended clearing member's margin and clearing fund deposits ''in the most orderly manner practicable.'' Rule 1106 provides similarly worded authority to close out open positions in options and certain other cleared contacts carried by a suspended clearing member. In 2011, the Commission approved an OCC rule change providing OCC the express authority to use a private auction as one of the means by which OCC may close out open positions and liquidate margin and clearing fund deposits of a suspended clearing member.[27] OCC anticipates it will use this auction process for OTC options as well. As an additional tool to ensure its ability to close out positions in OTC options promptly, OCC is proposing to amend Rule 1106 to provide for an alternative auction procedure specifically applicable only to OTC index options and related positions hedging, or hedged by, OTC index options (an ''OTC Options Auction''). An OTC Options Auction would be used only in unusual circumstances where OCC determines it is not feasible to close out open positions in OTC index options through the other means provided for in OCC's Rules and By-Laws.[28] The amendments to Rule 1106 summarize the OTC Options Auction procedures and incorporate by reference the detailed procedures contained in a document entitled ''OTC Options Auction Procedures,'' which will be posted on the Corporation's Web site and otherwise made available to clearing members upon request of OCC. A copy of the OTC Options Auction Procedures was attached to the filing as Exhibit 5.

Rule 1106(e)(2)(C) clarifies that, in the event that the liquidation of a clearing member results in a deficiency that would otherwise result in a proportionate charge against the clearing fund contributions of other clearing members, each OTC Index Option Member (as defined below) that failed to purchase or assume its share of an auction portfolio will be the first to absorb the deficiency, through a ''Priority Charge'' against such clearing members' clearing fund contributions. The Priority Charge is a ''first loss'' mechanism, and is not intended to increase a clearing member's total maximum exposure to OCC.

Under the OTC Options Auction procedures, all clearing members authorized to clear transactions in OTC index options (''OTC Index Option Members''), other than the defaulting

[24] 15 U.S.C. 77c(a)(65).

[25] 17 CFR 230.501.

[26] For example, the index multiplier applicable to OTC index options on the S&P 500 Index will be fixed at 1. In comparison, the index multiplier applicable to listed index options is 100.

[27] *See* Securities Exchange Act Release No. 34–65654 (October 28, 2011), 76 FR 68238 (November 3, 2011) (SR–OCC–2011–08). OCC subsequently filed a rule change, currently pending Commission approval, providing detailed procedures for the conduct of such an auction. *See* Securities Exchange Act Release No. 34–67443 (July 16, 2012), 77 FR 42784 (July 20, 2012) (SR–OCC–2012–11).

[28] OCC anticipates that these procedures would be applicable to other OTC derivatives that may be cleared by OCC in the future. However, OCC has limited the currently proposed rule to OTC index options, and will amend it as and if appropriate to apply to other over-the-counter products that OCC may propose to clear in the future.

clearing member, will be required to participate in the OTC Options Auction by submitting competitive bids for all or a portion of the defaulting clearing member's OTC index option portfolio. Each such participant will be subject to a minimum participation level based on the participant's proportionate share of the total ''risk margin'' requirement posted by all OTC Index Options Members in the previous month for all positions (not limited to OTC option positions) held in accounts eligible to hold OTC options positions (''OTC Eligible Accounts''), after removing the defaulting clearing member.[29] This method of calculating the minimum participation level in the OTC Options Auction results in all OTC Index Option Members being required to participate in the OTC Options Auction based on their clearing activity related to all positions in OTC Eligible Accounts. Required participation ensures that the OTC Options Auction will have sufficient participants authorized to clear transactions in OTC index options and that the most active clearing members in OTC index options will submit bids for the largest percentage of the auction portfolio, increasing the likelihood of the acquisition of OTC options positions by clearing members with appropriate financial strength, risk management capabilities and trading expertise. Each participant may submit bids at varying quantities and varying prices, so long as the participant's bids equal or exceed its minimum participation level. A participant may use bids from non-OTC Index Options Members and non-clearing members in order to meet its minimum participation level, subject to certain Corporation requirements including that it guarantee the performance of such third parties. Each bid will indicate what percentage of the auction portfolio the participant is bidding on and the amount of the bid. Bids will be stated in terms of a price for the entire auction portfolio, and may be either positive or negative. (Negative bids imply an auction portfolio that has a negative net asset value and indicate how much the Corporation would be required to pay the participant to assume the relevant percentage of the auction portfolio.) The Corporation will rank the submitted bids from best to worst and the auction portfolio will be allocated among the bidding participants accordingly until the auction portfolio is exhausted. The bid price that is sufficient to clear the entire auction portfolio will become the single price to be used for all winning bids, even if a participant's stated bid was better.

In order to provide a strong incentive to ensure competitive bidding by the OTC Index Option Members required to participate in an OTC Options Auction, OTC Index Options Members who fail to win their minimum participation in the auction will be subject to a potential priority charge against its clearing fund contribution. If the cost of liquidating a suspended clearing member's positions exhausts the clearing member's margin and clearing fund contribution and any other assets of the suspended clearing member available to OCC, then OCC, pursuant to Section 5 of Article VIII of the By-Laws, would ordinarily withdraw the amount of the deficiency from the clearing fund and charge it on a proportionate basis against all other clearing members' computed contributions as fixed at the time. When an OTC Options Auction has been held in respect of a suspended OTC Index Options Member, however, some or all of any such remaining loss would be assessed first against the clearing fund contributions of any OTC Options Auction participant(s) whose bids are insufficiently competitive to be allocated a portion of the auction portfolio equal to such participant's minimum required participation. This priority charge would be made regardless of the reason for the shortfall—*i.e.,* whether or not the loss resulted from the closing out of OTC options positions. The priority charge would be calculated based on an ''assessment ratio,'' which is formulated to provide incentive to all OTC Options Auction participants to participate to their full minimum participation level in the auction. The method of calculating the assessment ratio is such that if the net asset value of the auction portfolio is zero the assessment ratio will also be zero and no priority charge will be made. As the absolute net asset value of the auction portfolio (whether positive or negative) increases, the assessment ratio also increases, all other factors being equal. If all OTC Options Auction participants submit bids such that each receives an allocation of OTC options positions equal to its minimum participation level, no priority charge will be made regardless of whether or not there is a liquidation shortfall. If a liquidation shortfall remains after any priority charges, or if no priority charges were required, the Corporation will then make a proportionate charge against the clearing fund contributions of all clearing members, including those that participated in the OTC Options Auction, in the usual manner pursuant to Section 5 of Article VIII of OCC's By-Laws.

In order to protect the estate of the suspended clearing member, OCC reserves some discretion in supervising the auction. In the event that the bid price that clears the entire auction portfolio is determined by OCC to be an outlier bid, OCC may choose as the winning bid a price that clears at least 80% of the auction portfolio. The remaining auction portfolio will then be re-auctioned as described above.

OCC anticipates that the likelihood of having to use this alternative auction is small. Nevertheless, in view of the fact that positions in OTC index options are expected to be large and that there may be no active trading market in options with terms precisely identical to the terms of the OTC index options in question, OCC believes that this is an appropriate failsafe provision. It should be noted that the Chicago Mercantile Exchange Inc. (''CME'') has rules allowing its clearing house and certain CME committees to administer an auction process to liquidate positions in interest rate swaps (''IRS'') in the event of a default of a CME clearing member authorized to submit IRS for clearing (an ''IRS Member'').[30] Although the financial safeguards supporting IRS clearing, including its ''guaranty fund,'' and the IRS auction process are different from OCC's clearing fund and OTC Options Auction in that, among other things, there is a separate guaranty fund for IRS, the IRS auction shares certain similarities with the OTC Options Auction. In particular, the IRS auction process requires mandatory participation of IRS clearing members with open interest in a position being auctioned and, in order to provide incentive for IRS Members to submit quality bids in an IRS auction, provides that in the event there is a loss to CME's clearing house associated with an IRS Member's default, IRS Members that do not submit quality bids in an IRS auction are subject to having their IRS guaranty fund deposit assessed before assessments are made against other IRS clearing members' guaranty fund deposits. In its original rule filing, OCC had proposed a different failsafe solution whereby OCC could terminate

[29] This minimum participation level will be multiplied by 1.15 to calculate each participant's minimum bid size, such that the sum of all participants' bids will equal 115% of the auction portfolio, in order to increase the likelihood that the entire auction portfolio will be allocated to participants.

[30] *See* CME Rules 8G14, 8G25 and 8G802.B. *See also* Commodity Futures Trading Commission Rule Change Submission No. 12–061RR of CME, the Board of Trade of the City of Chicago Inc. and the New York Mercantile Exchange, available at: *http://www.cmegroup.com/market-regulation/files/12-061rr.pdf.*

open positions of a suspended clearing member by setting a close-out value that non-defaulting clearing members holding the opposite side of the suspended clearing member's positions would be required to accept or pay in settlement of the terminated positions. However, clearing members objected to that proposed method and have advocated the auction procedures proposed here in lieu of the early termination proposal.[31] Clearing members in an OTC advisory group were active in designing the OTC Options Auction procedures, including the priority charges.

Impact of Clearing OTC Options on Other OCC-Cleared Products

Cleared OTC options will not be fungible with listed options. However, an OTC option may have economic characteristics that are substantially similar or identical to the characteristics of options in series of listed options that OCC clears. While it is possible that in any given instance a market participant may elect to enter into an OTC option in lieu of an economically similar listed product, OCC does not believe that its clearing of OTC options will adversely affect the efficiency or liquidity of the listed markets. The OTC options markets currently exist to accommodate a variety of commercial and other needs of market participants, including the ability to customize the terms of transactions. While the availability of an OCC guarantee for OTC transactions in which the parties would otherwise be exposed to each others' creditworthiness may cause transactions that currently occur in the non-cleared OTC markets to migrate to the cleared-OTC markets, OCC does not believe it will cause significant migration from the listed markets to the cleared OTC markets. The limitation of the OTC options markets to ECPs as well as the significant minimum transaction size and tenor requirements that are applicable to certain transactions in the currently proposed OTC options under the S&P License Agreement will limit the use of cleared OTC options and should help to ensure that there is no substantial migration from the listed markets to the OTC markets for this product. The existing bilateral OTC options markets have existed for years alongside the listed options markets, and OCC believes that dealers in such bilateral options often use the listed markets to hedge positions taken in such bilateral options and other OTC derivatives.

Notice of Launch Date

Following approval of this rule change by the Commission, OCC expects to provide notice to its clearing members of the date on which it intends to implement this rule change and begin clearing OTC options.

* * * * *

The proposed changes to OCC's By-Laws are consistent with the purposes and requirements of Section 17A of the Exchange Act[32] because they are designed to permit OCC to clear OTC options subject to the same basic rules, procedures and risk management practices that have been used successfully by OCC in clearing transactions in listed options. OCC believes that clearance and settlement of OTC options pursuant to this rule filing is fully consistent with OCC's obligations with respect to the prompt and accurate clearance and settlement of securities transactions and the protection of securities investors and the public interest. The proposed rule change is not inconsistent with any existing rule of OCC.

The proposals contained in the advance notice shall not take effect until all regulatory actions required with respect to the proposals are completed.

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed changes contained in the advance notice will have any impact or impose any burden on competition.

(C) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the advance notice, and, except as discussed below, none have been received. OCC has been actively engaged with a number of clearing members that have expressed an interest in clearing OTC Options. The following are the only substantive written comments that were received, and they have been addressed, in the manner indicated:

- OCC received a written comment that the role of the Default Management Advisory Committee, as described in the OTC Options Auction procedures that were attached as Exhibit 5 to this rule filing, should be clarified. OCC has revised the procedures to clarify that the Default Management Advisory Committee will be a standing committee and will be formed from the inception of OCC's clearing of OTC Options. It will not be an *ad hoc* committee formed at the time of a default.
- OCC received a written comment asking that the Membership/Risk Committee have a role in setting exercise settlement values with respect to OTC index options in unusual circumstances pursuant to Section 4(a)(2) of Article XVII of the By-Laws. OCC has revised the rules to provide that OCC will consult with that committee when appropriate in setting exercise settlement values pursuant to Section 4(a)(2).
- OCC received a written comment asking for limitations on the indemnification of OCC by clearing members under Section 6(f) of Article XVII of the By-Laws. In response to this comment OCC has added an exclusion from the indemnity for claims, liabilities, or expenses that result primarily from OCC's gross negligence or willful misconduct or from OCC conduct that causes the offer or sale of the OTC Options to become subject to the registration provisions of Section 5 of the Securities Act.[33]

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed changes contained in the advance notice may be implemented pursuant to Section 806(e)(1)(G) of Clearing Supervision Act[34] if the Commission does not object to the proposed changes within 60 days of the later of (i) the date that the advance notice was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed changes contained in the advance notice if the Commission objects to the proposed changes.

The Commission may extend the period for review by an additional 60 days if the proposed changes raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. Proposed changes may be implemented in fewer than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed changes and

[31] *See* comment letter from Alessandro Cocco, Managing Director of J.P. Morgan Clearing Corporation and J.P. Morgan Securities LLC, to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (January 30, 2012), available at *http://www.sec.gov/comments/sr-occ-2011-19/occ201119-2.pdf.*

[32] 15 U.S.C. 78q–1.

[33] 15 U.S.C. 77e.

[34] 12 U.S.C. 5465.

authorizes the clearing agency to implement the proposed changes on an earlier date, subject to any conditions imposed by the Commission.

OCC has also filed the advance notice as a proposed rule change pursuant to Section 19(b)(1) of the Act [35] and Rule 19b–4 thereunder.[36] Pursuant to those provisions, within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–OCC–2012–14 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–2012–14. 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 advance notice that are filed with the Commission, and all written communications relating to the advance notice 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 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_12_14.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–2012–14 and should be submitted on or before October 18, 2012.

By the Commission.

Kevin O'Neill,

Deputy Secretary.

[FR Doc. 2012–23816 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

[35] 15 U.S.C. 78s(b)(1).

[36] 17 CFR 240.19b–4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67904; File No. SR–NASDAQ–2012–106]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer Members the Ability To Pay a Regulatory Fine Pursuant to an Installment Plan

September 21, 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 September 14, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II 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 the Substance of the Proposed Rule Change

The Exchange proposes a rule change to offer members the ability to pay a regulatory fine pursuant to an installment plan, under certain conditions. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to amend Rule 8320 governing ''Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay'' to offer members the ability to pay a regulatory fine pursuant to an installment plan, under certain conditions. In order for a member to be eligible to pay a regulatory fine via an installment plan, the fine under the applicable letter of acceptance, waiver, and consent (''AWC'') [3] must be $50,000 or more. A fine of less than $50,000 is not eligible for the installment plan. When submitting its AWC, the member must check the installment plan option on the election of payment form included with the AWC. A sample election of payment form and AWC are included in Exhibit 3 [4] to this proposed rule change. A down payment of twenty-five percent (25%) or more of the total fine must be submitted with the signed AWC.

After receipt of the AWC and down payment, an installment package, including a promissory note and payment schedule, will be mailed to the member. A sample promissory note and payment schedule are included in Exhibit 3 to this proposed rule change. The member must then submit an executed (signed and notarized) promissory note for the unpaid balance

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NASDAQ Rule 9216(a).

[4] The Commission notes that Exhibit 3 is an exhibit to the proposed rule change, not to this Notice.

of the fine, along with its first installment payment. The term of the installment plan may not exceed four years after the execution of the AWC. The member may elect monthly or quarterly payments.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] 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 a national market system, and, in general, to protect investors and the public interest. In addition, NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6(b)(6) and 6(b)(7) of the Act,[7] which require an exchange to provide fair procedures for the disciplining of members and persons associated with members. Specifically, NASDAQ believes that the proposal will promote the settlement of disciplinary cases by allowing members to make installment payments. NASDAQ believes that settlement is a beneficial method of disciplining members because it imposes meaningful sanctions on the member while avoiding the cost and uncertainty of a protracted disciplinary proceeding. NASDAQ further believes that affording members with the opportunity to pay a regulatory fine over a period of time may allow NASDAQ to impose higher fines in appropriate circumstances and diminish the risk that sanctioned members will fail to pay.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(6) and (b)(7).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) [10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that NASDAQ may offer members that are contemplating the execution of an AWC the option of entering into an installment arrangement as soon as possible. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will provide members the option of paying large fines in installments.[12] Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). 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 the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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–NASDAQ–2012–106 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2012–106. 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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–106, and should be submitted on or before October 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23798 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67909; File No. SR–EDGA–2012–42]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rule 13.9

September 21, 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 September 19, 2012, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') 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 is filing with the Commission a proposed rule change to amend Rule 13.9, which provides a new market data product to Members [3] and non-Members of the Exchange. The text of the proposed rule change is available on the Exchange's 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 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

In SR–EDGA–2012–38 (the ''Filing''),[4] the Exchange introduced a new market data product, Edge Routed Liquidity Report (''Edge Routed Liquidity Report'' or the ''Service'') to Members and non-Members of the Exchange (collectively referred to as ''Subscribers''). The Edge Routed Liquidity Report is a data feed that contains historical order information for orders routed to away destinations by the Exchange. The Filing stated that Edge Routed Liquidity Report is offered as either a standard report (the ''Standard Report'') or a premium report (the ''Premium Report'') (the Standard Report and the Premium Report shall be collectively referred to as the ''Reports'').

The purpose of this proposed rule change is to amend Rule 13.9 to provide additional information regarding the features of the Standard Report and the Premium Report. The Filing noted that both the Standard Report and the Premium Report provide a view of all marketable orders that are routed to away destinations by the Exchange. The Reports are available to the Subscribers on the morning of the following trading day (T + 1) and include limit price, routed quantity, symbol, side (bid/offer), time of routing, and the National Best Bid and Offer (NBBO) at the time of routing.

However, [the] Premium Report also identifies various categories of routing destinations. First, the Premium Report identifies whether the routing destination is either directed to a destination that is not an exchange (''Non-Exchange Destination'') or directed to another exchange. If the order is routed to a Non-Exchange Destination, the Premium Report will then also specify one of the following Non-Exchange Destination categories: Regular, Fast, Superfast and Midpoint (collectively, the ''Categories''). The Category is determined by the applicable routing strategy associated with the relevant order, based on responsiveness of the destination (i.e. latency), number of destinations, and/or type of execution (i.e. midpoint). For example, a routing strategy that leverages many dark pools for low-cost, low impact executions, which takes a greater amount of time to fill an order may be categorized as ''Regular'' in the Premium Report, whereas a destination specific strategy that has fewer Non-Exchange Destinations and responds more quickly may be categorized as ''Superfast'' in the Premium Report. Notwithstanding the foregoing, the Premium Report will not identify the specific destination.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act [6] in particular, which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of an additional market data feed, which will provide market participants with the opportunity to obtain additional data in furtherance of their investment decisions. The proposed rule change will contribute to providing such additional information and afford Subscribers transparency by categorizing routed liquidity to various Non-Exchange Destinations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[4] Securities Exchange Act Release No. 67765 (August 31, 2012), 77 FR 55248 (September 7, 2012) (SR–EDGA–2012–38).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

unsolicited written comments from its 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) [7] of the Act and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)(iii) [10] 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. The Exchange notes that waiver of these requirements will allow the Exchange to offer the Edge Routed Liquidity Report, with the revised and clarified distinction of the features available in each of the Reports, on or about the Filing's operative date. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would immediately provide additional information necessary for the operation of the Exchange's rules regarding the Edge Routed Liquidity Report. For this reason, the Commission designates the proposed rule change to be operative upon the operative date of the Filing.[11]

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–EDGA–2012–42 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2012–42. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2012–42 and should be submitted on or before October 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23768 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 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. The Exchange has satisfied this requirement.

[10] *Id.*

[11] For the 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).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67907; File No. SR–NYSEMKT–2012–45]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Sections 1203(a) and 1205(b) of the NYSE MKT Company Guide (''Company Guide'') To Increase the Fees Applicable to Issuers Requesting Review of a Determination To Limit or Prohibit the Continued Listing of Their Securities on the Exchange

September 21, 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 September 7, 2012, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 1203(a) and 1205(b) of the NYSE MKT Company Guide (''Company Guide'') to increase the fees applicable to issuers requesting review of a determination to limit or prohibit the continued listing of their securities on the Exchange. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Part 12 of the Company Guide provides that issuers may request a written or oral hearing to review a determination by the staff of NYSE Regulation, Inc. (the ''Staff'') to limit or prohibit the continued listing of their securities. A Listing Qualifications Panel (the ''Panel'') comprised of at least two, but generally three, members of the NYSE Amex Committee on Securities (the ''Committee'') conducts the hearing. Currently, Section 1203(a) of the Company Guide provides that the fee charged to the issuer for a written hearing is $4,000, and the fee for an oral hearing is $5,000. Issuers may also request a review of a Panel decision by the Committee as a whole. The Committee as a whole considers the written record and, in its discretion, may hold additional oral hearings. Currently, Section 1205(b) of the Company Guide provides that the fee for the Committee's review is $5,000. The Exchange last increased the delisting appeal fees in March 2004.[3]

The Exchange believes that the fees should be increased at this time because the costs incurred in preparing for and conducting appeals have increased significantly since the fees were last revised in 2004.

The Exchange believes that the costs of an appeal typically far exceed the current permitted fees. In the case of both written hearings and oral hearings, as well as all appeals heard by the Committee as a whole, these costs include the utilization of NYSE Regulation staff resources to prepare for appeals, including the drafting of written submissions, the time devoted to the coordination of appeals by staff from NYSE Euronext's Office of the Corporate Secretary and Legal Department, and the time spent by attorneys in the Legal Department in their role as counsel to the Committee. In addition, in both written and oral hearings, as well as appeals heard by the Committee as a whole, the Exchange incurs expenses in relation to the copying and mailing of documents and other miscellaneous expenses. In the case of oral hearings by a Panel or the Committee as a whole, the Exchange also incurs the additional cost of engaging a court reporter and utilizes Exchange staff and other resources in hosting the oral hearing at the offices of the Exchange.

All of the foregoing expenses have increased since 2004, but another significant factor is that, in many cases, appeals have become more complicated and contentious since the fees were last modified. Consequently, NYSE Regulation staff devote more time now to a typical appeal than was historically the case, including more involvement by NYSE Regulation senior management and attorneys within NYSE Regulation. Furthermore, in response to the increasing complexity of appeals, NYSE Regulation has in recent times engaged outside counsel in connection with appeals more frequently than was historically the case. Accordingly, the Exchange proposes to increase the fees for Panel hearings to $8,000 for a written hearing and $10,000 for an oral hearing and for Committee appeals to $10,000. The text of the proposed amendments to Sections 1203.(a) [sic] and 1205(b) will specify that the revised fees will only be applicable to issuers that initially submit their hearing request on or after September 17, 2012. The current fees will remain in effect for any hearing requests submitted before that date.

While the Exchange does not expect that the proposed revised fees would cover all of its costs associated with the appeal process, the proposed revised fees would cover a much larger portion of those costs than the current appeal fees. In that regard, the Exchange notes that, while the proposed fees would be twice the amount of the current fees, they would be consistent with or lower than the appeal fees of other national securities exchanges, depending on the process that the other national securities exchange uses. For example, Section 804.00 of the NYSE Listed Company Manual provides that a listed company must pay a $20,000 fee in connection with a delisting appeal.

The Exchange also believes that the proposed fee increases are consistent with the provision by the Exchange of a fair procedure for companies to challenge a delisting determination. In particular, the Exchange believes that the proposed amended fees should not deter listed issuers from availing [sic] of their due process rights to appeal Exchange delisting determinations because the increased fees will still be set at a level that will be affordable for listed companies.

2. Statutory Basis

Securities Exchange Act of 1934 (the ''Act''),[4] in general, and furthers the objectives of Section 6(b)(5) of the Act,[5] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the proposed fee increases are consistent with the investor protection objectives of Section 6(b)(5) in that they are designed to provide adequate resources for appropriate preparation for and conduct of Panel hearings and Committee appeals, which help to assure that the Exchange's continued listing standards are properly enforced and investors in companies subject to delisting are protected.

In addition, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act[6] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using its facilities. In particular, the Exchange notes that the proposed fee increases constitute a reasonable allocation of fees under Section 6(b)(4) because: (i) Even after the proposed increases, the Exchange's appeal fees will still only partially cover its actual costs of conducting appeals; and (ii) the Exchange only charges appeal fees to companies that make an appeal.

The Exchange also believes that the proposed fee increases are consistent with Section 6(b)(7) of the Act[7] in that the proposed fees are in accordance with the provisions of Section 6(d) of the Act,[8] and in general, are consistent with the provision by the Exchange of a fair procedure for the prohibition or limitation by the exchange of any

[3] *See* Securities Exchange Act Release No. 49344 (March 1, 2004), 69 FR 10773 (March 8, 2004) (SR–Amex–2003–111).

[4] 15 U.S.C. 78a.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(7).

[8] 15 U.S.C. 78f(d).

person with respect to access to services offered by the Exchange. In particular, the Exchange believes that the proposed amended fees should not deter listed issuers from availing [sic] of their due process rights to appeal Exchange delisting determinations because the increased fees will still be set a level that will be affordable for listed companies.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [9] of the Act and subparagraph (f)(2) of Rule 19b–4 [10] thereunder, because it establishes a due, fee, or other charge imposed by NYSE MKT.

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–2012–45 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–2012–45. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEMKT–2012–45 and should be submitted on or before October 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23766 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67903; File No. SR–CBOE–2012–082]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Small Order Preference Priority Overlay

September 21, 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 September 12, 2012, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) 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 the Substance of the Proposed Rule Change

The Exchange is proposing to amend Rules 6.45A, *Priority and Allocation of Equity Option Trades on the CBOE Hybrid System,* and 6.45B, *Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System,* to expand on the description of the existing operation of the small order preference priority overlay. The text of the proposed rule change is available on the Exchange's Web site (*www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE Rules 6.45A and 6.45B set forth, among other things, the manner in which electronic Hybrid System trades in options are allocated. Paragraph (a) of each rule essentially governs how incoming orders received electronically by the Exchange are electronically executed against interest in the CBOE quote. Paragraph (a) of each rule currently provides a ''menu'' of matching algorithms to choose from when executing incoming electronic orders. The menu format allows the Exchange to utilize different matching algorithms on a class-by-class basis. The menu includes, among other choices, the ultimate matching algorithm (''UMA''), as well as price-time and pro-rata priority matching algorithms with additional priority overlays. The priority overlays for price-time and pro-rata currently include: public customer priority for public customer orders resting on the Hybrid System, participation entitlements for certain qualifying market-makers. Additional priority overlays for UMA, price-time and pro-rata include the small order preference and a market turner priority (for participants that are first to improve CBOE's disseminated quote). These overlays are optional.

If the small order priority overlay is in effect for an option class, then the following applies:

- Orders for five (5) contracts or fewer will be executed first by the Designated Primary Market-Maker (''DPM'') or Lead Market-Maker (''LMM''), as applicable, that is appointed to the option class; provided however, that on a quarterly basis the Exchange evaluates what percentage of the volume executed on the Exchange (excluding volume resulting from the execution of orders in AIM (*see* CBOE Rule 6.74A, *Automated Improvement Mechanism (''AIM'')*) is comprised of orders for five (5) contracts or fewer executed by DPMs and LMMs, and will reduce the size of the orders included in this provision if such percentage is over forty percent (40%).
- This procedure only applies to the allocation of executions among non-customer orders and market maker quotes existing in the EBook at the time the order is received by the Exchange. No market participant is allocated any portion of an execution unless it has an existing interest at the execution price. Moreover, no market participant can execute a greater number of contracts than is associated with the price of its existing interest. Accordingly, the small order preference contained in this allocation procedure is not a guarantee; the DPM or LMM, as applicable, (i) must be quoting at the execution price to receive an allocation of any size, and (ii) cannot execute a greater number of contracts than the size that is associated with its quote.
- If a Preferred Market-Maker (*see* CBOE Rule 8.13, *Preferred Market-Maker Program*) is *not* quoting at a price equal to the national best bid or offer (''NBBO'') at the time a preferred order is received, the allocation procedure for small orders described above shall be applied to the execution of the preferred order. If a Preferred Market Maker *is* quoting at the NBBO at the time the preferred order is received, the allocation procedure that is generally applicable for all other sized orders contained in subparagraphs (a)(i) and (ii) of Rules 6.45A or 6.45B, as applicable, is applied to the execution of the preferred order (*e.g.,* if the default matching algorithm is price-time with a public customer and participation entitlement overlay, the order will execution [sic] first against any public customer orders, then the Preferred Market-Maker would receive its participation entitlement, then the remaining balance would be allocated on a price-time basis).
- The small order priority overlay is only be [sic] applicable to automatic executions and is not be [sic] applicable to any electronic auctions.[5]

The purpose of the proposed rule change is to expand on the text contained in subparagraphs (a)(iii) of Rules 6.45A and 6.45B to simply make it clearer that, in the event an order for five contracts or fewer is received when there *is* a Preferred Market-Maker quoting at a price equal to the NBBO at the time a preferred order is received, any Market Turner priority overlay status would *not* be applied. Currently the rule text does not include this level of detail,[6] so the Exchange is proposing to include this information within the rule to provide additional clarity on the existing operation of the small order preference overlay. Specifically, as revised, the text would provide that, in the event an order for five contracts or fewer is received when there is a Preferred Market-Maker quoting at a price equal to the NBBO at the time a preferred order is received, the allocation procedure contained in subparagraphs (a)(i) and (ii) of Rules 6.45A or 6.45B, as applicable, orders shall be applied to the execution of the preferred order (as the rule text already provides) and that any Market Turner priority overlay status (which is described in subparagraph (a)(iii)(2) of Rules 6.45A or 6.45B, as applicable) shall not be applied to that execution.

The operation of the small order priority overlay described above is part of CBOE's careful balancing of the rewards and obligations that pertain to each of the Exchange's classes of memberships. This balancing is part of the overall market structure that is designed to encourage vigorous price competition between Market-Makers (including DPMs, LMMs and Preferred Market-Makers) on the Exchange, as well as maximize the benefits of price competition resulting from the entry of customer and non-customer orders, while encouraging participants to provide market depth. The Exchange believes the small order priority overlay, which includes priority participation rights for DPMs and LMMs or Preferred Market-Makers (as applicable) over non-customer orders and market maker quotes only when the DPM/LMM or Preferred Market-Maker (as applicable) is quoting at the best price, strikes the appropriate balance within its market and maximizes the benefits of an electronic market for all participants. In that regard, the Exchange believes that allowing the Preferred Market-Maker participation entitlement to take precedence over any otherwise applicable Market Turner allocation (in the limited scenario where a preferred order for five contracts or fewer is received when there is a Preferred Market-Maker quoting at a price equal to the NBBO at the time the preferred order is received) strikes the appropriate balance within its market and

[5] In addition to AIM, CBOE has various electronic auctions that are described under Rules 6.13A, *Simple Auction Liaison* (''SAL''), 6.14A, *Hybrid Agency Liaison (HAL),* and 6.74B, *Solicitation Auction Mechanism* (''AIM SAM''). Each of these auctions generally allocates executions pursuant to the matching algorithm in effect for the options class with certain exceptions noted in the respective rules.

[6] The rule text currently indicates that, ''[i]f a Preferred Market Maker is quoting at the NBBO at the time the preferred order is received, the allocation procedure contained in subparagraphs (i) or (ii), as applicable, shall be applied.'' Subparagraphs (i) and (ii) of Rules 6.45A and 6.45B describe the UMA, price-time, and pro-rata priority allocation algorithms (as well as the additional priority overlays applicable to the respective allocation algorithms). Subparagraph (iii) of Rules 6.45A and 6.45B describe the additional priority overlays applicable to all allocation methodologies, which overlays include the small order preference overlay and the Market Turner overlay.

maximizes the benefits of an electronic market for all participants. In particular, the application of the Preferred Market-Maker participation entitlement under the small order preference priority overlay can contribute to market quality to the extent that it acts as an incentive to attract and retain Market-Maker participation on CBOE and, given the small order size and NBBO quoting requirement that are conditions to receiving the preference, CBOE believes that applying small order preference over Market Turner priority for these types of small orders is appropriate and consistent [sic] the protection of investors and the public interest.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act [7] in general and furthers the objectives of Section 6(b)(5) of the Act [8] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. In particular, the Exchange believes that including the additional detail within the rules should provide additional clarity and avoid any confusion on the operation of the small order preference priority overlay in a class where the Market Turner priority overlay is also in effect. The Exchange also believes that the provision allowing the Preferred Market-Maker participation entitlement to take precedence over any otherwise applicable Market Turner allocation (in the limited scenario where a preferred order for five contracts or fewer is received when there is a Preferred Market-Maker quoting at a price equal to the NBBO at the time a preferred order is received) strikes the appropriate balance within its market and maximizes the benefits of an electronic market for all participants. In particular, the application of the Preferred Market-Maker participation entitlement under the small order preference priority overlay can contribute to market quality to the extent that it acts as an incentive to attract and retain Market-Maker participation on CBOE and, given the small order size and NBBO quoting requirement that are conditions to receiving the preference, CBOE believes that applying small order preference over Market Turner priority for these types of small orders is appropriate and consistent [sic] the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10] 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–CBOE–2012–082 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–082. 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 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2012–082, and should be submitted on or before October 18, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–23764 Filed 9–26–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[11] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of Reporting Requirements Submitted for OMB Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before October 29, 2012. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: Agency Clearance Officer, Curtis Rich, *Curtis.rich@sba.gov,* Small Business Administration, 409 3rd Street SW., 5th Floor, Washington, DC 20416; and OMB Reviewer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Curtis Rich, Agency Clearance Officer, (202) 205–7030.

SUPPLEMENTARY INFORMATION:

Title: ''Disaster Assistance Customer Satisfaction Survey.''

Frequency: On Occasion.

SBA Form Number: 987.

Description of Respondents: Affected Disaster Areas.

Responses: 2,800.

Annual Burden: 239.

Curtis Rich,

Management Analyst.

[FR Doc. 2012–23735 Filed 9–26–12; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 2.125 (2⅛) percent for the October–December quarter of FY 2013.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Eugene D. Stewman,

Acting Director, Office of Financial Assistance.

[FR Doc. 2012–23732 Filed 9–26–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0281]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 18 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before October 29, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0281 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-85.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year

period. The 18 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Charles E. Castle

Mr. Castle, age 55, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Castle understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Castle meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License (CDL) from Ohio.

Robert R. Coscio

Mr. Coscio, 73, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coscio understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coscio meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Larry W. Dearing

Mr. Dearing, 60, has had ITDM since 1996. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dearing understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dearing meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Indiana.

Bradley E. DeWitt

Mr. DeWitt, 53, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. DeWitt understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. DeWitt meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oregon.

Leonard R. Dobosenski

Mr. Dobosenski, 56, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dobosenski understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dobosenski meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Rodney L. Fife

Mr. Fife, 36, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Fife understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Fife meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Ohio.

Patrick J. Flynn

Mr. Flynn, 28, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Flynn understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Flynn meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Thomas K. Galford

Mr. Galford, 32, has had ITDM since 1988. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Galford understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Galford meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from West Virginia.

Laurence S. Goldstein

Mr. Goldstein, 43, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in

impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Goldstein understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Goldstein meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from New York.

Michael L. Kiefer

Mr. Kiefer, 54, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kiefer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kiefer meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from South Dakota.

Marcus J. Kyle

Mr. Kyle, 28, has had ITDM since 2006. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kyle understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kyle meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Kevin K. Leavey

Mr. Leavey, 24, has had ITDM since 2000. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Leavey understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Leavey meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from New Jersey.

Sharon K. Locke

Ms. Locke, 64, has had ITDM since 2011. Her endocrinologist examined her in 2012 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent 2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Locke understands diabetes management and monitoring, has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Locke meets the vision requirements of 49 CFR 391.41(b)(10). Her optometrist examined her in 2012 and certified that she does not have diabetic retinopathy. She holds a Class B CDL from Indiana.

David J. Maxwell

Mr. Maxwell, 22, has had ITDM since the age of 8. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Maxwell understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Maxwell meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from North Dakota.

Robert C. Moore

Mr. Moor, 51, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Moore understands diabetes management and monitoring, *has stable control of his diabetes using insulin, and is able to drive a CMV safely.* Mr. Moore meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Jedediaha C. Record

Mr. Record, 32, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Record understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Record meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wyoming.

Jessie L. Webster

Mr. Webster, 42, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Webster understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Webster meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kentucky.

Robert F. Zitoli

Mr. Zitoli, 35, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting

in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Zitoli understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Zitoli meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds an operator's license from Massachusetts.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441) [1]. The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: September 19, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–23760 Filed 9–26–12; 8:45 am]

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[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2012–0164]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 19 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective September 27, 2012. The exemptions expire on September 27, 2014.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

Background

On August 2, 2012, FMCSA published a notice of receipt of Federal diabetes exemption applications from 19 individuals and requested comments from the public (77 FR 46149). The public comment period closed on September 4, 2012, and no comments were received.

FMCSA has evaluated the eligibility of the 19 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 19 applicants have had ITDM over a range of 1 to 22 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the August 2, 2012, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comments

FMCSA did not receive any comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the 19 exemption applications, FMCSA exempts Kevin M. Brown (CO), Alvin J. Chandler (VA), Vernon V. Cromartie (NJ), Eric C. Fuller (AZ), Kevin M. Klevecz (VA), Matthew R. Lanciault (NH), Steven L. Leslie (MI), Anthony J. Lesmeister (ND), Lawrence C. Mace (PA), Del A. Meath (MN), David D. Nelson (ND), Benny D. Puck (IA), Bob F. Rice (WA), Thomas P. Ropiak (WI), Larry L. Smith (IN), William G. Smith (AR), Larry D. Way (OH), Paul E. Williams, Jr. (GA), and Quintin E. Williams (NC) from the ITDM requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the 1/exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: September 19, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–23759 Filed 9–26–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1097X]

Pickens Railway Company—Abandonment Exemption—in Pickens County, SC

Pickens Railway Company (Pickens) has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon approximately 8.5 miles of rail line between approximate milepost 0.0 (at or near Pickens) and the end of the line at approximate milepost 8.5 (at or near Easley), in Pickens County, S.C. The line traverses United States Postal Service Zip Codes 29671 and 29641.

Pickens has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) overhead traffic on the line, if any, can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.[1]

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on October 27, 2012, unless stayed pending reconsideration. Petitions to stay that do

[1] Pickens states that it has used the subject line to access a Pickens-owned locomotive shop to repair or rebuild locomotives but that there have been no rail cars (as opposed to locomotives) on the line for more than two years. Under the circumstances, Pickens asserts that use of the class exemption procedure is appropriate, citing *Union Pacific Railroad Co.—Abandonment Exemption—in Ada County, Idaho,* AB 33 (Sub-No. 137X) (STB served Aug. 6, 1999).

not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 9, 2012. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by October 17, 2012, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to Pickens' representative: Rose-Michele Nardi, Weiner Brodsky Sidman Kider PC, 1300 19th Street, NW., Fifth Floor, Washington, DC 20036–1609.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

Pickens has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by October 2, 2012. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at (800) 877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Pickens shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Picken's filing of a notice of consummation by September 27, 2013, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

By the Board.

Decided: September 19, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Unit.

[FR Doc. 2012–23757 Filed 9–26–12; 8:45 am]

BILLING CODE 4915–01–P

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which currently is set at $1,600. *See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2012 Update,* EP 542 (Sub-No. 20) (STB served July 27, 2012).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities; Proposed Information Collection; Submission for OMB Review

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, ''Identity Theft Red Flags and Address Discrepancies under the Fair and Accurate Credit Transactions Act of 2003.'' The OCC also is giving notice that it is sending the collection to OMB for review.

DATES: Comments must be received by October 29, 2012.

ADDRESSES: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0237, 250 E Street SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274 or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 250 E Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0237, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information or a copy of the collection from Mary H. Gottlieb, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: There have been no changes to the requirements of the regulations; however, certain sections of the regulations have been transferred to the Bureau of Consumer Financial Protection (CFPB) pursuant to title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1955, July 21, 2010 (Dodd-Frank Act), and republished as CFPB regulations (76 FR 79308 (December 21, 2011)). The transferred regulations, which relate to address discrepancies, previously were found at 12 CFR 41.82, and have now been moved to 12 CFR 1022.82. The burden estimates for this portion of the collection have been revised to remove the burden attributable to OCC-regulated institutions with over $10 billion in total assets, now carried by CFPB pursuant to section 1025 of the Dodd-Frank Act. The OCC retains enforcement authority under 12 CFR 1022.82 for those institutions under its supervision with total assets of $10 billion or less.

Title: Identity Theft Red Flags and Address Discrepancies under the Fair and Accurate Credit Transactions Act of 2003.

OMB Control No.: 1557–0237.

Description: Section 114 of the FACT Act amended section 615 of the Fair Credit Reporting Act (FCRA) to require the Agencies [1] to issue jointly:

- Guidelines for financial institutions and creditors regarding identity theft with respect to their account holders and customers. In developing the guidelines, the Agencies were required to identify patterns, practices, and

[1] Section 114 required regulations to be issued jointly by the Federal banking agencies, the National Credit Union Administration and the Federal Trade Commission. Therefore, for purposes of this filing, ''Agencies'' refers to these entities. It is important to note that Section 1088(a)(8) of the Dodd-Frank Act further amended section 615 of FCRA to also require the Securities and Exchange Commission and the Commodity Futures Trading Commission to issue Red Flags Rules.

specific forms of activity that indicate the possible existence of identity theft. The guidelines must be updated as often as necessary, and must be consistent with the policies and procedures required under section 326 of the USA PATRIOT Act, 31 U.S.C. 5318(l).

• Regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines in order to identify possible risks to account holders or customers or to the safety and soundness of the institution or creditor.

• Regulations generally requiring credit and debit card issuers to assess the validity of change of address requests under certain circumstances.

Section 315 of the FACT Act also amended section 605 of the FCRA to require the Agencies to issue regulations providing guidance regarding what reasonable policies and procedures a user of consumer reports must have in place and employ when a user receives a notice of address discrepancy from a consumer reporting agency (CRA).[2] These regulations are required to describe reasonable policies and procedures for users of consumer reports to:

• Enable a user to form a reasonable belief that it knows the identity of the person for whom it has obtained a consumer report, and

• Reconcile the address of the consumer with the CRA, if the user establishes a continuing relationship with the consumer and regularly and, in the ordinary course of business, furnishes information to the CRA.

As required by section 114 of the FACT Act, appendix J to 12 CFR part 41 contains guidelines for financial institutions and creditors to use in identifying patterns, practices, and specific forms of activity that indicate the possible existence of identity theft. In addition, 12 CFR 41.90 requires each financial institution or creditor that is a national bank, Federal branch or agency of a foreign bank, and any of their operating subsidiaries that are not functionally regulated, to establish reasonable policies and procedures to address the risk of identity theft that incorporate the guidelines. Pursuant to § 41.91, credit card and debit card issuers must implement reasonable policies and procedures to assess the validity of a request for a change of address under certain circumstances.

Section 41.90 requires each OCC-regulated financial institution or creditor that offers or maintains one or more covered accounts to develop and implement a written Identity Theft Prevention Program (Program). In developing the Program, financial institutions and creditors are required to consider the guidelines in appendix J and include the suggested provisions as appropriate. The initial Program must be approved by the institution's board of directors or an appropriate committee thereof. The board, an appropriate committee thereof, or a designated employee at the level of senior management must be involved in the oversight of the Program. In addition, staff members must be trained to carry out the Program. Pursuant to § 41.91, each credit and debit card issuer is required to establish and implement policies and procedures to assess the validity of a change of address request if it is followed by a request for an additional or replacement card. Before issuing the additional or replacement card, the card issuer must notify the cardholder of the request and provide the cardholder a reasonable means to report incorrect address changes or use another means to assess the validity of the change of address.

As required by section 315 of the FACT Act, § 1022.82 requires users of consumer reports to have in place reasonable policies and procedures that must be followed when a user receives a notice of address discrepancy from a credit reporting agency (CRA).

Section 1022.82 requires each user of consumer reports to develop and implement reasonable policies and procedures designed to enable the user to form a reasonable belief that a consumer report relates to the consumer about whom it requested the report when it receives a notice of address discrepancy from a CRA. A user of consumer reports also must develop and implement reasonable policies and procedures for furnishing an address for the consumer that the user has reasonably confirmed to be accurate to the CRA from which it receives a notice of address discrepancy when the user can: (1) Form a reasonable belief that the consumer report relates to the consumer about whom the user has requested the report; (2) establish a continuing relationship with the consumer and; (3) establish that it regularly and in the ordinary course of business furnishes information to the CRA from which it received the notice of address discrepancy.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals; Businesses or other for-profit.

Estimated Number of Respondents: 2,010.

Estimated Total Annual Burden: 223,860 hours.

This collection was published for 60 days of comment on May 25, 2012. 77 FR 31439. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC'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 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.

Dated: September 19, 2012.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division.

[FR Doc. 2012–23745 Filed 9–26–12; 8:45 am]

BILLING CODE 4810–33–P

[2] As noted above, these regulations have been transferred to the CFPB.

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 distributions of stock and stock rights.

DATES: Written comments should be received on or before November 26, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be

directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Distributions of Stock and Stock Rights.

OMB Number: 1545–1438.

Regulation Project Number: CO–8–91.

Abstract: The requested information is required to notify the Service that a holder of preferred stock callable at a premium by the issuer has made a determination regarding the likelihood of exercise of the right to call that is different from the issuer's determination.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 2,000.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 333.

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: September 21, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–23724 Filed 9–26–12; 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 modifications of commercial mortgage loans held by a real estate mortgage investment conduit.

DATES: Written comments should be received on or before November 26, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Environmental Settlement Funds-Classification.

OMB Number: 1545–2110.

Regulation Project Number: REG–127770–07.

Abstract: This final regulation would expand the list of permitted loan modifications to include certain modifications of commercial mortgages. Changes to the regulations are necessary to better accommodate evolving commercial mortgage industry packages

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 200.

Estimated Time per Respondent: 15 hours.

Estimated Total Annual Burden Hours: 3,000.

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: September 21, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–23725 Filed 9–26–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2009–26

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 Notice 2009–26, Build America Bonds and Direct Payment Subsidy Implementation.

DATES: Written comments should be received on or before November 26, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Allan Hopkins, (202) 622–6665, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Build America Bonds and Direct Payment Subsidy Implementation.

OMB Number: 1545–2143.

Notice Number: Notice 2009–26.

Abstract: This Notice provides guidance on the new tax incentives for Build America Bonds under § 54AA of the Internal Revenue Code (''Code'') and the implementation plans for the refundable credit payment procedures for these bonds. This Notice includes guidance on the modified Build America Bond program for Recovery Zone Economic Development Bonds under § 1400U–2 of the Code. This Notice provides guidance on the initial refundable credit payment procedures, required elections, and information reporting. This Notice solicits public comments on the refundable credit payment procedures for these bonds. This Notice is intended to facilitate prompt implementation of the Build America Bond program and to enable state and local governments to begin issuing these bonds for authorized purposes to promote economic recovery and job creation.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and not-for-profit institutions.

Estimated Number of Respondents: 1,000.

Estimated Average Time per Respondent: 15 hours.

Estimated Total Annual Burden Hours: 15,000.

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: September 21, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–23727 Filed 9–26–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2003–37

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 Revenue Procedure 2003–37, Documentation Provisions for Certain Taxpayers Using the Fair Market Value Method.

DATES: Written comments should be received on or before November 26, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Documentation Provisions for Certain Taxpayers Using the Fair Market Value Method of Internet Expense Apportionment.

OMB Number: 1545–1833.

Revenue Procedure Number: Revenue Procedure 2003–37.

Abstract: Revenue Procedure 2003–37 describes documentation and information a taxpayer that uses the fair market value method of apportionment of interest expense may prepare and make available to the Service upon request in order to establish the fair market value of the taxpayer's assets to the satisfaction of the Commissioner as required by § 1.861–9T(g)(1)(iii). It also sets forth the procedures to be followed in the case of elections to use the fair market value method.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeepers: 125.

Estimated Average Time Per Respondent/Recordkeeper: 5 hours.

Estimated Total Annual Reporting and/or Recordkeeping Burden: 625 hours.

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: September 21, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–23728 Filed 9–26–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8281

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 8281, Information Return for Publicity Offered Original Issue Discount Instructions.

DATES: Written comments should be received on or before November 26, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Information Return for Publicity Offered Original Issue Discount Instruments.

OMB Number: 1545–0887.

Form Number: 8281.

Abstract: Internal Code section 1275(c)(2) requires the furnishing of certain information to the IRS by issuers of publicity offered debt instruments having original issue discount. Regulations section 1.1275–3 prescribes that Form 8281 shall be used for this purpose. The information on Form 8281 is used to update Publication 1212, List of Original Issue Discount Instruments.

Current Actions: There are no changes being made to Form 8281 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Responses: 500.

Estimated Number of Response: 6 hours, 7 minutes.

Estimated Total Annual Burden Hours: 3,060.

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: September 21, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–23737 Filed 9–26–12; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 77 Thursday,

No. 188 September 27, 2012

Part II

Environmental Protection Agency

40 CFR Part 80

Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2010–0133; FRL–9678–7]

RIN 2060–AR55

Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the Clean Air Act Section 211(o), the Environmental Protection Agency is required to determine the applicable volume of biomass-based diesel to be used in setting annual percentage standards under the renewable fuel standard program for years after 2012. We proposed an applicable volume requirement for 2013 of 1.28 billion gallons on July 1, 2011. In order to sufficiently evaluate the many comments on the proposal from stakeholders as well as to gather additional information to enhance our analysis, we did not finalize this volume requirement in the January 9, 2012, rulemaking setting the 2012 percentage standards. In this action we are finalizing an applicable volume of 1.28 billion gallons of biomass-based diesel for calendar year 2013.

DATES: This final rule is effective on November 26, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2010–0133. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; Telephone number: 734–214–4131; Fax number: 734–214–4816; Email address: *macallister.julia@epa.gov*, or the public information line for the Office of Transportation and Air Quality; telephone number (734) 214–4333; Email address *OTAQ@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this rule are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol and biodiesel. Potentially regulated categories include:

Category	NAICS [1] codes	SIC [2] codes	Examples of potentially regulated entities
Industry	324110	2911	Petroleum Refineries.
Industry	325193	2869	Ethyl alcohol manufacturing.
Industry	325199	2869	Other basic organic chemical manufacturing.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	454319	5989	Other fuel dealers.

[1] North American Industry Classification System (NAICS).
[2] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this final action. This table lists the types of entities that EPA is now aware could potentially be regulated by this final action. Other types of entities not listed in the table could also be regulated. To determine whether your activities will be regulated by this final action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this final action to a particular entity, consult the person listed in the preceding section.

Outline of This Preamble

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I. National Technology Transfer Advancement Act
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K. Congressional Review Act
VIII. Statutory Authority

I. Executive Summary

The Renewable Fuel Standard (RFS) program began in 2006 pursuant to the requirements in Clean Air Act (CAA) section 211(o) which were added through the Energy Policy Act of 2005 (EPAct). The statutory requirements for the RFS program were subsequently modified through the Energy Independence and Security Act of 2007 (EISA), resulting in the promulgation of revised regulatory requirements on March 26, 2010.[1] The transition from the RFS1 requirements of EPAct to the RFS2 requirements of EISA generally occurred on July 1, 2010.

A. Purpose of This Action

While CAA section 211(o)(2)(B) specifies the volumes of biomass-based diesel to be used in the RFS program through year 2012, it directs the EPA to establish the applicable volume of biomass-based diesel for years after 2012 no later than 14 months before the first year for which the applicable volume will apply. On July 1, 2011, we proposed that the applicable volume of biomass-based diesel for 2013 would be 1.28 billion gal.[2]

In a final rulemaking published on January 9, 2012, we specified the 2012 standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel. Although we had intended to also finalize the applicable volume of biomass-based diesel for 2013 in that rulemaking, we did not do so. In that final rule we explained that we were continuing to evaluate the many comments on the NPRM from stakeholders as well as fulfilling other analytical requirements. We indicated that we intended to gather additional information to enhance our analysis including consideration of costs and benefits. In today's notice we are finalizing the applicable volume of biomass-based diesel for 2013. We believe that the volume we are finalizing today is feasible and consistent with the overall analytic approach to the RFS2 program and also consistent with the overall intent of the Act to expand the use of renewable fuels through the year 2022.

While we did not finalize the 2013 applicable volume of biomass-based diesel within 14 months before the first year for which the applicable volume will apply as required by the statute, we do not believe that this will create a difficulty in the ability of obligated parties to meet the applicable volume that we are finalizing today. We are finalizing the 2013 applicable volume about three months before it will apply. As described in Section III.B, producers of biodiesel, the largest contributor to biomass-based diesel, have significantly greater production capacity than will be required by today's final rule, and in general it only requires a few months to bring an idled biodiesel facility back into production. Moreover, many facilities that are producing volume currently are underutilizing their capacity, and can ramp up production relatively quickly. Finally, the biodiesel industry is already producing at a rate consistent with an annual volume of about 1.3 billion gallons.

B. Summary of Today's Action

In today's action we are finalizing an applicable volume of 1.28 billion gallons for biomass-based diesel for 2013. This is the volume that was projected for 2013 in the March 26, 2010, RFS2 final rulemaking, and we are requiring it in 2013 based on consideration of the factors specified in the statute.

Today's final rule does not specify the percentage standard for biomass-based diesel in 2013, but only the applicable volume. The percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that will be applicable in 2013 are being proposed in a separate Notice of Proposed Rulemaking.

C. Impacts of This Action

The RFS program established by Congress is a long-term program aimed at replacing fossil fuels used in the transportation sector with low-GHG renewable fuels over time. In the March 26, 2010 RFS2 final rule, EPA assessed the costs and benefits of this program as a whole when the program would be fully mature in 2022. While this is an appropriate approach to examining the costs and benefits of a long-term program like the RFS2, for this final rulemaking we have estimated costs and benefits in 2013 where such estimates can reasonably be made.

Quantified estimates of benefits include $41 million in energy security benefits and $19–52 million in air quality disbenefits. Other benefits include GHG emissions reduction benefits and both direct and indirect employment benefits in rural areas due to increased biodiesel production. Impacts on water quality, water use, wetlands, ecosystems and wildlife habitats are expected to be directionally negative but modest due to both the small impact on crop acres planted necessary to supply sufficient soy oil feedstock and due to the relatively small impact on these measures of soybean production compared to other potential crops.

Biodiesel is produced from a variety of feedstocks, including recycled cooking oil, agricultural oils such as soybean and canola oil, and animal fats. Most biodiesel producers can switch from one feedstock to another depending on price and availability. However, for the purpose of analyzing the impacts of this action, we have assumed that all of the 280 million gallon increment above the 2012 standard is met through increased demand for soy oil. Using this assumption, we estimate that soybean prices could increase up to 3 cents per pound in 2013 if all of the 280 million gallon increment above the 2012 standard is met through increased demand for soy oil. Using these assumptions, we estimate the cost of producing this increment in biomass-based diesel would range from $253 to $381 million in 2013.[3] Adding the estimate of 2013 costs to the total 2013 fuel pool would suggest a diesel fuel cost increase of less than 1 cent per gallon.

II. Statutory Requirements

Section 211(o)(2)(B)(i) of the Clean Air Act specifies the applicable volumes of renewable fuel on which the annual percentage standards must be based, unless the applicable volumes are waived or adjusted by EPA in accordance with specific authority and directives specified in the statute.[4] Applicable volumes are provided in the statute for years through 2022 for cellulosic biofuel, advanced biofuel, and total renewable fuel. For biomass-based diesel, applicable volumes are provided

[1] 75 FR 14670.

[2] 76 FR 38844.

[3] Cost estimates do not account for projections in recent trends in crop yields and grain prices resulting from drought conditions that are occurring in many areas of the country.

[4] For example, EPA may waive a given standard in whole or in part following the provisions at section 211(o)(7).

through 2012. For years after those specified in the statute (i.e., 2013+ for biomass-based diesel and 2023+ for all others), EPA is required under section 211(o)(2)(B)(ii) to determine the applicable volume, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years for which the statute specifies the applicable volumes and an analysis of the following:

- The impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;
- The impact of renewable fuels on the energy security of the United States;
- The expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);
- The impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;
- The impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and
- The impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

While EPA is given the authority to determine the appropriate volume of renewable fuel for those years that are not specified in the statute based on a review of program implementation and analysis of the factors listed above, the statute also specifies that the applicable volume of biomass-based diesel cannot be less than the applicable volume for calendar year 2012, which is 1.0 billion gallons (see CAA 211(o)(2)(B)(v)).

It is useful to note that the statutory provisions described above are silent in two important areas. For instance, the statute does not provide numerical criteria or thresholds that must be attained when EPA determines the applicable volume of biomass-based diesel for years after 2012 (other than specifying a minimum volume of 1.0 billion gal), nor does it describe any overarching goals for EPA to achieve in setting the applicable volumes for biofuels in years after those specifically set forth in the statute. Instead, the statute provides a list of factors we must consider. Due to this ambiguity in the statute, commenters differed in their perspectives on the intent of Congress in allowing EPA to determine the appropriate applicable volume for biomass-based diesel for years after 2012.

Some expressed the belief that Congress intended the required volumes of biomass-based diesel to increase every year, with EPA's role being that of determining an achievable size of that increase. Others expressed their belief that Congress intended for the statutory minimum volume of 1.0 billion gallons to be used to set the applicable volume for all years after 2012, with higher volumes being required only if EPA could demonstrate that those higher volumes were already being produced. Given that all biomass-based diesel counts towards the advanced biofuel requirement, and that the statute requires annual increases in advanced biofuel through 2022, we believe that it is appropriate that biomass-based diesel play an increasing role in supplying advanced biofuels to the market between 2012 and 2022. However, the determination of whether to increase the volume requirement for biomass-based diesel in any given year is subject to a consideration of a number of factors in the statute as described above.

We also note that the statute does not provide authority to raise the applicable volumes of advanced biofuel or total renewable fuel above those specified in the statute for years up to and including 2022. Thus, any increase in the biomass-based diesel volume requirement above that specified for 2012 would not have any impact on the advanced biofuel or total renewable fuel volume requirements. While increasing the biomass-based diesel volume requirement above the 1.0 billion gallons minimum value specified in the statute could result in a change in the makeup of biofuels used to meet the advanced biofuel and the total renewable fuel standards, doing so would not change the total required volumes of those fuels (in terms of ethanol-equivalent gallons).

We received one comment in response to the NPRM requesting that we prohibit increases in biomass-based diesel above 1.0 billion gallons in years after 2012. We disagree. As described in this preamble, we believe it is appropriate to require 1.28 billion gal of biomass-based diesel in 2013, and that we should consider further increases in the future by evaluating the factors specified in the statute.

The statute also specifies the timeframe within which these volumes must be promulgated: the rules establishing the applicable volumes must be finalized no later than 14 months before the first year for which such applicable volume will apply. For the biomass-based diesel volume requirement applicable in 2013, the deadline for promulgation was November 1, 2011. As described in the January 9, 2012, final rule that set the applicable percentage standards for 2012, we delayed issuing this final rule to allow additional time to evaluate the many comments on the NPRM from stakeholders as well as to fulfill other analytical requirements. To this end, we did in fact gather additional information to enhance our analysis of the factors required in the statute, and we considered costs and benefits. Our assessment is provided in Sections III and IV. We do not believe that the delay in issuing this final rule will materially affect the regulated community, however, since we are setting the final volume requirement several months prior to the date when it will be applicable.

The statute requires that in evaluating and establishing renewable fuel volumes in years beyond those for which volumes are specified in the statute, that EPA must coordinate with the Departments of Agriculture and Energy. EPA has coordinated with these agencies in developing this final rule through a series of telephone exchanges and meetings. Consistent with the statute, EPA will coordinate with these agencies in future rules in setting fuel volumes.

III. Factors Affecting Supply and Consumption

As described in Section II, we are required to review the implementation of the RFS program for years prior to 2013 and to use information from this review in determining the applicable volume of biomass-based diesel for 2013. In the NPRM we indicated our belief that this review is of limited value due to the short history of the RFS program. Not only did the RFS1 program have no volume requirement specific to biomass-based diesel, but even in 2010 under the RFS2 program several unique factors hindered biodiesel production volumes from increasing substantially above historical levels. For instance, RFS1 RINs from both 2008 and 2009 could be carried over to 2010 and used to meet a combined 2009/2010 volume requirement for biomass-based diesel.

Since release of the NPRM, however, some information has become available on the implementation of the RFS program in 2011. The available data provide some indication as to how the biomass-based diesel standard for 2011

is affecting the market for biodiesel. Based on information provided through the EPA-Moderated Transaction System (EMTS), reported biodiesel production increased significantly to about 1.07 billion gal in 2011. This is a significant increase over the 2010 production volume of about 400 mill gal and exceeds the applicable volume requirement of 800 mill gal for 2011. 2011 biomass-based diesel RINs were available to meet the higher advanced biofuel volume requirement. Based on these results, we believe that the RFS program is driving production of biomass-based diesel, and that higher applicable volume requirements in future years would likewise drive increases in production volumes.

In the NPRM we indicated that, based on the limited information available on the current and historical operation of the RFS program, it would be prudent for 2013 to consider only moderate increases in biomass-based diesel above the statutory minimum of 1.0 billion gallons. We cited the annual increments in biomass-based diesel volumes specified in the statute for years 2009 through 2012 and conveyed our belief that our proposed applicable volume of 1.28 billion gallons for 2013 was not a dramatic change from the trend in increments in the statute. In addition, since this biomass-based diesel volume had already been partially evaluated in the RFS2 rule, we decided to evaluate the appropriateness of setting an applicable volume of 1.28 billion gallons for 2013 by considering whether 1.28 billion gal of biomass-based diesel was reasonable given likely market demand, availability of feedstocks, production capacity, storage, distribution, and blending capacity, the capability of the existing diesel fleet to consume this volume of biodiesel, and the impacts of biomass-based diesel in a variety of areas as required under the statute.

In responding to the NPRM, some commenters took issue with our characterization of the proposed volume of 1.28 billion gallons as a ''moderate'' increase consistent with the annual increments in biomass-based diesel volumes specified in the statute for years 2009 through 2012. These comments also suggested that any comparison to volume requirements in the statute is not appropriate. However, we did not base our proposed volume of 1.28 billion gallons on this comparison but referred to past statutory increments to put our proposal in context. Regardless of the size of these past statutory increments, however, we find the final 280 mill gal increment to be moderate and achievable, as described below, especially in light of the substantial increases in production volume that occurred in 2011 which were approximately twice the amount of the 280 mill gal increase we are adopting for 2013. Other commenters agreed with the comparison and agreed that the 0.28 billion gallons increment can appropriately be characterized as moderate.

In some cases commenters opposed the proposed volume requirement of 1.28 billion gallons, citing concerns that the 2012 applicable volume of 1.0 billion gallons is not achievable. As noted above, our evaluation indicates that biodiesel production exceeded 1.0 billion gallons in 2011, confirming our projection that the 1.0 billion gallon applicable volume for 2012 is achievable. Therefore, concerns about the industry's ability to meet the applicable volume in 2012 are not a reasonable basis for concerns about achieving 1.28 billion gallons in 2013. Other commenters agreed with our assessment of 2012 and agreed that an increase of 0.28 billion gallons over the statutory minimum for 2013 is moderate given the capabilities of the industry.

Several commenters suggested that 1.28 billion gallons is an infeasible target for 2013 and requested that we set the biomass-based diesel standard at the statutory minimum of 1.0 billion gallons. Commenters taking this view generally did not offer any data or information to support their belief that 1.28 billion gal is not achievable in 2013 beyond references to historical biodiesel production rates. As described in the NPRM, we believe that the use of biodiesel production data from 2010 and earlier is of limited value, and production capacity as well as more recent data on actual production volumes does in fact demonstrate that the industry is capable of significant increases in production when demand for it exists. As described more fully in the sections below, we continue to believe that 1.28 billion gallons is achievable based on production capacity, availability of feedstock, recent trends in production volumes, and efforts to update infrastructure for storage, transport, and blending. We also believe that this volume is likely to encourage continued investment and innovation in the biodiesel industry. Our consideration of other impacts, such as fuel costs and environmental impacts, can be found in Section IV.

A. Demand for Biomass-Based Diesel

The demand for biomass-based diesel in 2013 will be a function of a number of factors, including not only the biomass-based diesel standard, but also the advanced biofuel standard, since the standards under the RFS2 program are nested. For purposes of the analysis and discussion in this rule, we have assumed that the applicable volume of advanced biofuel for 2013 will remain at the 2.75 billion gal level specified in the Act. While EPA is authorized to reduce the applicable volume of advanced biofuel pursuant to CAA section 211(o)(7)(D)(i) in years that it reduces the cellulosic biofuel applicable volume, any decision to do so will be made in the rule establishing the 2013 renewable fuel standards, and EPA is not currently in a position to pre-judge the results of that future rulemaking.

In addition to biomass-based diesel, biofuels that are likely to be available for meeting the advanced biofuel standard would include cellulosic biofuel, imported sugarcane ethanol, and other domestically produced advanced biofuels. As described in the January 9, 2012 rulemaking establishing the 2012 standards,[5] cellulosic biofuels will be a very small fraction of the 2.0 billion gallon advanced biofuel requirement in 2012, and we expect the same to be true in 2013 with respect to the 2.75 billion gal advanced biofuel requirement. Regarding other domestically produced advanced biofuels, volumes reached about 60 mill gal in 2011, and we have projected for the applicable 2013 standards that they could reach 150 mill gal or more in 2013. As a result, most of the 2.75 billion gal advanced biofuel requirement will be met with biodiesel and imported sugarcane ethanol.

Recent market projections suggest that the volume of sugarcane ethanol that can be imported into the U.S. from Brazil in 2013 could be on the order of historical import volumes prior to 2010, with the potential to reach the historical maximum or more. However, there is considerable variability in the projections for 2013. For instance, one source that evaluates trends and issues for U.S. energy markets is the U.S. Energy Information Administration's (EIA) Annual Energy Outlook (AEO).[6] This report projects U.S. net ethanol imports in 2013 to be 306 million gallons. Another source for U.S. and world commodity projections is the Food and Agricultural Policy Research Institute's (FAPRI) U.S. and World Agricultural Outlook. The most current version of the FAPRI 2011 Agricultural Outlook projects for the year 2013 that the U.S. will have net ethanol imports

[5] 77 FR 1320.

[6] U.S. Energy Information Administration (EIA). ''AEO2011, Table 11'' April 2011. *http://www.eia.doe.gov/forecasts/aeo/index.cfm.*

of 768 million gallons.[7] Based on historical trends, virtually all imported ethanol is expected to be sugarcane ethanol. As a result, while there is good reason to believe that there will be increased volumes of imported sugarcane ethanol in 2013 to help meet the advanced biofuel standard, there may also be a demand for volumes of biodiesel in excess of 1.0 billion gallons.

If we do not set the biomass-based diesel standard above 1.0 billion gallons, biodiesel producers will be less certain of the demand for their product given the opportunities that are also created by the advanced biofuel standard for imported sugarcane ethanol. Despite the fact that monthly production rates in the middle of 2012 are consistent with an annual production volume of about 1.28 billion gal, the selection of facilities producing biodiesel at any given time is highly variable. Without a regulatory requirement for 1.28 billion gal, the biodiesel industry is less likely to maintain online production capabilities for this volume. Instead, many producers will wait until late in 2013 to determine if imported sugarcane ethanol volumes will fall short of what is needed to meet the advanced biofuel volume requirement of 2.75 billion gal in 2013. While much of the idled capacity in the biodiesel industry can be brought back online relatively quickly, waiting until the end of 2013 to do so may reduce the time available and could result in the biodiesel industry being unable to make up the difference between the advanced biofuel requirement and shortfalls in imported sugarcane ethanol.

Thus in setting the biomass-based diesel volume requirement at 1.28 billion gallons rather than at the statutory minimum of 1.0 billion gallons, we are creating greater certainty for both producers of biomass-based diesel and obligated parties and increasing certainty that the intended GHG emissions reductions and energy security benefits associated with the use of advanced biofuels will be realized. It is possible that there may be some additional cost for compliance with the advanced biofuel requirement of 2.75 billion gallons under a biomass-based diesel requirement of 1.28 billion gallons, as compared to setting the biomass-based diesel requirement at the statutory minimum of 1.0 billion gallons and allowing the market to determine the relative volumes of each type of advanced biofuel that will be produced in 2013 to meet the advanced biofuel standard of 2.75 billion gallons. However, setting the biomass-based diesel applicable volume requirement at 1.28 billion gallons will provide greater certainty that the 2.75 billion gal advanced biofuel applicable volume requirement can be achieved. We believe that the potential for somewhat increased costs is appropriate in light of the additional certainty of GHG reductions and enhanced energy security provided by the advanced biofuel volume requirement of 2.75 billion gallons.

Among the parties that submitted comments in response to the NPRM, none contested our assessment of the volumes of sugarcane ethanol that might be expected to be imported into the U.S. from Brazil in 2013. Nevertheless, parties that were opposed to setting the biomass-based diesel applicable volume at 1.28 billion gallons in 2013 raised doubts about the projected demand for biomass-based diesel in 2013. In some cases commenters ignored the fact that much of the advanced biofuel standard can be met with biomass-based diesel or implicitly assumed that EPA would waive some portion of the advanced biofuel requirement. The American Trucking Association (ATA) explicitly requested that we lower the 2013 advanced biofuel standard in order to ensure that demand for biomass-based diesel would not exceed 1.0 billion gallons in 2013. As described in a separate Notice of Proposed Rulemaking,[8] we are proposing to not reduce the 2013 advanced biofuel requirement of 2.75 billion gal.

The American Petroleum Institute cited projections from AEO 2011 in support of their argument that biodiesel volumes will not reach 1.28 billion gallons in 2013. For instance, Table 11 of AEO 2011 projects a total biodiesel consumption of 1.04 billion gal in 2013. However, we do not believe that the projections provided in AEO 2011 can be used in this way, since EIA assumes that the required volume of advanced biofuel in any given year will be reduced concurrently with reductions in the required volume of cellulosic biofuel.[9] As a result, the total projected volume of biodiesel and imported ethanol in the 2013 EIA projections falls far short of what would be necessary to meet the applicable volume of 2.75 billion gal of advanced biofuel set forth in the statute.

Some parties that were opposed to setting the biomass-based diesel applicable volume at 1.28 billion gallons in 2013 did recognize that the advanced biofuel requirement of 2.75 billion gal could place pressure on the industry to produce volumes of biodiesel in excess of 1.0 billion gal but questioned the need to set the biomass-based diesel standard above the statutory minimum of 1.0 billion gallons. They argued that the market should be allowed to determine the relative volumes of biomass-based diesel, imported sugarcane ethanol, and other advanced biofuels needed to meet the advanced biofuel standard of 2.75 billion gallons. This approach, they argued, could potentially minimize the overall cost of compliance with the advanced biofuel standard in 2013. However, as noted above, the statute does not provide any overarching goals for EPA to achieve in setting the applicable volumes for biofuels in years after those specifically set forth in the statute. Instead, the statute provides a list of factors we must consider. While one of those factors is cost, other factors must also be considered as described in Section II. Additionally, setting the biomass-based diesel standard at 1.28 billion gallons instead of at the statutory minimum of 1.0 billion gallons will provide more certainty that the applicable volume of advanced biofuel set forth in the statute will not need to be reduced, since it guarantees that an additional 420 million ethanol-equivalent gallons of advanced biofuel will be available. This, in turn, means that there will be more certainty of reduced GHG emissions through the use of more advanced biofuels and increased certainty of energy security benefits in terms of reduced reliance on fossil fuels. In addition, increasing the biomass-based diesel volume requirement to 1.28 billion gal in 2013 provides an incentive for continued investment and innovation in the biodiesel industry and serves the long term goal of the statute to increase volumes of renewable fuels over time such that in the longer term they are more likely to be available to offset the need for crude oil.

B. Availability of Feedstocks To Produce 1.28 Billion Gallons of Biodiesel

In the NPRM, we provided our assessment of the types and amounts of feedstock that could be used to produce 1.28 billion gallons of biomass-based diesel in 2013. This assessment included references both to the work that had been done in the RFS2 final

[7] Table ''Ethanol Trade'', Commodity Outlook/Biofuels, FAPRI–ISU 2011 World Agricultural Outlook. *http://www.fapri.iastate.edu/outlook/2011/.*

[8] This NPRM will propose the applicable 2013 percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel.

[9] Communication between D. Korotney of EPA and W. Brown of EIA, 8/25/2011.

rule as well as a recent report released by IHS Global Insight.[10] The feedstock estimates from these two sources are shown in Table III.B–1.

TABLE III.B–1—FEEDSTOCK SOURCES (IN MILL GALLONS) THAT MAY CONTRIBUTE TO 2013 VOLUME OF 1.28 BILLION GAL

Source	RFS2 final rule	IHS global insight
Grease and rendered fats	380	272
Corn oil	300	185
Soybean oil	600	624
Canola oil	0	68
Palm oil	0	7
Other	0	185
Total	1,280	1,340

As some comments pointed out, these two sources used fundamentally different approaches. In the case of the RFS2 final rule, projections of feedstock volumes were determined first, and then summed to conclude that 1.28 billion gal is a reasonable volume of biomass-based diesel that could be achieved in 2013. In contrast, the IHS Global Insight report began with the aim of reaching 1.3 billion gallons in 2013, and then conducted modeling to determine the likely mix of feedstock sources that would support that volume. Nevertheless, we believe that these sources suggest two similar ways that the market could meet the demand for feedstock under a required volume of 1.28 billion gallons of biomass-based diesel. The actual mix of feedstock sources used to produce 1.28 billion gallons of biomass-based diesel could also differ substantially from the values shown in Table III.B–1 as the market adjusts to the new mandate.

One commenter stated that we relied too heavily on these sources without additional analysis. We did in fact conduct a more up-to-date analysis of these feedstock sources and, as described below, the updated analysis confirms our belief that the projections in Table III.B–1 are reasonable projections for the mix of feedstock sources that could be used to reach 1.28 billion gallons of biomass-based diesel. We will continue to coordinate with USDA in the future on RFS related rulemakings. Other comments agreed with our assessment of available feedstock and our conclusions that there would be sufficient volumes to meet a biomass-based diesel volume requirement of 1.28 billion gallons. A summary of our updated assessment of feedstock sources is included below.

It should be noted that the projections in Table III. B–1 do not account for recent trends in crop yields and grain prices resulting from drought conditions that are occurring in many areas of the country. Given the wide range of feedstocks from which biodiesel can be produced, the ultimate impact of these drought conditions on the mix of biodiesel feedstocks in 2013 is difficult to predict at this time.[11]

1. Grease and Rendered Fats

According to the U.S. Census Bureau, the total volume of yellow grease and other greases (most likely trap grease) produced in 2010 was about 340 mill gallons[12]. In the first half of 2011, production of greases was about 10% higher than for the same period in 2010, suggesting that total 2011 production could reach 370 mill gallons or more, similar to the production rates in 2008 and 2009.

With regard to inedible tallow, the volume produced in 2010 was about 440 mill gallons, and indications from the first half of 2011 are that a similar volume will be generated in 2011 as well.

Taken together, the total volume of grease and rendered fats produced annually is over 800 mill gallons. This is significantly more than was estimated in the RFS final rule and the report from IHS Global Insight for use in the production of biomass-based diesel in 2013. Moreover, we have not included in our estimate other potential sources, such as edible tallow, lard, and poultry fats. While these other potential feedstocks currently have existing markets, it may become economical for them to be used in the production of biomass-based diesel.

In their comments on the NPRM, the America Cleaning Institute raised concerns about the diversion of animal fats from the oleochemical industry for the production of biofuels. We do not have the authority to prevent feedstocks that meet the statutory definition of renewable biomass from being used in the production of renewable fuel. The choice of which feedstocks will be used to produce biomass-based diesel will be determined by the market. We also note that in responding to comments to the rule establishing the RFS2 program, we acknowledged that animal fat can be used in other markets such as the soap industry, but that the diversion of some portion of this feedstock to the biofuels industry was both not prohibited and would not significantly impact the GHG assessment of biofuel made from this feedstock.[13] However, based on our assessment, it is possible that the 1.28 billion gall requirement could be met without the use of animal fats. As noted above, the total volume of grease and rendered fats is estimated at 800 mill gallons, far above the volumes listed in Table III.B–1. It is therefore possible that the industry may produce biodiesel predominately from waste grease instead of animal fats. Moreover, the volumes of other feedstock sources, such as corn oil and vegetable oils as described more fully below, may exceed the volumes needed to produce 1.28 billion gal biodiesel, further reducing the need to rely on animal fats for biodiesel production. Finally, EPA has received inquiries from industry regarding the use of additional sources

[10] Table 2, ''Biodiesel Production Prospects for the Next Decade,'' IHS Global Insight, March 11, 2011.

[11] EPA has received requests for a waiver of RFS volumes under CAA section 211(o)(7) based on the impact of the drought, and has invited comment on the requests.

[12] Current Industrial Reports, U.S. Census Bureau, M311K—Fats and Oils: Production, Consumption, and Stocks, Table 2b. Assumes 7.5 lb/gal. *http://www.census.gov/manufacturing/cir/historical_data/m311k/index.html*. The U.S. Census Bureau terminated collection of data for this report as of July 2011 so updated data is not available.

[13] ''Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments,'' February 2010, EPA–420–R–003, pages 6–15 and 7–304. Docket number EPA–HQ–OAR–2005–0161.

of waste oils often from the food processing industry as biodiesel feedstock, indicating the sources of feedstock are likely to continue expanding, improving the availability of alternatives to animal fat as a biofuel feedstock.

Since the market will determine the specific amount of animal fats used in the production of biofuels, we cannot project how their availability for the production of oleochemicals might be affected. We agree with the American Cleaning Institute that increases in the use of animal fats to produce biofuel could increase the price of those animal fats and/or reduce their availability for the production of oleochemicals. Such circumstances could in turn compel the oleochemical industry to use a greater fraction of alternative feedstock sources such as cottonseed oil. However, as discussed in Section IV.A.8, there could be sufficient sources of other feedstocks to produce 1.28 billion gallons of biomass-based diesel without using any animal fats. Moreover, the cost of animal fat is dependent on the general demand for this material which is only in part impacted by its potential use as a biofuel feedstock. As a result, and as discussed more fully in Section IV.A.8, we do not believe oleochemical production facility location will be significantly impacted by the potential use of rendered fats as a biofuel feedstock if some portion of the 280 million gallon increase in the biomass-based diesel standard is produced from rendered fats.

2. Corn Oil

The RFS2 final rule projected that by 2013, 34% of all dry mill ethanol facilities in the U.S. would extract inedible corn oil from the by-products of ethanol production using advanced extraction technologies. This estimated extraction rate led us to conclude that the volume of corn oil could reach 300 mill gallons in 2013. While currently available technologies have not been able to reach the oil extraction rates that we assumed in the RFS2 final rule, these lower extraction rates have been offset by a higher number of ethanol plants utilizing some form of extraction technology. For instance, according to a recent article in Ethanol Producer Magazine, up to 55 percent of plants may be extracting corn oil by the end of 2012.[14] Similarly, in an article in Biodiesel Magazine, Dave Elsenbast, vice president of supply chain management for REG stated that as of July 2011 about 35% of U.S. corn ethanol plants had implemented corn oil extraction and that he expected that number to double within the next couple of years.[15] In the NPRM we stated our expectation that the percentage of dry mill ethanol facilities using some form of corn oil extraction technology will increase to 60% by 2013. Given the information from Ethanol Producer Magazine and Biodiesel Magazine, this estimate appears reasonable.

If 60% of all dry mill corn ethanol facilities in the U.S. were extracting inedible corn oil at rates capable with current technology, the amount of corn oil available for biodiesel production would be approximately 270 million gallons. However, as described in the RFS2 final rule, we expect that by 2013 technology improvements will increase corn oil production levels to 300 million gallons. Additional corn oil could come from ethanol production facilities using corn fractionation or wet milling technology. This corn oil was not considered as a biodiesel feedstock in the RFS2 rule, but market conditions may result in its availability to the biodiesel industry. The higher adoption rate of corn oil extraction in comparison to our projections from the RFS final rule, and the promise of ever-increasing oil extraction yields, indicate that the 300 million gallons of corn oil extraction projected in the RFS2 rule in 2013 remains a reasonable projection. Comments from the Renewable Energy Group support this view.

3. Soybean Oil

While a number of parties commented on the use of soybean oil for the production of biomass-based diesel, none provided data or information suggesting that there would be insufficient supplies to meet the need for 1.28 billion gallons of biomass-based diesel as well as other traditional markets for soybeans. Instead, comments on the use of soybean oil were focused on costs. We have addressed these comments separately in Section III.B.3. The rest of this section summarizes our assessment of soybean oil availability, updated since the NPRM.

Since the RFS2, other oilseeds (e.g., canola oil) have emerged as potential sources of biodiesel feedstock. However, the U.S. market for soybean oil biodiesel is significantly more mature than for biodiesel made from other oilseeds. Because of this, we anticipate that soybeans will remain the primary source of U.S. biodiesel from oilseeds in 2013. It is possible that biodiesel production from other oilseeds such as canola could achieve a significant level of production by 2013. If other oilseeds with approved pathways are able to contribute to the biodiesel volumes, achieving the biomass based diesel mandate would be facilitated. For the purposes of this analysis, EPA is making the conservative assumption that there will be no biodiesel production from other oilseeds in 2013.

We examined historical and projected soybean oil supplies and use to verify that the volumes shown in Table III.B–1 are achievable in 2013. Our analysis concludes that there will be sufficient supplies of soybean oil to meet the needs of both biodiesel production and other domestic uses in 2013. Producing 600 million gallons of soybean-based biodiesel will require 4,530 million pounds of soybean oil.

Table III.B.3–1 below lists U.S. Department of Agriculture (USDA) historical data and current projections for U.S. supply and use of soybean oil from the 2006/2007 crop year to the 2013/2014 year. Since 2006/2007, domestic use of soybean oil for non-biodiesel purposes has ranged from 14,134 million pounds to 15,813 million pounds. USDA projects non-biodiesel use will stay above 14,000 million lbs through the 2013/2014 year.

TABLE III.B.3–1—HISTORICAL SUPPLIES AND USE OF SOYBEAN OIL IN THE U.S.

[In million lbs]

Year starts October 1	Total supplies	Domestic use for non-biodiesel purposes	Supplies available for biofuel feedstock use or export	Historical exports	Historical biofuel feedstock use
2006/07	23,536	15,813	7,723	1,877	2,762

[14] Joseph Riley, ''Customized Coproducts Needed as Industry Matures,'' June 6, 2011. Ethanol Producer Magazine.

[15] Dave Elsenbast quoted in Ron Kotrba, ''Biodiesel from corn oil: a growing force,'' July 6, 2011. Biodiesel Magazine.

TABLE III.B.3–1—HISTORICAL SUPPLIES AND USE OF SOYBEAN OIL IN THE U.S.—Continued

[In million lbs]

Year starts October 1	Total supplies	Domestic use for non-biodiesel purposes	Supplies available for biofuel feedstock use or export	Historical exports	Historical biofuel feedstock use
2007/08	23,730	15,089	8,641	2,911	3,245
2008/09	21,319	14,196	7,123	2,193	2,069
2009/10	22,578	14,134	8,444	3,359	1,680
2010/11	22,452	14,244	8,208	3,233	2,550
2011/12 [a]	21,215	14,100	7,115		
2012/13 [a]	21,075	14,200	6,875		
2013/14 [a]	21,290	14,400	6,890		

[a] Projected.

Sources: USDA, Agricultural Marketing Service, *Oil Crops Outlook,* February 10th, 2012. USDA, Economic Research Service, *Agricultural Long-Term Projections,* February 2012.

Historical values for exports and biofuel feedstocks in the above table are provided for context only. The remaining values are related as follows:

Total Supplies = Domestic Use for Non-Biodiesel Purposes + Supplies Available for Biofuel Feedstock Use or Export

USDA projects that 6,875 million pounds of soybean oil will be available for biofuel feedstock use or export in the 2012/2013 crop year and that 6,890 million pounds will be available in the 2013/2014 year (see Table III.B.3–1). This is considerably more than the approximately 4,530 million pounds needed to meet the soybean-based biodiesel portion of the 1.28 billion gallon mandate.[16]

4. Effects on Food Prices

In order to determine the likelihood of a substantial increase in food prices, EPA projected the effects of a 1.28 billion gallon mandate using the CARD stochastic modeling framework discussed in Section IV.B.1. of this final rule. Assuming that the 280 million gallon increment is met entirely with soybean oil biodiesel in 2013, we project that the price of soybean oil will be $0.45 per pound under this mandate, compared to $0.42 under a 1.0 billion gal volume requirement. This represents a price increase of 3 cents per pound (about 7 percent). The increase in demand for soybean oil is also expected to have a small impact on the price of soybeans. We project that the price of soybeans will be $10.39 per bushel under this mandate, compared to $10.21 per bushel under a 1.0 billion gal volume requirement. This represents a price increase of 18 cents per bushel (about 1.8 percent). Both of these projections are within the recent historical range of prices (see Table III.B.4–1).

TABLE III.B.4–1—HISTORICAL AND PROJECTED PRICES OF SOYBEANS AND SOYBEAN OIL

[2010 dollars per lb]

	Soybean oil	Soybeans
2006–2011 Low Annual Average Price	$0.33 per lb	$9.70 per bushel.
2006–2011 High Annual Average Price	$0.54 per lb	$12.36 per bushel.
2013 Projected Price	$0.45 per lb	$10.39 per bushel.

Sources: USDA, Agricultural Marketing Service, *Oil Crops Outlook,* February 10th, 2012. USDA, Economic Research Service, *Agricultural Long-Term Projections,* February 2012.

The timeframe of this rulemaking did not permit large-scale modeling of the impacts of this mandate on the agricultural sector. We therefore cannot predict the exact impact that these increases in soybean and soybean oil prices will have on food prices in general.

As noted above, these results assume that 600 mill gal of this mandate is soybean-based. To the extent that this increment is met with other feedstocks, the overall effect of this mandate on the price of soybeans and soybean oil would be smaller.

5. Other Bio-Oils

Although the modeling we conducted for the RFS2 final rule assumed that the only form of bio-oil used to make biomass-based diesel would be from soybeans, in fact other seed oils may contribute meaningful volumes to the pool. For instance, on September 28, 2010, we approved a RIN-generating pathway for biodiesel made from canola oil.[17] The volume of biodiesel made from canola oil was 96 mill gallons in 2008.[18] In addition, we are evaluating other pathways for the production of biodiesel from oilseeds which could potentially be approved for RIN generation by 2013. On January 5, 2012 we proposed to include oil from camelina as an approved feedstock for producing biodiesel (77 FR 462). Algal oil could also provide additional feedstocks if promising technologies for production are commercialized.

Nevertheless, even if none of these other sources of bio-oil were available, we believe that the total volume of grease, fats, corn oil, and soybean oil would be sufficient to produce 1.28

[16] This calculation assumes a vegetable oil to biodiesel conversion rate of approximately 7.6 pounds of oil per gallon of biodiesel. Actual conversion rates vary depending on the technology used and the purity of the virgin oil. As a result, the actual amount of soybean oil required to produce 600 million gallons of biodiesel could be slightly higher or lower than the amount we have estimated in this rulemaking.

[17] 75 FR 59622.

[18] EPA memorandum, ''Summary of Modeling Input Assumptions for Canola Oil Biodiesel for the Notice of Supplemental Determination for Renewable Fuels Produced Under the Final RFS2 Program,'' Document # EPA–HQ–OAR–2010–0133–0049.

billion gallons of biomass-based diesel in 2013.

C. Production Capacity

Total production capacity of the biodiesel industry has exceeded 1.28 billion gallons for a number of years. As of February 2012, total production capacity was more than 2.5 billion gallons for 191 companies.[19] According to the EPA registration database, 216 facilities have registered with the EPA under the RFS2 program as of March 15, 2012. Plants that are currently not registered under RFS2 are either producing extremely low volumes that fall under the regulatory threshold for RIN generation, are producing products other than biodiesel such as soaps or cosmetics, or have shut down until such time as the demand for biodiesel rises.

While comments generally did not disagree that sufficient production capacity exists to reach 1.28 billion gallons in 2013, some questioned how quickly idled plants can be brought back online. We note that most of the production capacity exists at plants that are already producing some volume, and that many operating biodiesel plants are currently producing at less than their full capacity. As a result, these facilities typically do not need to go through the additional steps that are associated with starting up an idled plant, such as securing new financing, establishing contracts with feedstock suppliers and customers, hiring and retraining employees, and testing and proving the equipment. Nevertheless, since many new plants can be built and started within a year or so[20], we also believe that pre-existing but idled plants can be restarted in considerably less than a year. Given the time between release of this action and when the 1.28 billion gal requirement will become effective, there is no reason to believe that idled plants cannot be restarted in time to contribute meaningfully to total volumes in 2013.

D. Consumption Capacity

Biodiesel is registered with the EPA under 40 CFR Part 79 as a legal fuel for use in highway vehicles. Under this registration, it can legally be used at any blend level, from 1% (B1) to 100% (B100) in highway diesel fuel. As there are no equivalent registration requirements for non-highway fuels, biodiesel can legally be used at any blend level in nonroad diesel and heating oil. However, other factors typically limit the concentration of biodiesel in conventional diesel fuel. To the extent that the consumption of biodiesel occurs only at lower blend levels, the geographic area where biodiesel must be marketed would correspondingly be greater, impacting both how much biodiesel can be consumed in the U.S. as a whole as well as how the infrastructure may need to change to accommodate 1.28 billion gallons in 2013. As described below, we believe that there are no impediments to consuming an additional 280 mill gal of biodiesel.

Most engine manufacturers have explicit statements in their engine warranties regarding acceptable biodiesel blend levels. Although a few permit B100 to be used in their engines without any adverse impact on their warranties, most limit biodiesel blends to B20 or less, and of those, about half allow no more than B5.[21] For specific applications where a party knows which engines will be using biodiesel blends, higher concentrations of biodiesel may be possible. However, for general distribution such as at retail facilities, these warranty conditions create a disincentive to blend or sell biodiesel at higher concentrations and would tend to drive most blends towards low concentrations of biodiesel such as B5. Those parties that commented on this issue agreed with this assessment.

Cold weather operability represents another reason for preferential use of B5 and even B2. The most common measure of cold weather operability is the fuel cloud point. The cloud point is the temperature at which gelling begins (as indicated by solid crystals beginning to form in the fuel), and thus is an indicator of when potential engine filter plugging issues could arise. The higher the cloud point temperature of the fuel, the more likely such problems are to be experienced in cold weather. Biodiesel generally has a higher cloud point than conventional, petroleum-based diesel fuel, with fat-based biodiesel such as tallow having a higher cloud point than virgin oil-based biodiesel such as a fuel made with soybean and canola oil. While cloud point issues with conventional, petroleum-based diesel are generally mitigated during the winter months through blending with lighter grades (i.e., #1 diesel fuel), the cloud point of biodiesel generally requires more dramatic interventions such as heated storage tanks, lines, and blending equipment, as well as heating rail cars and tank trucks. However, some of these biodiesel cloud point mitigation efforts may be reduced through the use of low biodiesel blend levels such as B2 or B5, since cloud point is strongly correlated with biodiesel concentration in the final blend. Insofar as biodiesel is blended into conventional diesel before being transported to its final destination for sale, low biodiesel blend levels may reduce the need for heated equipment at the final destination.

Based on highway and nonroad diesel consumption projections for 2013 from the EIA, a biodiesel volume of 1.28 billion gallons would represent about 2.9% of all diesel fuel.[22] If all biodiesel were to be blended as B5, almost 60% of the diesel fuel consumed nationwide in 2013 would contain biodiesel. However, today some biodiesel is blended at concentrations higher than B5, and we expect that some blending at these higher concentrations would continue in the future. One commenter disagreed that blends higher than B5 will be marketed in any but niche markets. We agree with this comment. However, since biodiesel prices have been higher than conventional diesel prices in the recent past, and yet blends above B5 have in fact been sold, we believe that the existing markets for blends such as B20 are niche markets that will continue into the future. The sale of biodiesel blends higher than B5 will reduce the total amount of diesel fuel that will contain some biodiesel. Directionally, then, this will also reduce the geographical areas to which biodiesel must be distributed. Based on the number of retail stations offering different biodiesel blend levels in 2010, we estimate that about 30% of biodiesel was sold at retail in blends with biodiesel concentrations as high as 20%. Another 17% of biodiesel was sold in blends with biodiesel concentrations between 10% and 20%.[23] If the volumes of biodiesel currently sold as B10 and higher were to continue to be sold in 2013, such blends would account for about one quarter of the 1.28 billion gal mandate, and 45% of the diesel fuel consumed nationwide in 2013 would contain biodiesel.

Heating oil represents another opportunity for large volumes of biodiesel to be consumed. According to EIA's Annual Energy Outlook 2012, residential consumption of distillate fuel oil has been about 4 billion gal. Moreover, some of the practical issues

[19] Plant list from National Biodiesel Board, 2/7/2012.

[20] Based on construction times for new plants listed in Biodiesel Magazine from July 2006 through May 2009.

[21] ''Automakers' and Engine Manufacturers' Positions of Support for Biodiesel Blends,'' *Biodiesel.org.*

[22] Assumes total diesel volume consumed in the transportation sector in 2013 is 44.86 billion gal, per Annual Energy Outlook (AEO) 2012 Early Release, Table A2.

[23] National Biodiesel Board, Retailing Fueling Sites, as of February 17, 2011. *http://biodiesel.org/buyingbiodiesel/retailfuelingsites/default.shtm.*

leading to warranty limits on engines regarding the use of biodiesel are less of a concern when burning biodiesel for home heating purposes. As a result, significant volumes of biodiesel can be consumed as heating oil and count for compliance purposes under the RFS program.

We believe that distributing and consuming 1.28 billion gallons of biodiesel in 2013 are achievable. As shown in Table III.D–1, a number of states already have mandates for the use of biodiesel in 2013,[24] and efforts are underway by the production and distribution industries to meet these mandates.

TABLE III.D–1—STATES WITH BIODIESEL MANDATES

Minnesota	Diesel fuel for use in internal combustion engines must contain at least 5% biodiesel. Beginning May 1, 2012, during the months of April through October, diesel fuel must contain at least 10% biodiesel (B10).
Oregon	Diesel fuel sold in the state must be blended with at least 5% biodiesel.
Washington	At least 2% of all diesel fuel sold in Washington must be biodiesel or renewable diesel. This requirement will increase to 5% after it is determined that in-state feedstock sources and oil-seed crushing capacity can meet a 3% requirement.
Pennsylvania	All diesel fuel sold in Pennsylvania must contain at least 2% biodiesel one year after in-state production of biodiesel reaches 40 million gallons. The mandated biodiesel blend level will increase to 5% biodiesel one year after in-state production of biodiesel reaches 100 million gallons.
New Mexico	After July 1, 2012, all diesel fuel sold to consumers for use in on-road motor vehicles must contain at least 5% biodiesel. This requirement may be suspended for up to six months under certain conditions.
Louisiana	Within six months following the point at which cumulative monthly production of biodiesel produced in the state equals or exceeds 10 million gallons, at least 2% of the total diesel volume must be biodiesel.

Source: U.S. Department of Energy, Alternative Fuels and Advanced Vehicles Data Center.

Collectively, these states currently account for approximately 13 percent of the nationwide consumption of diesel. Other states that have implemented other forms of incentives are listed in Table III.D–2.

TABLE III.D–2—STATES WITH REBATES, REFUNDS, REDUCED TAX RATES, OR CREDITS FOR BIODIESEL PRODUCTION OR BLENDING

Illinois.
Indiana.
Kansas.
Kentucky.
Maine.
Maryland.
Michigan.
Montana.
North Dakota.
Oklahoma.
Rhode Island.
South Carolina.
South Dakota.
Texas.
Virginia.
Washington.

Source: U.S. Department of Energy, Alternative Fuels and Advanced Vehicles Data Center.

* Conditions and exemptions for all incentive programs vary by state.

Collectively, the states listed in Table III.D–2 currently account for approximately 37% of the nationwide consumption of biodiesel. A variety of states also have requirements for the use of biodiesel in state fleets, provisions that allow biodiesel to be used as an alternative to meeting alternative fuel vehicle mandates, and credits/rebates for the installation of biodiesel dispensing and blending equipment. Altogether, therefore, more than half of the states in the U.S. have mandates and/or incentives that will induce them to address biodiesel infrastructure issues.

One commenter pointed out that state-specific economic incentives for the production of biodiesel do not necessarily eliminate cost differences between biodiesel and conventional diesel. We agree with this comment. Nevertheless, efforts to incentivize biodiesel production and use in individual states will directionally help the nation to meet a 1.28 billion gal biomass-based diesel requirement in 2013.

Based on our review of the ability of diesel engines to use diesel blended with biodiesel, and the various state requirements and incentives to use biodiesel, we believe that consumption of 1.28 billion gal of biodiesel will not be problematic.

E. Biomass-Based Diesel Distribution Infrastructure

The National Petroleum Refiners Association (NPRA) stated that an analysis of the feasibility of meeting increased biodiesel use requirements should be based on a maximum biodiesel blend ratio of 5%.[25] We disagree, since there is no reason to expect that existing consumption patterns involving higher concentrations of biodiesel will not continue into the future, as described above. However, we have assessed the additional biodiesel distribution infrastructure that will be needed under a 1.28 billion gal mandate assuming a blend ratio no higher than 5%. NPRA commented that the required increase in the use of biodiesel will necessitate numerous installations of biodiesel storage tanks (possibly heated) as well as the installation of biodiesel receiving and blending capacity at the diesel fuel distribution terminals throughout the U.S. markets. This is also consistent with our analysis. In the proposal, we noted that some terminals may be able to avoid or delay the installation of additional biodiesel storage facilities by storing 50/50 biodiesel/diesel fuel blends that are then further blended with diesel fuel to produce a finished fuel. However, we assumed that all biodiesel blending facilities would install segregated (heated and insulated) biodiesel storage facilities in our infrastructure analysis. We further noted that some terminals may delay the installation of biodiesel in-line blending equipment by splash blending biodiesel.[26] However, we stated that we expect that this approach would be temporary due to the heightened concerns over achieving a correct blend ratio and a fully mixed biodiesel blend that accompanies splash

[24] As one commenter pointed out, some of these mandates have not yet taken effect as in-state production volumes have not yet reached specified thresholds. Nevertheless, the state mandates represent incentives within those states to increase production.

[25] NPRA acknowledged that higher biodiesel blend ratios are sometimes used but that this would not substantially increase the capacity of the market to absorb additional biodiesel volume. NPRA recently changed its name to the American Fuel & Petrochemical Manufacturers (AFPM).

[26] In-line blending refers to the process of blending biodiesel into petroleum-based diesel fuel in the delivery line that feeds into the tank truck from the terminal storage tanks. Splash blending refers to the process of first loading petroleum-based diesel fuel into a tank truck followed by biodiesel so that the final blend meets the desired blend ratio.

blending. We assumed that terminals would install in-line biodiesel blending equipment in our infrastructure analysis.

We proposed finding that there will be sufficient fuel distribution infrastructure available to support the use of 1.28 billion gal of biomass-based diesel in 2013. NPRA stated that the rapid expansion in B5 blending capability in the marketplace necessary to support the use of the envisioned volumes of biodiesel is unrealistic and unachievable. NPRA did not further support this statement. The National Biodiesel Board (NBB) stated that there will be sufficient biodiesel distribution infrastructure available to facilitate the use of the envisioned volumes of biodiesel.[27] NBB further stated that in most markets, terminals can treat 5% biodiesel blends as a fungible commodity like diesel fuel and that they believe that many terminals may be storing B5 blends. To the extent terminals store a finished B5 blend, it would obviate the need for much of the segregated biodiesel storage and blending capability that is assumed in our infrastructure analysis. The Iowa Biodiesel Board stated that claims that industry cannot accommodate the distribution of the target gallons are baseless and cited various examples of recent biodiesel blending initiatives at Iowa terminals.

We acknowledge that the required expansion of the fuel distribution infrastructure necessary to support the use of the 1.28 billion gal of biomass diesel may pose challenges to industry. However, we continue to believe that industry can respond effectively to this challenge to support the use of the envisioned 2013 biodiesel volume. In fact, EIA data suggests that much of the necessary infrastructure is already in place. EIA data indicates that annual biodiesel production in 2011 was nearly 1 billion gallons, and monthly biodiesel production from October to December 2011, and from March to May 2012 averaged nearly 100 million gallons per month.[28] These data indicate that significant progress has already been made in expanding the fuel distribution infrastructure necessary to support the use of the 1.28 billion gal of biomass diesel. We anticipate such efforts will continue to be successful in supporting the required biodiesel volume for 2013.

The American Trucking Association (ATA) stated that EPA should have provided a discussion of the costs of the infrastructure changes contained in the proposed rule. These costs were accounted for in the discussion of the overall impacts on transportation fuel price contained in Section IV.B.1.d. Additional discussion of specific ATA comments is included below.

ATA commented that EPA underestimated the number of tank trucks needed to distribute the additional amount of biodiesel in 2013 relative to volume used in 2012. ATA stated that the assumed 6 trips per tank truck per day that EPA used in estimating the number of tank trucks that would be needed was unrealistically high. ATA stated that one large ATA member that transports biofuels reports that the average length of haul (one way) is 141 miles. Based on this, ATA stated that 2 loads per day would be a more accurate estimate considering loading and unloading times.

ATA assumed a single shift tank truck delivery operation. Our estimated number of tank trucks was based on a two shift operation. We continue to believe that a two shift truck delivery model of operation is appropriate to maximize the utilization of distribution system resources. Given time for loading and unloading and lunch breaks for 2 shifts, our assumed 6 deliveries per day equates to an average one way truck shipping distance of 40 miles. We project that a number of additional biodiesel plants will be brought into production to meet the 2013 biodiesel volume. Biodiesel production plants tend to be geographically dispersed. Hence, the opening of additional plants will tend to reduce the average shipping distance from the biodiesel production plant to the terminal compared to today. We also project that the production volume will increase at a number of existing biodiesel plants. This will facilitate the shipment by rail of biodiesel volumes that previously were shipped by truck long distances. Thus, we believe that biodiesel trucking distances will be substantially reduced in the future.

Nevertheless, we acknowledge that uncertainty exists regarding what biodiesel shipping distances will be in the future. Therefore, we believe that it is useful to evaluate the potential impacts of longer shipping distances on the number of additional tank trucks that will be needed to transport biodiesel. If we were to assume a 141 mile average truck shipping distance per ATA and a two-shift operation, this would translate to 4 loads per day per tank truck. At 4 loads per day, 38 additional number of tank trucks would be needed in 2013 relative to 2012 (as opposed to the 25 that we projected). If we were to assume only 2 deliveries per day as ATA did, an additional 75 trucks would be needed for the 2013 case. Even under this extreme case, the addition of 75 tank trucks would represent less than 0.3% of the total U.S. fleet of petroleum products tank trucks (estimated at 27,000).[29] Consequently, the possibility that biodiesel shipping distances might be longer than we projected would not materially affect our conclusions about the ability to accommodate the additional tank trucks and drivers needed.

In the proposal, we estimated that a total of 5 tank trucks will be needed to transport 80 mill gallons/yr of renewable diesel that we projected would be used annually in 2012 and 2013 to the locations where it is blended with petroleum-based diesel fuel. This is based on each tank truck carrying 7,800 gallons of renewable diesel fuel making 6 deliveries per day. We estimate that the production facility that will account for the renewable diesel produced through 2013 will ship its product 20 miles or less by tank truck to facilities that produce blends with petroleum-based diesel fuel. Shipment of the projected renewable diesel volume such short distances could likely be achieved by making 6 deliveries during one shift without the need for a second shift. We anticipate that the renewable diesel fuel will be blended directly into storage tanks containing petroleum-based diesel fuel. Consequently, we continue to believe that the distribution of renewable diesel fuel could be accomplished without undue difficulty.

IV. Impacts of 1.28 Billion Gallons of Biomass-Based Diesel

In order to evaluate the impacts of a biomass-based diesel volume of 1.28 billion gal in the areas required under the statute (see Section II), we first considered what the appropriate reference would be. Since the statute requires that the biomass-based diesel volume we set for 2013 be no lower than 1.0 billion gal, we believe that this is an appropriate reference point. Therefore, in the discussion that follows, we have focused on either a volume of 1.28 billion gal biomass-based diesel or an increment of 0.28 billion gal biomass-based diesel, depending on the specific

[27] NBB did not provide an analysis regarding the addition of new biodiesel distribution facilities.

[28] *http://www.eia.gov/biofuels/biodiesel/production/table1.pdf.*

[29] Department of Transportation, Hazardous Materials, Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids, Notice of Proposed Rulemaking, 76 FR 4847, January 27, 2011. *http://www.gpo.gov/fdsys/pkg/FR-2011-01-27/pdf/2011-1695.pdf.*

sources of information and analyses available.

The statute requires that an applicable biomass-based diesel volume for 2013 and other years be based on an analysis of specified environmental and other impacts. These analyses can be conducted for 1.28 billion gal biomass-based diesel or an increment of 0.28 billion gal. Most of the areas we are required to analyze were covered in the RFS2 final rule in some form, and we believe that we can use this information in satisfying our statutory obligations to analyze specified factors in determining the applicable volume of biomass-based diesel for 2013.

Some of the analyses presented in the RFS2 final rule were for the specific case of 1.28 billion gallons in 2013. These analyses included an investigation of the expected annual rate of commercial production of biomass-based diesel in 2013, impacts on agricultural commodity supply and price, and the cost to consumers of transportation fuel. Some of these were discussed in Section III above. Most of the analyses in the RFS2 final rule, however, were conducted to represent full implementation of the RFS2 program in 2022. In these analyses, the biomass-based diesel volume was estimated to be 1.82 billion gallons, which was compared to a reference case biodiesel volume of 380 mill gallons. These cases are shown in Table IV–1.

TABLE IV–1—PRIMARY 2022 REFERENCE AND CONTROL CASES FROM RFS2 FINAL RULEMAKING (BILLION GALLONS)

	Advanced biofuel						Non-advanced biofuel	Total renewable fuel
	Cellulosic biofuel		Biomass-based diesel		Other advanced biofuel			
	Cellulosic ethanol	Cellulosic diesel	FAME [a] biodiesel	NCRD [b]	Other biodiesel [c]	Imported ethanol	Corn ethanol	
Reference	0.25	0	0.38	0	0	0.64	12.29	13.56
Control	4.92	6.52	0.85	0.15	0.82	2.24	15.00	30.50

[a] Fatty acid methyl ester (FAME) biodiesel.
[b] Non-Co-processed Renewable Diesel (NCRD).
[c] Other Biodiesel is biodiesel produced in addition to the amount needed to meet the biomass-based diesel standard.

The biomass-based diesel volume of 1.82 billion gallons analyzed for 2022 in the RFS2 final rule is higher than the 1.28 billion gallons we are required to evaluate for today's final rule for 2013. More importantly, the change in biodiesel production in 2022 due to the statutory mandates for biomass-based diesel plus other diesel anticipated to meet the advanced biofuel volume (a total increase of 1.44 billion gallons compared to the reference case without the EISA mandates) is much larger than the change we are evaluating for 2013 (0.28 billion gallons). The RFS2 final rule analysis considers impacts from the entirety of the renewable fuel mandates, as opposed to impacts resulting solely from the biodiesel portion of the mandates.

In response to the NPRM, the American Petroleum Institute (API) commented that comparing the analyses conducted in the RFS2 final rule for the fully implemented RFS2 program in 2022 to a biodiesel increment of 0.28 billion gal occurring in 2013 was misleading. They cited the fact that the 2022 analysis between the control and reference cases accounts for agricultural and market conditions that develop over multiple years, while the proposed biomass-based diesel requirement of 1.28 billion gallons in 2013 would require those changes to occur over a single year. They also cited the fact that the single-year growth from 2012 to 2013 that would occur under a requirement for 1.28 billion gallons (0.28 billion gallons in one year) is about twice as high as the annualized growth rate in the RFS final rule (1.44 billion gal increase over ten years, or about 0.14 billion gal per year).

As described in Section III, we believe that the industry can increase production to at least 1.28 billion gallons by 2013, that sufficient feedstock will be available, and that the infrastructure will be able to accommodate these higher volumes. Therefore, we do not believe that API's concern about the different annual production growth rates in the RFS2 final rule compared to our proposal for 2013 is warranted.

With regard to concerns about agricultural and market conditions, we agree that the positive impacts of yield growth and foreign crop production increases that may be reflected in the 2022 analysis from the RFS final rule, and which develop over multiple years, may not be representative of a single-year increase in biomass-based diesel of 0.28 billion gallons in 2013. However, the RFS is a forward-looking program that focuses on long-term changes in the fuels sector. For this reason, it is not appropriate to emphasize specific interim year impacts in cases where these impacts are transient and continually changing. However, in some cases we have been able to analyze a 2013 impact, which should then be compared to the 2022 impact analyzed for the RFS2 final rule. In other cases we have used trends used to derive our 2022 assessments to indicate likely impacts in 2013. Since the NPRM, EPA has conducted a specific analysis of the effects of the 2013 mandate on the biofuels market. This analysis is detailed in Section IV.B of this rulemaking. This analysis was conducted in response to comment about quantifying some of the costs and benefits of this rule. However, it also addresses API's concerns by providing a year-specific analysis.

We recognize that uncertainties remain regarding how markets for soybeans and other crops will react to a mandate of 1.28 billion gallons for biomass-based diesel. For instance, the volume of soybean oil required to meet the mandate will likely be higher in 2013 than it has been in 2011. As a result, there may be upward pressure on soybean oil prices, which we consider in Section III.B of this rulemaking. Nevertheless, we expect that RIN prices will adjust in the market to provide the economic incentive for the mandate to be met. As described in the rulemaking that established the RFS1 program, the RIN system was designed with this end in mind.

A. Consideration of Statutory Factors

1. Climate Change

Since biodiesel has a GHG benefit compared to the petroleum-based diesel it is replacing, an increase in biomass-based diesel of 0.28 billion gal from 2012 to 2013 will lead to a displacement of conventional diesel fuel, with corresponding GHG emissions reductions. This increased use of biomass-based diesel will contribute to

lower climate change impacts in comparison to the petroleum-based diesel it is replacing. The GHG lifecycle analysis of soybean biodiesel presented in the final RFS2 rule was based on modeling and analysis that estimated an annualized emissions stream over a 30-year averaging period, starting in 2022 (the year when the RFS2 program will be fully implemented). For the purpose of this annual rulemaking, we have not quantified the GHG emissions benefits for the 280 mill gallon increase in biomass-based diesel in 2013. At this time, we do not have a quantified estimate of the GHG impacts for the single year 2013 standard. We also do not believe it would be appropriate to use the 30-year average RFS2 estimate starting in 2022 as a surrogate for the single year impact of the 2013 BBD standard. While we are not quantifying the GHG emissions impact of this 2013 BBD rule, qualitatively we believe that it will provide a reduction in GHGs.

One commenter suggested that increased biodiesel use would also reduce GHG emissions compared to sugarcane ethanol, an alternative advanced biofuel that would be used to meet the mandate. This statement is based on the specific GHG reductions associated with a gallon of biodiesel produced in 2022 that we estimated in our lifecycle analysis for different biofuels. However, for this rulemaking we are only considering the GHG impacts of the biomass-based diesel standard. Therefore, it is outside the scope of this rule to analyze the potential GHG emission impacts of displacing sugarcane ethanol with biodiesel.

One commenter also suggested that by requiring 0.28 billion gallons of biomass-based diesel above the statutory minimum of 1.0 billion gallons, effectively shifting the biodiesel used for the ''other'' advanced biofuel category to biomass-based diesel, EPA would actually promote increased volumes of renewable fuels (rather than ethanol-equivalent gallons based on the 1.5 equivalence value), allowing for the greater displacement of fossil fuels. However, this is not the case. Although the requirement for a physical volume of biomass-based diesel will be 1.28 billion gallons, the contribution of this volume to compliance with the advanced biofuel requirement is based on energy-equivalence with respect to ethanol, not physical volumes. Thus there will be no additional quantities of other advanced fuels produced.

2. Energy Security

This final standard will assure an increased use of biomass-based diesel in the U.S. and help to improve U.S. energy security. Reducing U.S. petroleum imports and increasing the diversity of U.S. liquid fuel supplies lowers both the financial and strategic risks caused by potential sudden disruptions in the supply of imported petroleum to the U.S. The economic value of reductions in these risks provides a measure of improved U.S. energy security. This section summarizes EPA's estimates of U.S. oil import reductions and energy security benefits from this rule.

In 2010, U.S. petroleum import expenditures represented 14 percent of total U.S. imports of all goods and services.[30] These expenditures rose to 18 percent by April of 2011.[31] In 2010, the United States imported 49 percent of the petroleum it consumed,[32] and the transportation sector accounted for 71 percent of total U.S. petroleum consumption. This compares to approximately 37 percent of total U.S. petroleum supplied by imports and 55 percent of U.S. petroleum consumption in the transportation sector in 1975. Requiring higher volumes of renewable fuels to be used in the U.S. is expected to lower U.S. oil imports.

This rule will require an additional 280 million gallons of biodiesel to be produced, which equals about 255 million gallons of diesel equivalent.[33] Based on analysis of historical and projected future variation in U.S. petroleum consumption and imports, we estimate that approximately 50 percent of the reduction in fuel consumption resulting from adopting renewable fuels is likely to be reflected in reduced U.S. imports of refined fuel, while the remaining 50 percent is expected to be reflected in reduced domestic fuel refining. Of this latter figure, 90 percent is anticipated to reduce U.S. imports of crude petroleum for use as a refinery feedstock, while the remaining 10 percent is expected to reduce U.S. domestic production of crude petroleum. Thus, on balance, each gallon of fuel saved as a consequence of the renewable fuel standards is anticipated to reduce total U.S. imports of petroleum by 0.95 gallons.[34] Therefore, based on these assumptions, this rule is expected to reduce imports of petroleum by about 242 million gallons. Table IV.A.2–1 below compares EPA's estimates of the reduction in imports of U.S. crude oil and petroleum-based products from this program to projected total U.S. imports for the year 2013.

TABLE IV.A.2–1—PROJECTED IMPORT REDUCTIONS FROM THIS RULE AND TOTAL U.S. PETROLEUM-BASED IMPORTS IN 2013

[Millions of barrels]

U.S. petroleum-based import reductions from the rule (million barrels/yr)	U.S. total petroleum-based imports without the rule (million barrels/yr)
5.8	3,391

In order to understand the energy security implications of reducing U.S. petroleum imports, EPA worked with Oak Ridge National Laboratory (ORNL), which has developed approaches for evaluating the economic costs and energy security implications of oil use. The energy security estimates provided below are based upon a methodology developed in a peer-reviewed study entitled, ''*The Energy Security Benefits of Reduced Oil Use, 2006–2015,*'' completed in March 2008. This study is included as part of the docket for this rule.[35] [36] When conducting its analysis, ORNL considered the full economic cost of importing petroleum into the United States.

The economic cost of importing petroleum into the U.S. is defined to include two components in addition to the purchase price of petroleum itself. These are: (1) The higher costs for oil imports resulting from the effect of increasing U.S. import demand on the world oil price and on the market power of the Organization of Petroleum Exporting Countries (i.e., the ''demand'' or ''monopsony'' costs); and (2) the risk of reductions in U.S. economic output and disruption of the U.S. economy caused by sudden disruptions in the supply of imported petroleum to the U.S. (i.e., ''macroeconomic disruption/adjustment costs'').

An often-identified component of the full economic costs of U.S. oil imports

[30] *http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=WTTIMUS2&f=W.*

[31] *http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbblpd_a.htm.*

[32] *http://www.eia.gov/dnav/pet/pet_pri_rac2_dcu_nus_m.htm.*

[33] RFS2 Final Rulemaking.

[34] This figure is calculated as 0.50 + 0.50*0.9 = 0.50 + 0.45 = 0.95.

[35] Leiby, Paul N., ''*Estimating the Energy Security Benefits of Reduced U.S. Oil Imports,*'' Oak Ridge National Laboratory, ORNL/TM–2007/028, Final Report, 2008. (Docket EPA–HQ–OAR–2010–0162).

[36] The ORNL study ''*The Energy Security Benefits of Reduced Oil Use, 2006–2015,*'' completed in March 2008, is an updated version of the approach used for estimating the energy security benefits of U.S. oil import reductions developed in an ORNL 1997 Report by Leiby, Paul N., Donald W. Jones, T. Randall Curlee, and Russell Lee, entitled ''*Oil Imports: An Assessment of Benefits and Costs.*'' (Docket EPA–HQ–OAR–2010–0162).

is the cost to U.S. taxpayers of existing U.S. energy security policies. The two primary components of this cost are likely to be (1) the expenses associated with maintaining a U.S. military presence—in part to help secure a stable oil supply—in potentially unstable regions of the world; and (2) costs for maintaining the U.S. Strategic Petroleum Reserve (SPR). The SPR is the largest stockpile of government-owned emergency crude oil in the world.

The EPA recognizes that potential national and energy security risks exist due to the possibility of tension over oil supplies. Much of the world's oil and gas supplies are located in countries facing social, economic, and demographic challenges, thus making them even more vulnerable to potential local instability. Thus, to the degree to which this final rule increases the diversity of sources of liquid fuel for U.S. consumption and/or reduces reliance upon imported energy supplies that can be deployed by either consumers or the nation's defense forces, the United States could expect benefits related to national security and increased energy supply. Although the Agency recognizes the clear benefit to the United States from reducing dependence on foreign oil, the Agency has been unable to calculate the monetary benefit that the United States will receive from the improvements in national security expected to result from this program.

Also, while the costs of building and maintaining the SPR are clearly related to U.S. oil use and imports, these costs have not varied historically in response to U.S. oil import levels. Thus, the costs of maintaining the SPR are excluded from this analysis. In addition, given the redistributive nature of this monopsony effect from a global perspective, it is excluded in the energy security benefits calculations for this rule. In contrast, the other portion of the energy security premium, the U.S. macroeconomic disruption and adjustment cost that arises from U.S. petroleum imports, does not have offsetting impacts outside of the U.S. and, thus, is included in the energy security benefits estimated for this rule. To summarize, EPA has included only the macroeconomic disruption portion of the energy security benefits to estimate the monetary value of the total energy security benefits of this program.

The U.S. is projected to be a net exporter of diesel fuel in 2013.[37] Increased biodiesel production would likely result in less domestic consumption of diesel fuel in the U.S. The reduced consumption may be reflected in increased exports of diesel from the U.S. However, regardless of the incremental effect of this rule on net imports, increasing the diversification of the U.S. and global diesel fuel pools would likely confer some reduction in the severity of a future potential disruption in the world oil market. Our energy security analysis does not evaluate the energy security benefits of individual finished petroleum products; rather, our analysis takes into account the energy security benefits of overall net petroleum product imports. Although we believe such an approach provides a reasonable estimate of energy security impacts, in future year evaluations of the biodiesel volumes, we may consider whether to develop an estimate more specific to the biodiesel market.

The energy security premiums for the year 2013 are presented in Table IV.A.2–2 as well as a breakdown of the components of the energy security premiums for those years. These energy security premiums are recorded on a dollar per barrel of oil imported reduced from this rule. On a gallon of biodiesel fuel basis, these translate into an estimated $0.15/gallon benefit in 2013 for the macroeconomic disruption and adjustment costs component of the energy security premium (in 2010$).

TABLE IV.A.2–2—ENERGY SECURITY PREMIUMS IN 2013 (2010$/BARREL) BASED ON ORNL METHODOLOGY

Monopsony	Macroeconomic disruption/adjustment costs	Total mid-point
$11.40	$7.13	$18.53
($3.83–$19.40)	($3.41–$10.35)	($10.03–$26.74)

Note: Values in parentheses represent a 90% confidence interval around the central value.

Using EPA's fuel consumption analysis in conjunction with ORNL's energy security premium estimates, the agency has developed estimates of the total energy security benefits for the year 2013 in Table IV.A.2–3.

TABLE IV.A.2–3—ESTIMATED ENERGY SECURITY BENEFITS IN 2013 (2010$)

U.S. oil imports reduced (million barrels/yr)	Benefits ($ millions)
5.8	$41.2

One commenter suggested that an increase in biodiesel for the mandate is statistically insignificant. EPA interprets this comment to mean that the increase in biodiesel production due to this rule is not a sufficiently large volume that it will add significantly to the energy security position of the U.S. EPA's analysis of energy security is conducted on a per gallon basis, and per gallon estimates are extrapolated upwards to estimate the total energy security benefits estimate in Table IV.A.2–3. Thus, we assume that each extra gallon of biodiesel has an equal energy security benefit regardless of the overall size of the renewable fuels volume requirement. Thus, total energy security benefits are increasing with this rule.

3. Agricultural Commodities and Food Prices

For the RFS2 final rule, we examined the impacts of increased renewable fuels production on commodity prices, food prices and trade in agricultural products which considered the impacts of all the biofuel feedstock sources anticipated to meet the 2022 biofuel volume requirements, not just biodiesel. For the RFS2, EPA used two primary models for its agricultural economic impacts analysis, the Food and Agriculture Sector Optimization Model (FASOM) and the Food and Agricultural Policy Research Institute-Center for Agriculture and Rural Development (FAPRI–CARD) models. The FASOM model is a long-term economic model of the U.S. forest and agriculture sectors that maximizes the net present value of the sum of producer and consumer surplus across the two sectors over time subject to market, technology, and other constraints. The FAPRI–CARD models are a system of econometric models covering many agricultural commodities in the U.S. and internationally. They are

[37] U.S. Energy Information Administration (EIA). ''Short-Term Energy Outlook'', Table 4a, June 2012. *http://205.254.135.7/forecasts/steo/tables/pdf/4atab.pdf*.

based on historical data analysis, current academic research, and a reliance on accepted economic, agronomic, and biological relationships in agricultural production and markets.[38]

To meet the RFS2 renewable fuel volumes, a number of price effects on the agricultural commodities were estimated in the RFS2 final rule for 2022. For instance, FASOM estimated that an increase in renewable fuel volumes to meet the RFS2 will result in an increase in the U.S. soybean prices of $1.02 per bushel (10.3 percent) above the Reference Case price in 2022. FASOM also projected the price of soybean oil will increase by $183 per ton (37.9 percent) over the 2022 Reference Case price (all prices are in 2007$). Most of the additional soybeans needed for increased biodiesel production are diverted from U.S. exports to the rest of the world. In FASOM, soybean exports decrease by 135 million bushels (−13.6 percent) in 2022 relative to the AEO2007 Reference Case. This change represents a decrease of $453 million (−4.6 percent) in the total value of U.S. soybean exports in 2022. However, these price effects are not attributed to the demand for biodiesel feedstock alone, rather the compounding affect of all changes in feedstock demand estimated to result from the total biofuel mandate in 2022. Since the impact on soybeans due to biodiesel demand was only a portion of this total feedstock impact and since the impact in 2013 will be less than considered in 2022 (since the 2013 biodiesel volumes are less than those considered for 2022), the impact on soybean prices and exports from an increase to 1.28 billion gall in 2013 should also be less. See Sections III.B.3 and IV.B.1.a of this rulemaking for further information on the impact on soybean availability and prices.

A recent report by IHS Global Insight[39] also discusses potential agricultural and economic impacts from increasing vegetable oil demand for biodiesel production. According to this study, existing soybean yield technologies are expected to be applied increasingly across the U.S., resulting in roughly a 10% higher growth rate in soybean yields than USDA's projections from 2010–2016 which were used by EPA in its RFS2 analyses. Similarly, Global Insight predicts these higher yield technologies will be implemented in other large soybean-producing countries, such as Brazil and Argentina. If higher yields than modeled for RFS2 indeed are realized, then it is likely that the price increases for soybean oil will be less than estimated for RFS2. Likewise, other price impacts, such as those on food prices, will still move in the same direction (i.e., an increase in price resulting from an increase in demand) but could be smaller than in the RFS2 analysis.

For the analyses performed for the RFS2 final rule, EPA estimated a $10 per person per year increase in food costs in the U.S. due to the total annual impact of the RFS2 program by 2022 compared to a Reference case that assumed no RFS2 renewable fuel requirements. Again, the biodiesel impacts will represent only a small portion of these overall impacts and will likely be even smaller in 2013 due to the smaller volume of feedstock required. One commenter suggested that EPA should conduct a more thorough analysis of food price impacts of this rule. EPA has conducted an analysis projecting the amount of soybean oil that will be required to meet this mandate and the effect this will have on the prices of soybeans and soybean oil. The results of this analysis are discussed in detail in Sections III.B.3 and IV.B.1.a of this rule.

4. Air Quality

As described in the NPRM, we are relying on the analyses of renewable fuel impacts conducted in support of the RFS2 rule[40] to qualitatively discuss the expected air quality impacts of a biomass-based diesel volume of 1.28 billion gallons. The RFS2 analyses reflect EPA's most current assumptions regarding biodiesel emission impacts.[41]

In the RFS2 rule, we analyzed both changes in pollutant emissions (measured in tons) and changes in ambient air quality associated with the changes in pollutant emissions. The changes in pollutant emissions were calculated by comparing the 2022 RFS2 renewable fuel volumes to volumes if the RFS2 mandate were not in place (the reference scenario).[42] The analysis reflected full implementation of the RFS2 program in 2022 and accounted for impacts from multiple types of renewable fuels, of which biodiesel was only one type. Specifically, the RFS2 emissions inventory analysis assumed 1.82 billion gal of biodiesel in the RFS2 scenario compared to 0.38 billion gal of biodiesel in the reference scenario, reflecting a 1.44 billion gal increase in biodiesel with the rule in place.

Biodiesel emission impacts from the RFS2 rule emissions inventory analysis are presented in Table IV.A.4–1. A complete discussion of the emissions inventory analysis conducted for the RFS2 rule can be found in Chapter 3 of the RFS2 Regulatory Impact Analysis (RIA).[43] These biomass-based diesel emission impacts (which reflect a 1.44 billion gal increase in biodiesel) are all less than 1% of the total U.S. emissions inventory for each pollutant.[44] We expect the impacts of the 1.28 billion gal of biomass-based diesel volume relative to the 1.0 billion gal statutory minimum volume (which reflect a 0.28 billion gal increase) to be smaller.

[38] CARD Staff, *Technical Report: An Analysis of EPA Renewable Fuel Scenarios with the FAPRI–CARD International Models,* December, 2009. Docket #: EPA–HQ–OAR–2005–0161–3177.

[39] ''Biodiesel Production Prospects for the Next Decade,'' IHS Global Insight, March 11, 2011.

[40] 75 FR 14670, March 26, 2010.

[41] U.S. EPA 2010, Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. February 2010. Docket EPA–HQ–OAR–2009–0472–11332. Section 3.1.1.2.4.

[42] In the RFS2 Regulatory Impact Analysis, we analyzed the mandated 2022 RFS2 renewable fuel volumes relative to volumes required by two reference scenarios: RFS1 mandate (7.1 billion gallons of renewable fuels) and AEO 2007 (13.6 billion gallons of renewable fuels). Both reference scenarios assumed the same volume of biodiesel, so the emission and air quality impacts described in this section are the same for both reference scenarios.

[43] U.S. EPA 2010, Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. February 2010. Docket EPA–HQ–OAR–2009–0472–11332.

[44] While the national-level emissions and air quality impacts may be small, there may still be local and regional impacts that are larger in percentage terms. Our analysis is unable to capture this local and regional variability.

TABLE IV.A.4–1—BIODIESEL EMISSION IMPACTS OF THE RFS2 RENEWABLE FUEL VOLUMES (1.82 BILLION GAL) RELATIVE TO THE REFERENCE CASE (0.38 BILLION GAL)

	Biodiesel impacts of RFS2 rule emissions inventory analysis (Δ 1.44 billion gal biodiesel)			Percent RFS2 total U.S. inventory [c]
	Upstream [a] (tons)	Downstream [b] (tons)	Total (tons)	
VOC	−1,049	−2,422	−3,471	−0.03
CO	913	−4,104	−3,191	−0.01
NO_X	−290	1,346	1,056	0.01
PM_{10}	4,268	−569	3,699	0.10
$PM_{2.5}$	632	−315	317	0.01
SO_2	1,580	0	1,580	0.02
NH_3	4,171	0	4,171	0.10
Benzene	10	−30	−20	−0.01
Ethanol	0	0	0	0.00
1,3-Butadiene	0	−16	−17	−0.10
Acetaldehyde	2	−66	−65	−0.14
Formaldehyde	1	−182	−181	−0.21
Naphthalene	−1	0	−1	−0.01
Acrolein	63	−9	54	0.84

[a] U.S. EPA 2010, Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. February 2010. Docket EPA–HQ–OAR–2009–0472–11332. Table 3.2–11. Note: units in Table 3.2–11 were mislabeled as tons/mmBTU. Actual units are tons.

[b] U.S. EPA 2010, Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. February 2010. Docket EPA–HQ–OAR–2009–0472–11332. Table 3.2–9.

[c] While the national-level emissions and air quality impacts may be small, there may still be local and regional impacts that are larger in percentage terms. Our analysis is unable to capture this local and regional variability.

The air quality analysis for the RFS2 rule used photochemical modeling to characterize primary pollutants that are emitted directly into the atmosphere and secondary pollutants that are formed as a result of complex chemical reactions within the atmosphere. Included in the air quality modeling scenarios for the RFS2 rule were large volumes of ethanol as well as other renewable fuels, and the nature of these complex chemical interactions makes it difficult to determine the air quality impacts of biodiesel alone. Specifically, the RFS2 air quality analysis reflects a roughly 21 billion gal increase in ethanol, far outweighing the volume increase in biodiesel (0.43 billion gal). A complete discussion of the RFS2 air quality analysis and its limitations can be found in Chapter 3 of the RFS2 Regulatory Impact Analysis (RIA).[45]

The RFS2 air quality analysis was completed earlier than the final emissions inventory analysis because of the length of time needed to conduct photochemical modeling.[46] [47] The air quality analysis assumed 0.81 billion gal of biodiesel in the RFS2 scenario compared to 0.38 billion gal of biodiesel in the reference scenario, reflecting a 0.43 billion gal increase in biodiesel use with the rule in place. We use the 0.43 billion gal increase in biodiesel assumed in the RFS2 air quality analysis to qualitatively discuss the potential impacts of a 0.28 billion gal increase in biodiesel from this rule.

Given the small emissions impact of a 0.43 billion gal increase in biodiesel on the total U.S. emissions inventory (the basis for our air quality modeling scenarios), we expect the portion of air quality impacts attributable to a move from 1.0 to 1.28 billion gal (a 0.28 billion gal biodiesel increase) to be small enough that on a nationwide basis the air quality impact will likely not be noticeable.

We note that Clean Air Act section 211(v) requires EPA to analyze and mitigate, to the greatest extent achievable, adverse air quality impacts of the renewable fuels required by the RFS2 rule. We intend to investigate any potential adverse impacts from increased renewable fuel use through that study and will promulgate appropriate mitigation measures separate from today's final rule.

5. Deliverability and Transport Costs of Materials, Goods, and Products Other Than Renewable Fuel

EPA evaluated in the RFS2 final rule the impacts on the U.S. transportation network from the distribution of the total additional volume of biofuels that will be used to meet the RFS2 standards. Oak Ridge National Laboratory (ORNL) conducted an analysis of biofuel transportation activity from production plants to petroleum terminals by rail, barge, and tank truck to identify potential distribution constraints to help support the assessment in the RFS2 final rule.[48] The ORNL analysis concluded that the increase in biofuel shipments due to the RFS2 standards will have a minimal impact on U.S. transportation infrastructure. The majority of biofuel transportation is projected to be accomplished by rail. Nevertheless, it was estimated that the biofuels transport will constitute only 0.4% of the total freight tonnage for all commodities transported by the rail system through 2022.[49] Given the small increase in freight shipments due to the transport of biofuels to meet the RFS2 standards, we believe that the distribution of biofuels

[45] U.S. EPA 2010, Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. February 2010. Docket EPA–HQ–OAR–2009–0472–11332.

[46] Emissions serve as inputs to the air quality modeling analysis. However, the final fuel volume assumptions (upon which the emission estimates were based) increased between the time that emissions were estimated to support the air quality modeling analysis and the time emissions were estimated to reflect the final rulemaking.

[47] The RFS2 air quality analysis reflects EPA's most recent air quality analysis applicable to changes in renewable fuel types and volumes.

[48] "Analysis of Fuel Ethanol Transportation Activity and Potential Distribution Constraints", Oak Ridge National Laboratory, March 9, 2009. To simplify the ORNL analysis, biomass-based diesel volumes were assumed to originate at the same points of production and to be shipped to the same petroleum terminals as the ethanol projected to be used to meet the RFS2 standards. This may tend to overstate the potential impact on the transportation system from the shipment of biomass-based diesel fuels since biomass-based diesel production plants were projected to be more geographically dispersed than ethanol production facilities. In any event, the simplifying assumption was assessed to have little impact on the results from the analysis given that biomass-based diesel represented only 8% of the total projected biofuel volumes under the RFS2 final rule.

[49] See sections 1.6.4 and 1.6.5 of the RFS2 RIA.

will not adversely impact the deliverability and transport costs of materials, goods, and products other than renewable fuels. There were no comments on the proposed rule to contradict this assessment.

6. Wetlands, Ecosystems, and Wildlife Habitats

As directed by CAA section 211(o)(2)(B)(ii), in setting the 2013 biodiesel volume requirements, EPA is to consider the impacts of biodiesel production and use on wetlands, ecosystems and wildlife habitat. No specific public comments on these impacts were received, so the following updates the largely qualitative analyses provided in the proposal.

The most complete and up-to-date assessment of these impacts is contained in the analysis prepared by EPA in response to the requirements set out in CAA section 204. This report to Congress considers a range of impacts but the focus of the discussion here is on wetlands, ecosystems and wildlife habitats as directed by the CAA amendments. This report does not attempt to quantify the impacts of biofuel production and use as these impacts are dependent on local or regional conditions. Nevertheless the analyses contained in the report provide qualitative assessments and reasonable expectations of trends which can be used to consider the environmental impacts of increases in biodiesel production and use. These trends are only summarized here while the final report provides extensive detail.[50]

The assessment focuses on the use of oil from soybeans as the feedstock for biodiesel production. Other oil seed feedstock sources represent a very small portion of biofuel production in 2013 so will be expected to have much less of an impact than soy oil. Corn oil extracted during the ethanol production process is increasing, adding a small increment of supply for biofuel production by 2013 that will offset demands for soy and other oil seed crops, thus reducing potential agricultural impact of biodiesel production. Corn as a feedstock for biofuel production is driven primarily by the demand for corn ethanol, not the demand for the corn ethanol co-product of extracted, non-food grade corn oil. Therefore the impact of the supply of extracted corn oil is not considered here. Finally, waste fats, oils and greases are expected to have negligible environmental impact as a feedstock since they do not impact agricultural land use and would otherwise be used for some lower value purpose or simply discarded.

Wetlands can be adversely affected by agricultural production through runoff that can result in nutrient loading (particularly from fertilizers) or from sedimentation (from erosion). Soy production tends to use less fertilizer than corn production (the most likely alternative crop) and can reduce the amount of fertilizer required for corn when planted in rotation with corn. However, compared to other crops, erosion can be higher from fields planted in row crops such as corn and soy beans. While the impacts of nutrient loading and erosion tend to be site specific, good farming practices including the optimum fertilizer use and the set aside of sensitive lands via the Conservation Reserve Program (CRP) can significantly help control these adverse affects. Wetlands can also be adversely affected through diversion of surface and ground water for agricultural irrigation. Soybean production less frequently relies on irrigation than corn and some other crops. More discussion on water usage is included below in the section on water use and water quality impacts.

Ecosystems and wildlife habitat can be adversely affected if CRP lands are converted to crop production, if row crops such as soybeans replace grassy crops and in general if new lands with diverse vegetation are converted to crop production. As explained in the RFS2 final rule, we do not expect the RFS program production to result in an increase in total acres of agricultural land under production in the U.S. compared to a reference case without the impact of the RFS2 volumes. The relatively small increase of 0.28 billion gall should not appreciably affect the amount of land devoted to oil seed production. Additionally, the USDA commitment to support the CRP program should minimize the likelihood of any significant change in the amount of CRP land. Therefore, while some very local changes may result due to individual farmer's planting decisions, since no new crop land are expected in the U.S. due to this increase in the biomass-based diesel standard and sensitive lands will be protected via programs such as CRP, no measureable impact in aggregate ecosystems or wildlife habitat due to cropland expansion is expected.

Increased water withdrawals for soy biodiesel production can lead to more frequent low-flow conditions that reduce the availability for aquatic habitat. Additionally, waste water from biodiesel production can adversely affect surface water quality if not properly treated.

7. Water Quality and Quantity

The water quality and quantity impacts of biodiesel are primarily related to the type of feedstock and the production practices used both to produce the feedstock and to convert the feedstock into biodiesel. Soybeans are the principal feedstock used for biodiesel production and are predicted to account for 600 million gallons of the 1.28 billion gallons evaluated for 2013. Non-food grade corn oil extracted during ethanol production, animal fats and recycled fats account for most of the remaining biodiesel feedstock. Since these fats and greases are the byproduct of another use and are not produced specifically for biodiesel manufacture, their production and primary use is not related to the level of biodiesel so their indirect impacts are not considered here. While non-food grade corn oil is extracted for its use as a feedstock for biodiesel production, it is a by-product of corn ethanol production. The corn used for biofuel production is primarily grown for the purpose of producing ethanol, not as a source of extracted non-food grade oil so the water impacts of corn production are primarily a concern for ethanol produced from the corn starch, not the by-product of extracted corn oil. Thus, this analysis will focus on soybeans as a primary source of vegetable oil used in biodiesel production. No specific public comments on these impacts were received so the following discussion updates the analyses provided in the proposal.

From a water quality perspective, the primary pollutants of concern from soybean production are fertilizers (nitrogen and phosphorus) and sediment. Additional pollutants such as from pesticides have the potential to impact water quality to a lesser degree. There are three major pathways for these potential pollutants to reach water from agricultural lands: runoff from the land's surface, subsurface tile drains, or leaching to ground water. Climate, hydrological, and management factors influence the potential for these contaminants to reach water from agricultural lands.

a. Impacts on Water Quality and Water Quantity Associated With Soybean Production

After corn, soybeans are the second largest agricultural crop in terms of acreage in the U.S. In 2010, American farmers planted 77.7 million acres of

[50] U.S. EPA (Environmental Protection Agency). February 2012. ''Biofuels and the Environment: First Triennial Report to Congress.'' Office of Research and Development, Washington, DC. EPA/600/R–10/183F.

soybeans and harvested 3.4 billion bushels. As with the production of any agricultural crop, the impact on water quality depends on a variety of factors including production practices, use of conservation practices and crop rotations by farmers, and acreage and intensity of tile drained lands. Additional factors outside agricultural producers' control include soil characteristics, climate, and proximity to water bodies.

Soybeans are typically grown in the same locations as corn since farmers commonly rotate between the two crops. Nutrients are applied to fewer soybean acres than corn and at much lower rates because soybean is a legume.[51] Legumes have associations in their roots with bacteria that can acquire atmospheric nitrogen and convert it into bio-available forms, reducing the need for external addition of nitrogen fertilizer. However, losses of nitrogen and phosphorus from soybeans can occur at quantities that can degrade water quality.[52] In 2006, USDA's NASS estimated that nitrogen was applied to 18 percent of the 2006 soybean planted acres in the Program States at an average rate of 16 pounds per acre per year. Phosphate was applied to 23 percent of the planted acres, at an average rate of 46 pounds per acre (NASS, 2007).[53] The quantity of nitrogen fertilizer applied to soybean fields ranged from 0 to 20 pounds per acre, while the quantity of phosphate ranged from 0 to 80 pounds per acre. As with corn, the conversion of idled acreage to soybeans is estimated to result in losses of nitrogen and phosphorus from the soil through cultivation.[54]

Agricultural conservation systems can reduce the impact of soybean production on the environment. The systems components include (1) Controlled application of nutrients and pesticides through proper rate, timing, and method of application, (2) controlling erosion in the field (i.e., reduced tillage, terraces, or grassed waterways), and (3) trapping losses of soil and fertilizer runoff at the edge of fields or in fields through practices such as cover crops, riparian buffers, controlled drainage for tile drains, and constructed/restored wetlands.[55]

The effectiveness of conservation practices, however, depends upon their adoption. The USDA's Conservation Effects Assessment Project (CEAP) quantified the effects of conservation practices used on cultivated cropland in the Upper Mississippi River Basin. It found that, while erosion control practices are commonly used, there is considerably less adoption of proper nutrient management to mitigate nitrogen loss to water bodies.[56] However, as noted above, the relatively low amount of fertilizer used for soy bean production tends to lessen the potential for nitrogen loss to water bodies. Additionally, soybean production can reduce the amount of biomass left on the field compared to a corn case where much of the stover is left to protect the soil and enhance biomass content. In such a case, there could be more soil erosion with soybean production compared to corn production and potentially greater nutrient runoff. Proper soil management can reduce this erosion concern.

Water for soybean cultivation predominately comes from rainfall, although about 11 percent of soybean acres in the U.S. are irrigated.[57] Water use for irrigated soybean production in the U.S. varies from 0.2 acre-feet per acre in Pennsylvania to about 1.4 acre-feet per acre in Colorado, with a national average of 0.8 acre-feet of water.[58] Water used for irrigation is at least temporarily not available for other uses and if pumped from deep aquifers, may not return to those aquifers for centuries.

There is some concern that the demand for corn and soybeans as biofuel feedstocks may lead to high prices of these commodities, inducing farmers with land currently enrolled in USDA's CRP to return to intensive agricultural production (e.g., Secchi et al., 2009).[59] The CRP provides farmers with financial incentives to set aside a certain portion of their cropland in order to conserve or improve wildlife habitat, reduce erosion, protect water quality, and support other environmental goals. Biomass produced from CRP lands is considered ''renewable biomass'' as defined under the RFS regulations and is therefore eligible for use in the production of renewable fuel under the RFS program. The Food, Conservation, and Energy Act of 2008 (known as the Farm Bill) capped CRP acreage at 32 million acres, reducing enrollment by 7.2 million acres from the 2002 Farm Bill with the potential for making more acreage available for the production of row crops. However, even if the aggregate total of CRP protected lands does not change significantly, individual farmers have the opportunity to move specific land in and out of CRP such that the specific lands in the program do not necessarily remain fixed. Historically, land entering and exiting the CRP program has been more vulnerable to erosion than other cultivated land, but also less productive.[60] So while the conversion of a specific piece of land from CRP to intensive feedstock production is possible, such a land use conversion is less likely than land already in crop production given practical economic and agronomic considerations.

b. Impacts on Water Quality and Water Quantity Associated With Biodiesel Production

Biological oxygen demand (BOD), total suspended solids, and glycerin pose the major water quality concerns in wastewater discharged from biodiesel facilities. Actual impacts depend on a range of factors, including the type of feedstock processed, bio-refinery technology, effluent controls, and water re-use/recycling practices, as well as the facility location and source and receiving water. Discharge water quality requirements of local and regional governments can help assure best

[51] U.S. EPA (United States Environmental Protection Agency). Renewable fuel standard program (RFS2) regulatory impact analysis. EPA–420–R–10–006. Available at: *http://www.epa.gov/otaq/renewablefuels/420r10006.pdf.*

[52] Dinnes, DL; Karlen, DL; Jaynes, DB; Kaspar, TC; Hatfield, JL; Colvin, TS; Cambardella, CA. 2002. Nitrogen management strategies to reduce nitrate leaching in tile-drained midwestern soils. Agronomy Journal 94(1): 153–171.

[53] NASS (United States Department of Agriculture, National Agricultural Statistics Service). 2007. Agricultural chemical usage 2006 field crops summary. Ag Ch 1 (07)a. Available at: *http://usda.mannlib.cornell.edu/usda/nass/AgriChemUsFC//2000s/2007/AgriChemUsFC-05-16-2007_revision.pdf.*

[54] Simpson, TW; Sharpley, AN; Howarth, RW; Paerl, HW; Mankin, KR. 2008. The new gold rush: Fueling ethanol production while protecting water quality. Journal of Environmental Quality 37(2): 318–324.

[55] Dinnes, DL; Karlen, DL; Jaynes, DB; Kaspar, TC; Hatfield, JL; Colvin, TS; Cambardella, CA. 220 2002. Nitrogen management strategies to reduce nitrate leaching in tile-drained 221 midwestern soils. Agronomy Journal 94(1): 153–171.

[56] U.S. Department of Agriculture, National Resources Conservation Service. 2010. Assessment of the effects of conservation practices on cultivated cropland in the Upper Mississippi River Basin. Available at: *http://www.nrcs.usda.gov/technical/NRI/ceap/umrb/index.html.*

[57] U.S. Department of Agriculture. 2010. 2007 Census of agriculture, Farm and ranch irrigation survey (2008). *http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Farm_and_Ranch_Irrigation_Survey/fris08.pdf.*

[58] U.S. Department of Energy. 2006. Energy demands on water resources: Report to Congress on the interdependency of energy and water. Available at: *http://www.sandia.gov/energy-water/docs/121-RptToCongress-EWwEIAcomments-FINAL.pdf.*

[59] Secchi, S; Gassman, PW; Williams, JR; Babcock, BA. 2009. Corn-based ethanol production and environmental quality: A case of Iowa and the conservation reserve program. Environmental Management 44(4): 732–744.

[60] ERS (United States Department of Agriculture, Economic Research Service). 2008. 2008 farm bill side-by-side. Available at: *http://www.ers.usda.gov/FarmBill/2008/Titles/TitleIIConservation.htm#conservation.*

control practices and reduce water quality concerns.

Despite the existing commercial market for glycerin and the likely expanded uses for glycerin as mentioned in the RFS2 final rule, the rapid development of the biodiesel industry has caused a glut of glycerin production, resulting in many facilities disposing of glycerin. Glycerin disposal may be regulated under several EPA programs, depending on the practice. However, there have been instances of glycerin dumping, including an incident in Missouri that resulted in a large fish kill.[61] Some biodiesel facilities discharge their wastewater to municipal wastewater treatment systems for treatment and discharge. There have been several cases of municipal wastewater treatment plant upsets due to high BOD loadings from releases of glycerin.[62] BOD can lead to methane emissions during the water treatment process. To mitigate wastewater issues, some production systems reclaim glycerin from the wastewater. Closed-loop systems in which water and solvents can be recycled and reused can reduce the quantity of water that must be pretreated before discharge. Others employ anaerobic digesters to mitigate the release of methane to the atmosphere.

Biodiesel can also impact water bodies as a result of spills. However, biodiesel degrades approximately four times faster than petroleum diesel including in aquatic environments.[63] Results of aquatic toxicity testing of biodiesel indicate that it is less toxic than regular diesel.[64] Biodiesel does have a high oxygen demand in aquatic environments and can cause fish kills as a result of oxygen depletion. Water quality impacts associated with spills at biodiesel facilities generally result from discharge of glycerin, rather than biodiesel itself.

Biodiesel facilities use much less water than ethanol facilities to produce biofuel. The primary consumptive water use at biodiesel plants is associated with washing and evaporative processes. Water use is variable but is usually less than one gallon of water for each gallon of biodiesel produced; some facilities recycle wash water, which reduces overall water consumption.[65]

8. Job Creation and Rural Economic Development

The Energy Independence and Security Act (EISA) requires analyses of, among other factors, the impact of renewable fuel use on ''* * * job creation [and] rural economic development * * *'' to help inform each annual determination of applicable volumes. In the RFS2 final rule, we anticipated employment to increase and income to expand in rural areas and farming communities as a result of the increased use of renewable fuel. Income expansion in rural areas from renewable fuel production will contribute to rural economic development. As mentioned above, industry activities are currently progressing, ramping up biodiesel production from the approximately 0.38 billion gallons estimated to have been used in the U.S. in 2010 to over 1.0 billion gallons that was produced in 2011. This increase in biodiesel production was in large part due to bringing on line existing capacity idled due to lack of demand, a trend that we expect will continue into the near future.

Employment impacts of federal rules are of particular concern in the current economic climate of sizeable unemployment. The recently issued Executive Order 13563, ''Improving Regulation and Regulatory Review'' (January 18, 2011), states, ''Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation''. Executive Order 13563 also states that ''[i]n applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible'' and that ''* * * each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify * * *'' Consistent with the Executive Order, and consistent with recent efforts to characterize the employment effects of economically significant rules, the Agency has provided this analysis to inform the discussion of labor demand and employment impacts in rural areas and farming communities. Estimates of this particular rule's effects on labor markets beyond the biodiesel production sector are ''difficult or impossible to quantify'' to an acceptable degree of accuracy using currently available methodologies, Therefore, the Agency has not quantified the rule's effects on labor in other sectors, including conventional diesel production and sales, nor has the agency attempted to estimate the effects induced by changes in workers' incomes or changes in food and fuel prices.

When the economy is at full employment, an environmental regulation is unlikely to have much impact on net overall U.S. employment; instead, labor would primarily be shifted from one sector to another. These shifts in employment impose an opportunity cost on society, approximated by the wages of the employees, as regulation diverts workers from other activities in the economy. In this situation, any effects on net employment are likely to be transitory as workers change jobs (e.g., some workers may need to be retrained or require time to search for new jobs, while shortages in some sectors or regions could bid up wages to attract workers).

On the other hand, if a regulation comes into effect during a period of high unemployment, a change in labor demand due to regulation may affect net overall U.S. employment because the labor market is not in equilibrium. Schmalansee and Stavins point out that net positive employment effects are possible in the near term when the economy is at less than full employment due to the potential hiring of idle labor resources by the regulated sector to meet new requirements (e.g., to install new equipment) and new economic activity in sectors related to the regulated sector.[66] In the longer run, the net effect on employment is more difficult to predict and will depend on the way in which the related industries respond to the regulatory requirements. For this reason, Schmalensee and Stavins urge caution in reporting and interpreting partial employment effects since it can ''paint an inaccurate picture of net employment impacts if not placed in the broader economic context.''

This rule is expected to primarily affect employment in the United States through the biodiesel plants and distributors, and through several related sectors, specifically, industries that supply inputs in the production of biodiesel. To provide a partial picture of

[61] U.S. EPA. 2010b. Renewable fuel standard program (RFS2) regulatory impact analysis. EPA–420–R–10–006. Available at: *http://www.epa.gov/otaq/renewablefuels/420r10006.pdf.*

[62] U.S. EPA. 2010b. Renewable fuel standard program (RFS2) regulatory impact analysis. EPA–420–R–10–006. Available at: *http://www.epa.gov/otaq/renewablefuels/420r10006.pdf.*

[63] Kimble, J. n.d. Biofuels and emerging issues for emergency responders. U.S. EPA. Available at: *http://www.epa.gov/oem/docs/oil/fss/fss09/kimblebiofuels.pdf.*

[64] Kahn, N; Warith, MA; Luk, G. 2007. A comparison of acute toxicity of biodiesel, biodiesel blends, and diesel on aquatic organisms. Journal of the Air and Waste Management Association 57(3): 286–296.

[65] Renewable Fuels Standard Program (RFS2), Regulatory Impact Analysis (RIA). EPA–420–R–10–006. Available at: *http://www.epa.gov/otaq/renewablefuels/420r10006.pdf.*

[66] Schmalensee, Richard, and Robert N. Stavins. ''A Guide to Economic and Policy Analysis of EPA's Transport Rule.'' White paper commissioned by Excelon Corporation, March 2011 (Docket EPA–HQ–OAR–2010–0799).

the employment consequences of this rule, EPA investigated the expected consequences for rural areas and farming communities. Assuming the current average of 30 to 40 people to operate a biodiesel plant of 30 million gallons (a typical capacity for a standalone transesterification plant), an expansion of 280 million gallons is the equivalent of adding about 4 plants representing the addition of around 350 direct jobs for biodiesel production.[67] Providing soy oil feedstock would require an estimated 120 additional truck trips per day or an addition of 120 delivery drivers per day assuming one trip per delivery truck per day to account for driving and loading/unloading time.[68] Expansions to the fuel distribution infrastructure (i.e., more fuel terminals, rail cars, tank trucks, barges etc.) would also be needed to support the use of an additional 280 million gallon increase in the 2013 volume requirement for biomass-based diesel. Necessary support to a functioning biodiesel plant such as the delivery of methanol to allow processing of vegetable oil into biodiesel as well as additional handling at biodiesel distribution centers will also add directly to the employment impacts.

Most large biodiesel plants in the U.S. are located in rural communities near feedstock (soybean oil or corn oil) sources. Urban biodiesel plants tend to be smaller with more diffuse feedstock suppliers. In 2011, approximately 71 percent of biodiesel producers were located in rural areas, defined as towns of less than 50,000. A 30 million gallon per year (MGY) biodiesel plant will spend nearly $140 million on goods and services with feedstocks accounting for more than 80 percent of expenditures.[69] The size of the economic impact on the local economy of spending by an individual biodiesel plant will depend on location (e.g., state) and how much feedstock is sourced locally. Moreover, our analysis cannot determine the extent to which new capital invested in biodiesel production displaces investments that otherwise would have occurred in rural areas.

In addition to the employment effects from increased biodiesel production, this rule would also result in reductions in conventional diesel fuel use, which could affect employment in the diesel fuel supply chain. The loss of expenditures to diesel fuel suppliers throughout the diesel fuel supply chain, from the petroleum refiners to diesel fuel distributors, is likely to result in some loss in employment in these sectors. The potential impacts on the diesel industry and other sectors of the economy are not quantified in this analysis because available data and methodologies are insufficient to support reasonably accurate estimates of the incremental employment effects of this rule.

To summarize, we anticipate that bringing idle biodiesel plants back online and expanding biodiesel distribution infrastructure in the U.S. will increase employment and investment in the renewable fuels and related industries, consistent with the EISA directive to assess impact on rural economic development. These increases in employment are similar to what we anticipated when we analyzed the volume requirements in RFS2 final rule. These employment impacts may be offset to some degree by decreases in other sectors and/or locations (e.g., from the reduced production and transport of conventional diesel fuel); however sufficiently reliable data and a satisfactory methodology supporting quantitative evaluation of the employment impacts beyond the biodiesel sectors are not currently available.

One commenter raised the issue of the impacts of the potential increased use of animal fats to produce biodiesel under a 1.28 billion gallon requirement on employment within the oleochemical industry. According to the commenter, with renewable fuel production consuming an increasingly significant amount of the total supply of animal fats produced in the U.S., this may limit the availability of animal fats for oleochemical production. According to the commenter, the price of animal fats recently exceeded the price of Malaysian palm oil. If the oleochemical industry switched to palm oil as a feedstock to make its products and located near palm oil supply, there could be a possible loss of U.S. employment in this industry.

As the same commenter acknowledged, we cannot prevent any feedstocks from being used to produce RIN-generating renewable fuel if they meet the regulatory definition of renewable biomass and are otherwise valid. Nevertheless, while Table III.B–1 lists grease and fats as one likely source of feedstocks for the production of biomass-based diesel, we noted in Section III.B that there could be sufficient sources of other feedstocks to produce 1.28 billion gallons of biomass-based diesel without using any animal fats. The comment implies that feedstock used in the oleochemical industry depends significantly on relative costs which can vary over time in part due to changes in demand. The cost of animal fat is dependent on the general demand for this material which is only in part impacted by its potential use as a biofuel feedstock. The general supply of animal fat is not expected to be impacted significantly by its alternative use as a biofuel feedstock or the range of other uses of this material. Thus the choice of feedstock(s) used by the oleochemical industry already depends on market prices of multiple feedstock sources. Since feedstock such as rendered fats or, as suggested by the commenter, palm oil are readily marketed and transportable, we do not expect the industry to relocate production every time feedstock market conditions change. Therefore we do not believe production facility location will be significantly impacted by the potential use of rendered fats as a biofuel feedstock if some portion of the 280 million gallon increase in the biomass-based diesel standard is produced from rendered fats.

B. Consideration of Applicable Statutory Economic Factors

The RFS program established by Congress is primarily a long-term program aimed at replacing substantial volumes of fossil-based transportation fuels with low GHG renewable fuels over time. Congress established a list of factors to be considered in setting the annual biomass-diesel mandate, and these factors include consideration of some aspects of economic costs and some aspects of economic benefits (among other impacts and factors). In the final rulemaking for the RFS2, EPA assessed the costs and benefits of this program as a whole when the program was fully mature, which we continue to believe is the appropriate approach to examining the costs and benefits of a long term program like the RFS2. However, the annual standard-setting process is part of the program. The annual standard-setting process encourages consideration of the program on a piecemeal (i.e., year to year) basis, which may not reflect the long-term economic effects of the program.

EPA received comments requesting that we consider costs and benefits for the 1.28 billion gallon biomass-based diesel mandate in 2013. This mandate is an interim step within the larger RFS program, so any examination of short-term impacts separate from that larger effort must be kept in context. Further, many of the impacts of this rule are difficult to fully quantify, which makes any comprehensive consideration of

[67] Presentation from National Biodiesel Board, ''Biodiesel Forecasts, Infrastructure, and Economic Impacts'', February 14, 2012.

[68] Ibid.

[69] Ibid.

costs and benefits difficult to undertake in the limited timeframe of the RFS annual rule. In spite of these limitations, EPA has analyzed some of the costs and has estimated the monetary value of some of the benefits of the 2013 biomass-based diesel mandate to provide more information on this rulemaking.

1. Monetized Quantifiable Costs

Our analysis of costs focuses on the sector most likely to be impacted by an increase in biomass-based diesel volumes—the agricultural commodity market. To assess some of the impacts of the 1.28 billion gallon biodiesel mandate, EPA used a stochastic economic model developed by the Center for Agricultural and Rural Development (CARD) at Iowa State University to conduct this analysis. The CARD stochastic model approximates U.S. and Brazilian biofuel production, consumption, and trade. Using a relatively small set of input assumptions about petroleum prices, commodity yields, and ethanol production, the CARD model examines what the U.S. and Brazilian biofuels markets may look like under different combinations of parameters (e.g., low petroleum prices, low soybean yields, and high Brazilian ethanol production).

The model shows the probability of different outcomes by running 500 different potential scenarios. This modeling approach provides a range of estimates which helps to bound uncertainty about possible impacts on the biofuels sector. Analysis of this range can indicate which outcomes are more likely than others and also provide a sense of the possible high and low estimates that should be considered for a given variable. The CARD model projects ranges for commodity yields and prices, fuel volumes and prices, and several other variables. For the biomass-based diesel standard, EPA analyzed the cost of mandating an additional 280 million gallons for biodiesel in 2013, going from 1.0 billion gallons of biomass-based biodiesel to 1.28 billion gallons. For purposes of this analysis, EPA assumed that the additional 280 million gallons of biodiesel we are mandating for 2013 will be entirely soybean-based and would not otherwise be produced. As we outline in Section III.B of this rulemaking, most of the additional 280 million gallons is likely to be soybean-based, but other sources are possible. Because soybean oil feedstock is more expensive than corn oil or waste feedstock, the cost impact of the extended volume requirement would decrease if biodiesel production from these other sources expands. We therefore consider the cost projections presented below to be potentially high estimates.

a. Impact on the Cost of Soybean Oil

One commenter suggested that the biodiesel mandate for 2013 will result in an increase of soybean oil prices. In response to this comment and other related comments, EPA modeled the change in soybean oil prices in 2013 using the CARD stochastic model. Assuming that the 280 million gallon increment is met entirely with soybean oil biodiesel in 2013, EPA estimates that the price of soybean oil will be $0.45 per pound (in 2010$) under this mandate, compared to approximately $0.42 under a 1.0 billion gallon mandate (see Section III.B of this rule for further discussion of feedstock availability and prices). The mandate is estimated to increase feedstock costs of soybean-based biodiesel by about $0.22 per gallon of biodiesel. The effect of this increase on the cost of the additional 280 million gallons is incorporated into the estimates in section IV.B.1.b.

b. Cost of Displacing Petroleum-Based Diesel With Soybean-Based Biodiesel

Producing an additional 280 million gallons of biodiesel will displace approximately 255 million gallons of petroleum-based diesel. Since biodiesel costs more to produce in the U.S. than diesel, this displacement has associated costs. In this analysis, we compare the cost of biodiesel and petrodiesel at the wholesale stage, since that is when the two are blended together. Therefore, this analysis does not consider taxes, retail margins, and any other costs and transfers that occur at or after the point of blending.

On this basis, EPA estimated the cost of producing and transporting a gallon of biodiesel to the blender. For soybean-based biodiesel, soybean oil feedstock costs generally represent the majority of the overall cost, usually somewhere between 70 and 90 percent. The soybean oil price estimates discussed in Section IV.B.1.a of this rule therefore had a strong impact on EPA's cost estimates, though estimates of distribution and other production costs were also important. Estimating the cost to produce biodiesel and transport it to the blender presents considerable uncertainties, even in the near term. Unforeseen fluctuations in the prices of oil, for example, could have a very significant effect.

After estimating the cost of biodiesel at the wholesale stage, EPA compared that to what it would cost to consume an equivalent amount of petroleum-based diesel instead. The Department of Energy's Energy Information Administration (EIA) publishes two regular reports that make estimates of wholesale diesel prices in 2013. In 2013, costs are on the low-end of the range if we use the wholesale diesel estimate from DOE's most recent Short-Term Energy Outlook (STEO).[70] The high-end estimate utilizes DOE's AEO12 ER wholesale diesel estimate.[71] Both estimates are relevant for an analysis of fuel prices in 2013. On this basis, we estimate the increase in the cost of fuel for 280 million gallons of biodiesel will be between $0.91 and $1.36 per gallon in 2013. This translates into total cost estimates of $253 million to $381 million from increased fuel cost in 2013.

TABLE IV.B.1.b–1—ESTIMATED INCREASE IN WHOLESALE COST OF BIODIESEL IN COMPARISON TO PETRODIESEL IN 2013

[In 2010 dollars]

Petroleum assumption	STEO March 2012	AEO 2012 early release
Difference in biodiesel production cost (per gallon)	$0.91	$1.36.
Cost of 280 million gallons	253 million	381 million.

[70] U.S. Department of Energy, Energy Information Administration. 2012. Short Term Energy Outlook, March 2012. Available at: *http://www.eia.gov/forecasts/steo/index.cfm.*

[71] U.S. Department of Energy, Energy Information Administration. 2012. Annual Energy Outlook 2012 (Early Release). Available at: *http://www.eia.gov/forecasts/aeo/er/.*

Consistent with our previous work in this area, EPA's quantifiable cost methodology is a ''bottom-up'' engineering cost analysis that estimates the cost to produce a gallon of soybean-based biodiesel and then compares that cost to the production cost of an energy-equivalent gallon of petroleum-based diesel. In certain situations, it may also be useful to use a ''top down'' analyses to estimate the potential cost of a program to society. In the case of the biomass-based diesel standard, one suggestion was to look at the RIN price as a proxy for the societal cost of the program.

RIN prices reflect the incremental private marginal cost of blending BBD into the diesel fuel pool. As noted by Professor Bruce Babcock, of Iowa State University:

''The market for RINs is an effective and efficient way to enforce the mandates. Motor fuel producers who find that biofuel is too difficult to access or to blend buy RINs instead. Fuel producers who have ready access to biofuels and find it profitable to blend biofuels sell their excess RINs. By making RINs tradable, the mandates are met at the lowest possible cost.'' [72]

We have received comments suggesting that we use RIN prices to estimate the costs to society of the biomass-based diesel RFS2 requirement. RIN prices may be more representative of marginal costs. However, the use of historical RIN price trends may have limitations since RIN price may reflect other policy changes such as changes in U.S. tax policy, import tariff policies, and other effects in RIN markets.[73] We finally note that other factors, such as the existence of multiple RIN vintages in any given year and the effects of other policies can create incentives for potential speculation in the RIN markets. In their 2011 report on RINs, USDA observed that this speculation results in RIN prices that are somewhat higher than the cost of biodiesel, though the exact amount of this increment is extremely difficult to quantify.[74]

c. Transportation Fuel Costs

In the NPRM, we cited cost estimates that we had developed in the RFS2 final rule. In response to comment, we have revised our methodology for examining the effect of this mandate on the cost of transportation fuel. The estimates described in Section IV.B.1 above represent the quantifiable costs to society as a whole stemming from our increase in the biomass-based diesel volume requirement from 1.0 billion gal to 1.28 billion gal. These estimates do not include certain transfers, such as those between buyers and sellers of diesel fuel. For this reason, the increase in the cost of transportation fuel from a societal perspective is different from the increase from the perspective of individual buyers and sellers of fuel. However, these costs do impact the retail price of diesel and associated economic impacts for fuel consumers.

To estimate the increase in the cost of transportation fuel associated with today's mandate for 1.28 billion gal in 2013, we took our projections for the quantifiable program costs reported in Section IV.B.1.b and compared that to projected fuel consumption. The AEO projects that the U.S. will consume 44.9 billion gal of blended diesel in 2013.[75] Averaged over this diesel pool, the quantifiable costs of the 1.28 billion gal mandate translate into a per gallon cost of between $0.006 and $0.008 in 2013.[76]

Several parties commented that the analysis of the cost impacts of 1.28 billion gallons of biomass-based diesel must take into account the biodiesel tax subsidy, which expired at the end of 2011. Fuel taxes and tax subsidies function to change the manner in which society pays for transportation fuel through redistribution of costs, but they do not change the total cost to society. For this reason we generally do not quantify the impact of taxes or tax subsidies on price, but instead focus on the costs to produce and distribute transportation fuel. Moreover, the impact of the biodiesel tax subsidy on the retail price of biodiesel is a complex relationship that can be difficult to assess. For instance, Figure IV.B.1.c–2 shows the retail price of biodiesel over the period January 2008 through April 2012. While the biodiesel tax credit was not effective during 2010 or 2012, the price of biodiesel was not substantially higher during these years than it was at other times. Moreover, after the tax credit was reinstated for 2011, including retroactive credits for biodiesel produced in 2010, the price of biodiesel in 2011 did not decrease substantially in 2011 compared to 2010. These results illustrate the difficulty in correlating biodiesel price with tax policies, and thus represents an additional reason that we have not made an effort to project biodiesel prices in the future under different tax policy scenarios.

[72] Babcock, B, *Mandates, Tax Credits, and Tariffs: Does the U.S. Biofuels Industry Need Them All?* Iowa State University, Center for Agricultural and Rural Development, Policy Brief 10–PB–1, March 2010. p. 4–5.

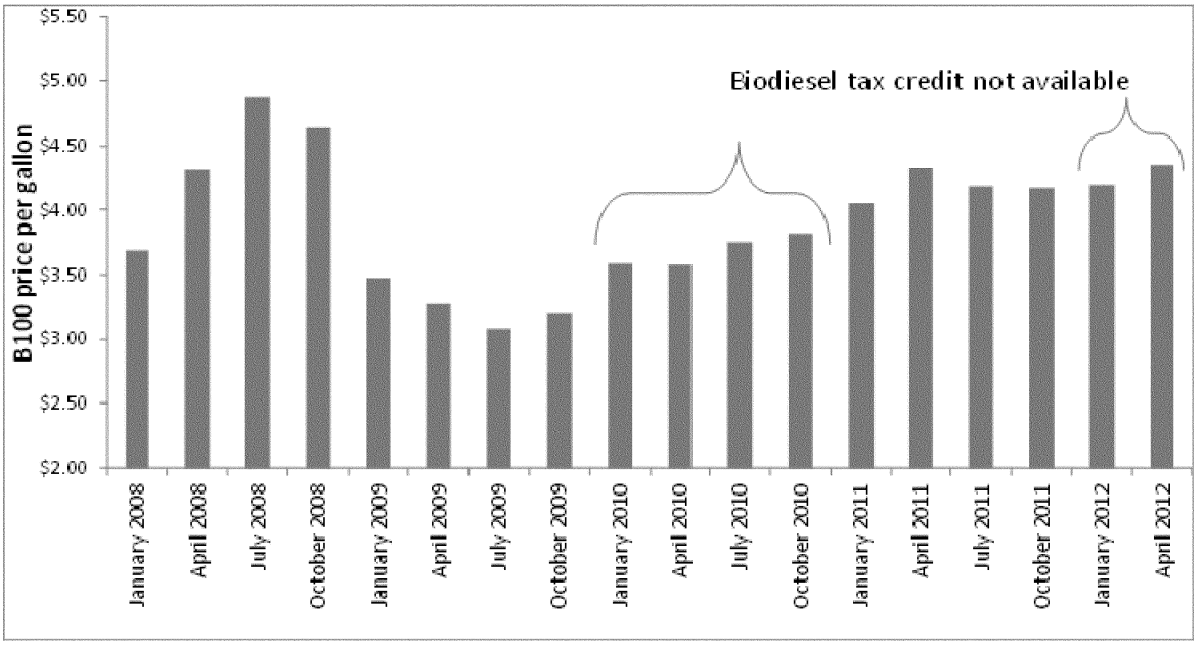
[74] McPhail, L, P Westcott, and H Lutman, *The Renewable Identification Number System and U.S. Biofuel Mandates,* United States Department of Agriculture, November 2011.

[75] U.S. Department of Energy, Energy Information Administration. 2012. Annual Energy Outlook 2012 (Early Release). Available at: *http://www.eia.gov/forecasts/aeo/er/.*

[76] If current RIN prices were used to gauge social cost in lieu of the bottom-up engineering cost approach applied herein, the estimate of transportation fuel costs would be higher.

Figure IV.B.1.c-2

Nationwide Average Biodiesel Prices at Retail



Source: DOE Alternative Fuels & Advanced Vehicles Data Center, Alternative Fuel Price Report.

http://www.afdc.energy.gov/afdc/price_report.html.

In their comments on the 2012 Renewable Fuel Standards, the American Trucking Association (ATA) suggested that production of biomass-based biodiesel from yellow grease and other rendered fats may not be economically practical due to the diffuse nature of the feedstock supply chain. Specifically, ATA argued that the cost of collection of often small quantities of this feedstock dispersed over a wide geographic area and their transport to biofuel producers may be cost-prohibitive.

We agree with the commenter that the transportation costs associated with the collection of yellow grease and other rendered fats may be greater than the cost of collection for biomass-based biodiesel feedstock such as soybean oil. However, the actual delivered cost of feedstock for use in producing biodiesel consists of two components: the cost of production and the cost of transportation. For soybean oil, the cost of production (e.g., planting, fertilizing, harvesting, expelling) is relatively large compared to the cost of transportation to centralized biofuel producers. However, the cost of production for yellow grease and other rendered fats is zero, as they are considered wastes or byproducts. When combining both cost components (i.e., production and transportation) for each respective feedstock from USDA's National Weekly Agricultural Energy Round-Up,[77] the total delivered costs for yellow grease and other rendered fats is consistently less that the total delivered costs for soybean oil. For instance, for the week of March 30, 2012, crude soybean oil was selling for about 53 ¢/lb, while yellow grease was selling for about 41 ¢/lb. As such, we believe that the ATA concerns regarding the feedstock supply chain are not warranted.

2. Monetized Quantifiable Benefits

Many of the benefits and impacts that Congress asked EPA to examine when evaluating whether to increase the volume requirement for biomass-based biodiesel are difficult to fully quantify. In this section, we present a selection of quantifiable benefits from increased biodiesel production, including increased energy security and reduced greenhouse gas emissions.

[77] USDA Livestock & Grain Market News for October 14, 2011. *http://www.ams.usda.gov/mnreports/lswagenergy.pdf.*

a. Energy Security

Quantified energy security benefits are taken from the estimates reported in Section IV.A.2 of this final rule. As noted there, EPA considers only the macroeconomic disruption and adjustment effect in its estimates of energy security benefits. Based on application of the ORNL methodology, we estimate that the energy security benefits of the additional 280 mill gal increment of biodiesel are $0.15 per gallon in 2013. This translates to a total program benefit of about $41 million.

b. Air Quality

We discuss air quality impacts qualitatively in Section IV.A.4 of this final rule and expect an additional 280 mill gal of biodiesel will have a relatively small impact on ambient air quality. That said, we do expect the production and combustion of biodiesel to have a slightly different emissions impact relative to petroleum-based diesel. As presented in Table IV.A.4–1, we estimated that the increased production of biodiesel related to the RFS2 mandate would impact both downstream and upstream emissions,

with increases in some pollutants and decreases in others.

Ideally, the monetized impacts of changes in air quality related to the final rule would be estimated based on changes in ambient pollution concentrations and population exposure, as determined by complete air quality and exposure modeling. However, conducting such detailed modeling was not possible within the timeframe for this analysis.

Instead, our analysis of $PM_{2.5}$-related health impacts associated with 280 million additional gallons of biodiesel uses a ''dollar-per-ton'' method to estimate selected $PM_{2.5}$-related health impacts. These $PM_{2.5}$-related dollar-per-ton estimates provide the total monetized human health impacts (the sum of premature mortality and premature morbidity) of reducing one ton of directly emitted $PM_{2.5}$, or one ton of a pollutant that contributes to secondarily-formed $PM_{2.5}$ (such as NOx, and SOx) from a specified source.[78] The dollar-per-ton technique has been used in previous analyses, including the 2012–2016 Light-Duty Greenhouse Gas Rule,[79] the Ozone National Ambient Air Quality Standards (NAAQS) RIA,[80] the Portland Cement National Emissions Standards for Hazardous Air Pollutants (NESHAP) RIA,[81] and the final NO_2 NAAQS.[82]

The analysis of the final 2013 fuel mandate did not estimate the direct emissions impacts to which we could apply the ''dollar-per-ton'' estimates. Instead, we converted ''dollars-per-ton'' to ''dollars-per-gallon'' by transferring the biodiesel tons-to-emissions relationship observed in the RFS2 final rule analysis to the current analysis (dividing emissions in Table IV.A.4–1 by 1.44 billion gallons of biodiesel) and multiplying that by each pollutant-specific dollar-per-ton estimate.

The dollar-per-ton estimates used to monetize the emissions impacts from each gallon of biodiesel are provided in Table IV.B.2.b–1.

TABLE IV.B.2.b–1—$PM_{2.5}$-RELATED DOLLAR-PER-TON VALUES (2010$) [a]

Year	All sources [c]	Upstream (non-EGU) sources [d]		Mobile sources	
	SO_2	NO_X	Direct $PM_{2.5}$	NO_X	Direct $PM_{2.5}$
Dollar-per-ton Derived from American Cancer Society Analysis (Pope et al., 2002) Using a 3 Percent Discount Rate [b]					
2015	$30,000	$4,900	$230,000	$5,100	$280,000
2020	33,000	5,400	250,000	5,600	310,000
Dollar-per-ton Derived from American Cancer Society Analysis (Pope et al., 2002) Estimated Using a 7 Percent Discount Rate [b]					
2015	27,000	4,500	210,000	4,600	250,000
2020	30,000	4,900	230,000	5,100	280,000
Dollar-per-ton Derived from Six Cities Analysis (Laden et al., 2006) Estimated Using a 3 Percent Discount Rate [b]					
2015	73,000	12,000	560,000	12,000	680,000
2020	80,000	13,000	620,000	14,000	750,000
Dollar-per-ton Derived from Six Cities Analysis (Laden et al., 2006) Estimated Using a 7 Percent Discount Rate [b]					
2015	66,000	11,000	510,000	11,000	620,000
2020	72,000	12,000	560,000	12,000	680,000

[a] Total dollar-per-ton estimates include monetized $PM_{2.5}$-related premature mortality and morbidity endpoints. Range of estimates are a function of the estimate of $PM_{2.5}$-related premature mortality derived from either the ACS study (Pope et al., 2002) or the Six-Cities study (Laden et al., 2006).

[b] The dollar-per-ton estimates presented in this table assume either a 3 percent or 7 percent discount rate in the valuation of premature mortality to account for a twenty-year segmented cessation lag.

[c] Note that the dollar-per-ton value for SO_2 is based on the value for Stationary (Non-EGU) sources; no SO_2 value was estimated for mobile sources.

[d] Non-EGU denotes stationary sources of emissions other than electric generating units (EGUs).

For certain $PM_{2.5}$-related pollutants (such as direct $PM_{2.5}$ and NOx), EPA estimates different per-ton values for reducing mobile source emissions than for reductions in emissions of the same pollutant from stationary sources such as fuel refineries and storage facilities. These reflect differences in the typical geographic distributions of emissions of each pollutant by different sources, their contributions to ambient levels of $PM_{2.5}$, and resulting changes in population exposure. We apply these separate values to estimates of changes in emissions from vehicle use and from

[78] Due to analytical limitations, the estimated dollar-per-ton values do not include comparable impacts related to reductions in other ambient concentrations of criteria pollutants (such as ozone, NO2 or SO_2) or toxic air pollutants, nor do they monetize all of the potential health and welfare effects associated with $PM_{2.5}$ or the other criteria pollutants.

[79] U.S. Environmental Protection Agency (U.S. EPA), 2010. Regulatory Impact Analysis, Final Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards. Office of Transportation and Air Quality. April. Available at *http://www.epa.gov/otaq/climate/regulations/420r10009.pdf.* EPA–420–R–10–009.

[80] U.S. Environmental Protection Agency (U.S. EPA). 2008. Regulatory Impact Analysis, 2008 National Ambient Air Quality Standards for Ground-level Ozone, Chapter 6. Office of Air Quality Planning and Standards, Research Triangle Park, NC. March. Available at *http://www.epa.gov/ttn/ecas/regdata/RIAs/6-ozoneriachapter6.pdf*>. EPA–HQ–OAR–2009–0472–0238.

[81] U.S. Environmental Protection Agency (U.S. EPA). 2010. Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry. Office of Air Quality Planning and Standards, Research Triangle Park, NC. August. Available on the Internet at <*http://www.epa.gov/ttn/ecas/regdata/RIAs/portlandcementfinalria.pdf*>. EPA–HQ–OAR–2009–0472–0241.

[82] U.S. Environmental Protection Agency (U.S. EPA). 2010. Final NO2 NAAQS Regulatory Impact Analysis (RIA). Office of Air Quality Planning and Standards, Research Triangle Park, NC. April. Available on the Internet at *http://www.epa.gov/ttn/ecas/regdata/RIAs/FinalNO2RIAfulldocument.pdf.* Accessed March 15, 2010. EPA–HQ–OAR–2009–0472–0237.

fuel production and distribution to determine the net change in total economic impacts from emissions of those pollutants. Monetized $PM_{2.5}$-related health impacts associated with the final rule can be found in Table IV.B.2.b–2 and per gallon impacts can be found in Table IV.B.2.b–3.

TABLE VI.B.2.b–2—TOTAL AMBIENT $PM_{2.5}$-RELATED MONETIZED HEALTH IMPACTS (MILLIONS 2010$) [a]

	2013 Monetized impacts (7% discount rate–3% discount rate)
Using Dollar-per-ton Derived from American Cancer Society Analysis (Pope et al., 2002)	
Downstream	$14 to $16.
Upstream	−$34 to −$37.
Net Impacts	−$19 to −$21.
Using Dollar-per-ton Derived from Six Cities Analysis (Laden et al., 2006)	
Downstream	$35 to $39.
Upstream	−$82 to −$91.
Net Impacts	−$47 to −$52.

[a] Note: Negative values indicate disbenefits associated with decrements in ambient air quality.

TABLE VI.B.2.b–3—PER GALLON AMBIENT $PM_{2.5}$-RELATED MONETIZED HEALTH IMPACTS (2010$ PER GALLON) [a]

	2013 Monetized impacts (7% discount rate–3% discount rate)
Using Dollar-per-ton Derived from American Cancer Society Analysis (Pope et al., 2002)	
Downstream	$0.05 to $0.06.
Upstream	−$0.12 to −$0.13.
Net Impacts	−$0.07 to −$0.08.
Using Dollar-per-ton Derived from Six Cities Analysis (Laden et al., 2006)	
Downstream	$0.12 to $0.14.
Upstream	−$0.29 to −$0.33.
Net Impacts	−$0.17 to −$0.19.

[a] Note: Negative values indicate disbenefits associated with decrements in ambient air quality.

The method used in this analysis to estimate the monetized $PM_{2.5}$-related impacts of an increase in biodiesel production is subject to a number of assumptions and uncertainties.

• The method does not reflect local variability in population density, meteorology, exposure, baseline health incidence rates, or other local factors that might lead to an overestimate or underestimate of the actual benefits of controlling fine particulates in specific locations. This is particularly a problem for the monetization of upstream emissions since those have a very specific geographic profile different to that associated with mobile source emissions.

• Transferring the biodiesel tons-to-emissions relationship derived from the RFS2 mandate in 2022 to the current analysis assumes that the incremental production of biodiesel associated with the 2013 mandate (of 280 million gallons) will yield the same relative emissions impacts, which we cannot say with certainty.

• This analysis assumes that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality. $PM_{2.5}$ produced via transported precursors emitted from stationary sources may differ significantly from direct $PM_{2.5}$ released from engines and other industrial sources. At the present time, however, no clear scientific grounds exist for supporting differential effects estimates by particle type.

• This analysis assumes that the health impact function for fine particles is linear within the range of ambient concentrations under consideration. Thus, the estimates include health benefits from reducing fine particles in areas with varied initial concentrations of $PM_{2.5}$, including both regions that are in attainment with fine particle standard and those that do not meet the standard, down to the lowest modeled concentrations. This is an appropriate assumption because the scientific literature provides no evidence of a threshold below which health effects associated with exposure to fine particles—including premature death—would not occur.

• There are several health benefits categories that we are unable to quantify due to limitations associated with using dollars-per-ton estimates, several of which could be substantial. Because NO_X and VOC emissions are also precursors to ozone, changes in NO_X and VOC would also impact ozone formation and the health effects associated with ozone exposure. Dollars-per-ton estimates for ozone do not exist due to issues associated with the complexity of the atmospheric air chemistry and nonlinearities associated with ozone formation. The PM-related benefits-per-ton estimates also do not include any human welfare or ecological benefits.

3. Quantifiable Benefits and Costs Compared

As we have observed above, the cost and benefit categories discussed in this section are not comprehensive. EPA has included estimates for those impacts that we are able to quantify at the present time, but this is not meant to suggest that EPA considers these to be the total costs and benefits of the 2013 biomass-based diesel mandate. However, for illustrative purposes, we are providing a range of quantifiable combined cost and benefit estimates for the impact of a 1.28 billion gallon mandate in 2013, based on those impacts that we were able to monetize.

EPA's estimates of quantifiable costs and benefits vary significantly in 2013 due to uncertainty about the price of diesel as well as uncertainty about the value of air quality impacts. Table IV.B.3–1 presents the range of estimates for the combined quantifiable costs and benefits of an additional 280 million gallons of biodiesel produced in 2013, which varies from −$425 million to −$263 million.

TABLE IV.B.3–1—ESTIMATES OF COMBINED COSTS AND BENEFITS OF THE 1.28 BILLION GALLON BIODIESEL MANDATE IN 2013

[In 2010 dollars]

AEO 2012 early release (million)	STEO March 2012 (million)
−$425 to −$391	−$297 to −$263

In this final rulemaking, we have only provided quantified cost and benefit estimates for the year 2013. However, as observed above, these estimates should not be considered in isolation. Rather, they should be treated as a snapshot within the larger trends of quantified costs and benefits laid out in the RFS2 final rule. The statute is forward-looking in that it created a program whose energy and environmental benefits are intended to grow over time. To evaluate the program on the basis of only one early year's impacts, as part of near-term implementation, would be to paint an unbalanced and incomplete picture. For example, as we examine the costs of the program through time, we see that these costs fall steadily. This is due to changes in the cost of key fuel inputs. For instance, the cost of petroleum, the basic raw material of diesel fuel, is expected to rise through time. Meanwhile, the principal cost of soybean-based biodiesel, the soybean oil feedstock, tends to fall though time due to rising crop yields. As a result, the

relative cost difference between diesel and biodiesel fuel would be expected to narrow through time as the program reaches maturity. Thus, while quantified costs from the wider use of biomass-based biodiesel can be greater than quantified benefits in the near term, through time we expect that benefits will tend to increase and outweigh costs. The estimates of quantified costs and benefits presented in this rulemaking should be considered within this context.

Further, as noted at the beginning of this section, this analysis is not intended to serve as a comprehensive quantification of the costs and benefits of this mandate. Rather, it illustrates those costs and benefits that are quantifiable in response to comments received on the proposed rule. To develop a comprehensive estimate of costs and benefits, one would need to qualitatively balance these estimates against the impacts discussed earlier in this section.

V. Final 2013 Volume for Biomass-Based Diesel

Through the RFS program, Congress established a schedule of renewable fuel volumes that gradually increases over time. While the schedule in the statute for biomass-based diesel ends in 2012, the schedule of increasing volumes for advanced biofuels continues through 2022. For the years between 2012 and 2022, the statute indicates that biomass-based diesel volumes can increase above the 2012 applicable volume of 1.0 billion gal, but they cannot ever be lower than 1.0 billion gal. Subject to a consideration of a number of factors as described in Section II, we believe that it is appropriate to consider biomass-based diesel as playing an increasing role in supplying advanced biofuels to the market between 2012 and 2022.

As described in Section IV.A.9, increases in the required volume of biomass-based diesel above 1.0 billion gal will help to support rural economic growth and job creation, will increase energy security, and reduce emissions of GHGs. Our estimates of the quantifiable benefits of an increase of 280 mill gal do not exceed the costs in 2013. However, as laid out above, we expect benefits to generally exceed costs over time based on the analysis performed for the RFS2 final rule. Thus by establishing an applicable volume for biomass-based diesel in 2013 that exceeds the minimum of 1.0 billion gal, we are helping to establish the industry as a substantial contributor to the required volumes of advanced biofuel anticipated after full implementation of the RFS program.

Therefore, based on our review of the factors required in the statute, we are finalizing an applicable volume of 1.28 billion gal biomass-based diesel for 2013, consistent with our proposal. We received comments both in support of and opposed to an increase above the statutory minimum of 1.0 billion gallons. We have determined that 1.28 billion gallons is achievable in 2013 and is a reasonable exercise of our authority under CAA 211(o)(2)(B)(ii) to bring about the long-term benefits of the RFS program.

We did not propose biomass-based diesel standards for 2014 and beyond in the NPRM since we believe we will be in a better position in the future to evaluate all of the factors related to establishing an applicable volume for 2014 and later years. In response to the NPRM, two parties commented that EPA should set the required volumes of biomass-based diesel through at least the year 2017. We agree that specifying the required volumes of biomass-based diesel for more than one compliance year would provide greater certainty for both biofuel producers and obligated parties, stability for future investments and contracts, and could potentially reduce the need to waive a portion of the advanced biofuel requirement in future years. However, one of the factors that we are required to consider when determining the appropriate biomass-based diesel volume for years after 2012 is a review of the implementation of the program during prior years. By determining the applicable volume requirement for biomass-based diesel only one year in advance, we are able to use the most up-to-date information on the implementation of the program in making our determination. This is particularly important in the early years of the program.

VI. Public Participation

Many interested parties participated in the rulemaking process that culminates with this final rule. This process provided opportunity for submitting written public comments following the proposal that we published on July 1, 2011 (76 FR 38844), and we considered these comments in developing the final rule. Public comments and EPA responses are discussed throughout this preamble, and all comments received are available in EPA docket number EPA–HQ–OAR–2010–0133.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because it has an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

The economic impacts of the RFS2 program on regulated parties, including the impacts of the required volumes of renewable fuel, were already addressed in the RFS2 final rule promulgated on March 26, 2010 (75 FR 14670). This action finalizes the applicable volume of biomass-based diesel for 2013. We have been able to quantify some of the economic impacts of this rule in 2013.

We estimate that soybean prices could increase up to 3 cents per pound in 2013 if the 2013 biodiesel standard is met solely as a result of increased demand for soy bean oil. Potential use of other less expansive feedstocks would reduce this impact on soy beans. Again assuming the 280 million gallon increase in required biomass-based diesel is met through increased demand for soy oil, we estimate the cost of producing this biomass-based diesel would range from $253 to $381 million in 2013. Adding these estimates of 2013 costs to the fuel pool would result in a diesel fuel cost increase of less than 1 cent per gallon. These estimates do not account for recent trends in crop yields and grain prices resulting from drought conditions that are occurring in many areas of the country. Given the wide range of feedstocks from which biodiesel can be produced, the ultimate impact of these drought conditions on the mix of biodiesel feedstocks in 2013 is difficult to predict at this time.

Quantified estimates of benefits and disbenefits include energy security benefits of $0.15 per gallon in 2013 and air quality disbenefits of $0.07 per gallon in 2013. Other benefits include GHG emission reduction benefits and both direct and indirect employment benefits in rural areas due to increased biodiesel production. Impacts on water quality, water use, wetlands, ecosystems and wildlife habitats are expected to be modest due to both the small impact on

crops planted and due to the relatively small impact of soy bean production.

B. Paperwork Reduction Act

This action does not impose any new information collection burden since it only specifies the required volume of biomass-based diesel under the RFS program for 2013. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 80, subpart M under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* This would include the following approved information collections (with OMB control numbers and expiration dates listed in parenthesis): ''Renewable Fuels Standard Program: Petition and Registration'' (OMB Control Number 2060–0637, expires March 31, 2013); ''Renewable Fuels Standard (RFS2)'' (OMB Control Number 2060–0640, expires July 31, 2013); ''Regulations of Fuels and Fuel Additives: 2011 Renewable Fuels Standard—Petition for International Aggregate Compliance Approach'' OMB Control Number 2060–0655, expires February 28, 2014). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. Detailed and searchable information about these and other approved collections may be viewed on the Office of Management and Budget (OMB) Paperwork Reduction Act Web site, which is accessible at *http://www.reginfo.gov/public/do/PRAMain.*

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The impacts of the RFS2 program on small entities that are directly regulated under the RFS2 program were already addressed in the RFS2 final rule promulgated on March 26, 2010 (75 FR 14670). This rule simply establishes the applicable volume for biomass-based diesel for 2013 at a level that is consistent with the analyses in the RFS2 final rule. Therefore, this action will not impose any additional requirements on small entities beyond those which have already been evaluated.

We received a comment suggesting that impacts on truckers of the applicable volume of biomass-based diesel for 2013 established in this rule should be evaluated as part of our standard small business impact analysis. In response, we note that such analyses are only required under the Regulatory Flexibility Act for parties directly regulated by a rule and that, in general, truckers are not directly regulated by today's action nor under the regulatory requirements established in the RFS2 final rule.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule simply establishes the applicable volume for biomass-based diesel for 2013 at a level that is consistent with the analyses in the RFS2 final rule. Thus, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS2 regulations. A summary of the concerns raised, and EPA's response to those concerns, is provided in this preamble.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule will be implemented at the Federal level and impose compliance costs only on transportation fuel refiners, blenders, marketers, distributors, importers, exporters, and renewable fuel producers and importers. Tribal governments would be affected only to the extent they purchase and use regulated fuels. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks and because it implements specific standards established by Congress in statutes.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action simply finalizes the annual standards for cellulosic biofuels for 2012 and biomass-based diesel for 2013, provisions for new RIN-generating pathways, and clarifying changes and minor technical amendments to the regulations.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g.,

materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action does not relax the ambient emission control measures on sources impacted by the RFS2 regulations. While we have estimated that some emissions may increase as the result of the incremental volume of 280 mill gal required through this final rule, ambient emission control measures remain unaffected.

K. Congressional Review Act

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

VIII. Statutory Authority

Statutory authority for the rule finalized today can be found in section 211 of the Clean Air Act, 42 U.S.C. 7545. Additional support for the procedural and compliance related aspects of today's rule, including the recordkeeping requirements, come from sections 114, 208, and 301(a) of the Clean Air Act, 42 U.S.C. 7414, 7542, and 7601(a).

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential Business Information, Diesel fuel, Fuel additives, Gasoline, Imports, Labeling, Motor vehicle pollution, Penalties, Petroleum, Reporting and recordkeeping requirements.

Dated: September 14, 2012.

Lisa P. Jackson,

Administrator.

[FR Doc. 2012–23344 Filed 9–26–12; 8:45 am]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status for Grotto Sculpin and Designation of Critical Habitat; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2012–0065; 4500030113]

RIN 1018–AY16

Endangered and Threatened Wildlife and Plants; Endangered Status for Grotto Sculpin and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list the grotto sculpin (*Cottus* sp. nov.) as an endangered species under the Endangered Species Act of 1973, and propose to designate critical habitat for the species. In total, all underground aquatic habitat underlying approximately 94 square kilometers (36 square miles) plus 31 kilometers (19.2 miles) of surface stream are being proposed for designation as critical habitat. The proposed critical habitat is located in Perry County, Missouri. If adopted, the effect of these regulations is to conserve grotto sculpin and its habitat under the Endangered Species Act.

DATES:

Written Comments: We will accept comments received or postmarked on or before November 26, 2012. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by November 13, 2012.

Public Meeting: To better inform the public of the implications of the proposed listing and proposed critical habitat, and to answer any questions regarding this proposed rule, we plan to hold a public meeting on Tuesday, October 30 from 5–8 p.m. at the Perryville Higher Education Center, 108 South Progress Drive, Perryville, MO 63775.

ADDRESSES: *Written Comments:* You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter Docket No. FWS–R3–ES–2012–0065, which is the docket number for this rulemaking. Then, click the Search button. You may submit a comment by clicking on ''Comment Now!.'' If your comments will fit in the provided comment box, please use this feature of *http://www.regulations.gov,* as it is most compatible with our comment review procedures. If you attach your comments as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred format is a spreadsheet in Microsoft Excel.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R3–ES–2012–0065; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the *Information Requested* section below for more information).

The coordinates or plot points or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at *http://www.fws.gov/midwest/Endangered, www.regulations.gov* at Docket No. FWS–R3–ES–2012–0065, and at the Columbia Missouri Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Amy Salveter, Field Supervisor, U.S. Fish and Wildlife Service, Columbia Missouri Ecological Services Field Office, 101 Park De Ville Drive, Suite A, Columbia, MO 65203; by telephone 573–234–2132; or by facsimile 573–234–2181. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: This document consists of: (1) A proposed rule to list the grotto sculpin as an endangered species; and (2) a proposed critical habitat designation for the grotto sculpin.

Executive Summary

Why we need to publish a rule. A species may warrant protection through listing under the Endangered Species Act (Act) if it meets the definition of an endangered or threatened species throughout all or a significant portion of its range. This species has been a candidate for listing since 2002, but was precluded from listing by other higher priority actions. The grotto sculpin currently is afforded no protection under the Act, and, because of continued threats, it warrants the protections afforded by listing under the Act. We are proposing to list the grotto sculpin as an endangered species. Listing a species as an endangered species or threatened species and designating critical habitat can only be done by issuing a rule.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined the threats to the species include:

- Habitat loss and degradation of aquatic resources, including such things as illegal waste disposal, chemical leaching, contaminated groundwater, vertical drains, urban development, sedimentation, and industrial sand mining.
- Predation by nonnative predators.
- Inadequate existing regulatory mechanisms that allow significant threats such as water contamination and exploitation of sinkholes.
- Other natural or manmade factors, including loss of genetic diversity, natural environmental variability, and climate conditions such as drought.

This rule proposes to designate critical habitat for the species. If prudent and determinable, we must designate critical habitat for endangered or threatened species. We are required to base the designation on the best available scientific data after taking into consideration economic and other impacts. We can exclude an area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species. We are proposing to designate critical habitat in Perry County, Missouri, as follows:

- Two units comprised of all underground aquatic habitat underlying approximately 94 km^2 (36.28 mi^2).
- Two units that include approximately 31 kilometers (19.2 miles) of surface stream.

We are preparing an economic analysis. To ensure that we consider the economic impacts, we are preparing an economic analysis of the proposed designation.

We will seek peer review. We are seeking comments from independent specialists to ensure that our listing determination and critical habitat designation are based on scientifically sound data and analyses. We will invite these peer reviewers to comment, during the comment period, on our proposed listing and critical habitat designation. Because we will consider all comments and information received during the comment period, our final determination may differ from this proposal.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(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) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing regulations that may be addressing those threats;

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species;

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(6) Specific information on:

(a) The amount and distribution of grotto sculpin and its habitat,

(b) What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range currently occupied by the species;

(c) Where these features are currently found,

(d) Whether any of these features may require special management considerations or protection;

(e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why,

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why;

(7) Land use designations and current or planned activities in the areas occupied by the species or proposed to be designated as critical habitat, and possible impacts of these activities on this species and proposed critical habitat;

(8) Information on the projected and reasonably likely impacts of climate change on the grotto sculpin and proposed critical habitat;

(9) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts;

(10) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(11) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described 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 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.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Columbia Missouri Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Meeting: We have scheduled a public meeting to be held on Thursday, October 11, 2012 at the Perryville Higher Education Center, 108 South Progress Drive, Perryville, MO 63775. Any interested individuals or potentially affected parties seeking additional information on the public meeting should contact the Columbia Missouri Ecological Services Field Office (See **FOR FURTHER INFORMATION CONTACT**). The U.S. Fish and Wildlife Service is committed to providing access to this event for all participants. Please direct all requests for interpreters, close captioning, or other accommodation to the Columbia Missouri Ecological Services Field Office (See **FOR FURTHER INFORMATION CONTACT**) by 5 p.m. on October 4, 2012.

Previous Federal Actions

We first identified the grotto sculpin as a candidate species in a notice of review published in the **Federal Register** on June 13, 2002 (67 FR 40657). Candidate species are assigned listing priority numbers (LPNs) based on the immediacy and magnitude of threats, as well as taxonomic status. The lower the LPN, the higher priority that species is for us to determine appropriate action using our available resources. The grotto sculpin was assigned an LPN of 2 due to imminent threats of a high magnitude. On May 11, 2004, we received a petition dated May 4, 2004, from The Center for Biological Diversity to list 225 candidate species, including the grotto sculpin. From 2004 through 2011, notices of review published in the **Federal Register** (69 FR 24876, 70 FR 24870, 71 FR 53756, 72 FR 69034, 73 FR 75176, 74 FR 57804, 75 FR 69222, 76 FR 66370) continued to maintain an LPN of 2 for the species.

Status Assessment for Grotto Sculpin

Background

Species Description

The grotto sculpin (*Cottus* sp. nov.) is a cave-dwelling fish that exhibits characteristics typical of troglomorphic (adapted to living in constant darkness) organisms, including greatly reduced or absent eyes and skin pigmentation (Burr *et al.* 2001, p. 286). The grotto sculpin is moderately-sized relative to other species in the genus; the largest specimen examined by Adams *et al.* (unpub. data) was 104 millimeters (mm) (4.1 inches (in)) standard length (SL).

Taxonomy

The grotto sculpin belongs to the family Cottidae (Pflieger 1997, p. 253) and until recently was considered to be a member of the banded sculpin (*Cottus carolinae*) complex. The banded sculpin occurs in streams and rivers in adjacent watersheds; however no other *Cottus* overlaps the geographic range of the grotto sculpin. Burr *et al.* (2001, p. 293) demonstrated that hypogean (underground) grotto sculpin found in Perry County, Missouri, are morphologically distinct from the epigean (above ground) forms of banded sculpin found outside the Cinque Hommes Creek drainage in that they exhibit obvious troglomorphic characteristics and other unique anatomical variations. Although the occurrence of banded sculpin in subterranean waters is well known, none of these sculpin shows evidence of cave adaption exhibited by grotto sculpin, and none is known to be a permanent cave resident. Grotto sculpin are distinguished from all other *Cottus* species, except banded sculpin, by the complete lateral line terminating near the base of the caudal fin and lack of connection between dorsal fins (Adams *et al.* unpub. data). The grotto sculpin is distinct from the banded sculpin based on a reduction in eye size and an increase in cephalic lateralis pore size (Adams *et al.* unpub. data). Morphology of brain structures in hypogean individuals also differs significantly from that of epigean banded sculpin, including reduced optic and olfactory lobes and enlarged inferior lobe of the hypothalamus, eminentia granularis, and crista cerebellaris (Adams 2005, pp. 17–18).

Population genetics of *Cottus* sculpin in southeast Missouri also have been analyzed. Adams *et al.* (unpub. data) conducted a population genetics study of sculpin from the Bois Brule drainage in Perry County, the Greasy Creek in Madison County, and the Current River in Ripley County. Unique evolutionary lineages for each of the three areas, based on distinct nuclear haplotypes, were identified and supported. A single nuclear haplotype was identified among sampled individuals throughout the Bois Brule drainage (Mystery Cave, Running Bull Cave, Rimstone River Cave, Crevice Cave, Moore Cave, and Cinque Hommes Creek), a second from Greasy Creek, and a third from the Current River. Adams *et al.* (unpub. data) is in the process of formally describing the grotto sculpin as a taxonomically distinct species based on the combination of morphologic and genetic uniqueness. Morphological data alone are not definitive in supporting a unique taxonomic unit; however, morphological data augmented by the results of genetic analyses by Adams *et al.* (unpub. data) support the divergence of grotto sculpin from other *Cottus* species.

Life History and Habitat

Grotto sculpin occupy cave streams, resurgences (also known as ''spring branches'') (Vandike 1985, p. 10), springs, and two surface streams (Adams 2012, pers. comm.; Burr *et al.* 2001, p. 284). Resurgences refer to the point of emergence of a cave stream from the cave system and are an interface between strictly subterranean habitats (caves) and streams that flow only on the surface. Age-class distribution of grotto sculpin between cave and surface habitats shifts throughout the year, but in general, adults make up a higher percentage of overall grotto sculpin abundance in caves, whereas juveniles comprise a higher percentage of overall abundance on the surface (Gerken 2007, p. 14). Adults increase in abundance at resurgence sites in October, peak in December, and disappear from resurgence sites in January (Adams *et al.* 2008, p. 5). Such seasonal changes in adult abundance might be indicative of a subterranean migration for spawning (Adams 2005, p. 50).

The appearance of grotto sculpin young-of-year in spring and early summer suggests late winter and early spring spawning (Day 2008, p. 18). The distance grotto sculpin travel upstream in caves is unknown, but a nest has been observed 0.6 meters (m) (2 feet (ft)) inside the cave portal at Thunderhole Resurgence, indicating they might stay close to surface habitats (Adams *et al.* 2008, p. 8). Five nests, with approximately 200 eggs each, were discovered within a 100-m (328-ft) area in Mystery Cave in December 1998, suggesting synchronous spawning within the cave (Adams 2005, p. 10). Nests were adhered to the underside of rocks in flowing water with a temperature of 14 °C (57 °F). Reproduction could occur as late as February or March in Cinque Hommes Creek, based on the observation of yolk-sac larvae and a single nest (Adams *et al.* unpub. data). Spawning could be tied to water temperature, with temperatures reaching optimum levels in caves as early as 2 to 3 months before surface habitats, explaining why spawning was not observed concurrently in those habitats (Adams 2005, pp. 10–11). Males remain present at nests and guard rocks to which nests are attached (Adams *et al.* unpub. data).

Young-of-year abundance increases between March and May at resurgence sites, and between April and May in caves (Adams *et al.* 2008, p. 5). That increase, coupled with decreased recaptures, likely is a result of young-of-year recruitment into the population. Adams *et al.* (2008, p. 7) classified grotto sculpin 30 mm (1.2 in) or less in length to be juveniles. At this size they can be tagged but are still susceptible to predation by adult sculpin as well as invasive fish. Grotto sculpin are cannibalistic, with the young providing a potential food source for adults in an otherwise forage-limited environment (Adams *et al.* 2008, p. 7). Seasonal decreases in abundance of young-of-year and juveniles likely are the result of spring and summer predation and cannibalism in addition to other causes of mortality. Epigean fishes, such as green sunfish (*Lepomis cyanellus*), bluegill (*L. macrochirus*), and channel catfish (*Ictalurus punctatus*), can access caves through sinkholes and are

potential predators on eggs and juveniles (Burr *et al.* 2001, p. 284).

Resurgences are used by juvenile grotto sculpin as nursery areas, where the juveniles maximize growth before migrating upstream into caves to reproduce or downstream to surface streams (Day 2008, p. 18). As juveniles grow, the potential for cannibalism decreases and mortality rates stabilize, resulting in increased recapture rates in caves. Both growth rate and metabolism are lower in caves versus resurgence sites (Adams 2005, p. 61; Adams *et al.* 2008, p. 8). However, fish in both habitats reach comparable lengths, alluding to greater longevity of fish in caves (Adams *et al.* 2008, p. 8).

Grotto sculpin tend to occur singly or in small aggregations of 2 to 3 individuals and can be found in the open water or hidden under rocks (Burr *et al.* 2001, p. 284). They occupy pools and riffles with moderate flows and variable depths (4 to 33 centimeters (cm) (1.6 to 13 in)) (Burr *et al.* 2001, p. 284). Although grotto sculpin have been documented to occur over a variety of substrates (for example, silt, gravel, cobble, rock rubble, and bedrock), the presence of cobble or pebble is necessary for spawning (Burr *et al.* 2001, p. 284; Adams *et al.* unpub. data). Gerken (2007, p. 16) examined habitat use by grotto sculpin in Mystery and Running Bull caves, Cinque Hommes Creek, and Thunderhole Resurgence. Grotto sculpin tend to be associated with a high availability of invertebrate prey, deeper cave pools, substrate containing cobble, and some level of sustained water flow (Gerken 2007, pp. 16–17). Use of surface habitat by grotto sculpin is most influenced by an abundance of amphipods and isopods. When surface streams with fewer prey items were used, available habitat was more than 23 percent clay. Grotto sculpin in caves occupied deeper pools where cobble comprised at least 10 percent of available habitat, and where amphipods and isopods were in greater abundance. Lower abundances of grotto sculpin were found in shallow cave pools where the substrate consisted of silt deposits deeper than 1.9 cm (0.8 in) (Gerken 2007, p. 16). Silt covered more overall area of available cave habitat, and silt also was deeper in caves compared to surface sites (Gerken and Adams 2007, p. 76).

Within and among caves and streams, sculpin typically move 0 to 50 m (0 to 164 ft) (Adams *et al.* 2008, p. 6). Over multiple sampling trips, substantial migrations greater than 200 m (656 ft) have been observed (range 0 to 830 m (0 to 2,723 ft)). The largest single movement of sculpin observed between two subsequent sampling trips (October to December 2007) was 610 m (2,001 ft) in Mystery Cave (Adams *et al.* 2008, p. 8). Such movements are seasonal and likely related to spawning and avoidance behavior of juveniles to escape predation by adult sculpin (Adams *et al.* 2008, p. 7). In May 2008, an individual that was tagged previously in Running Bull Cave was recaptured in Thunderhole Resurgence, evidencing the physical and biological connection of these two systems (Adams *et al.* 2008, p. 8).

Species Distribution and Status

The grotto sculpin was first documented in 1991 (Adams 2005, p. 11). Burr *et al.* (2001, pp. 280, 284) explored caves in five states that had extensive areas of karst to delineate the geographic range of the grotto sculpin, but found them to exist only in Missouri. Nine karst areas in Perry County, Missouri, were searched because sculpin (*Cottus* sp.) were previously known to be present in those areas, and the karst geology in those nine areas could provide suitable habitat for the grotto sculpin. Based on that study, the grotto sculpin is currently restricted to two karst areas (limestone regions characterized by sink holes, abrupt ridges, caves, and underground streams) in Perry County, Missouri: Central Perryville and Mystery-Rimstone (Burr *et al.* 2001, p. 283). Cave systems such as these that form beneath a sinkhole plain provide substantial organic input and an abundance of invertebrates. Such systems might be the only habitats that provide sufficient food and sustained water flow to support grotto sculpin populations (Burr *et al.* 2001, p. 291; Day 2008, pp. 16–17). Peck and Lewis (1978, pp. 43–53) documented an abundance of potential prey items in the karst region of southeast Missouri, including isopods, amphipods, flatworms, and snails.

The grotto sculpin is restricted to Blue Spring Branch (from the Moore Cave System resurgence to the confluence with Bois Brule Creek) and the Cinque Hommes Creek drainage, including underlying caves and Cinque Hommes Creek, its tributaries, resurgences, and springs. Within the Cinque Hommes Creek drainage, populations have been documented in five cave systems: Moore Cave, Crevice Cave, Mystery Cave, Rimstone River Cave, and Running Bull Cave (Adams *et al.* unpub. data; Adams 2012, pers. comm.). Within these cave systems, grotto sculpin occur in cave streams and associated resurgences and springs. Cinque Hommes Creek and Blue Spring Branch are the only surface streams where grotto sculpin have been found. Cinque Hommes Creek is the primary resurgence stream for caves in the Mystery-Rimstone Karst and Crevice Cave in the Central Perryville Karst, whereas Blue Spring Branch is the resurgence stream for the Moore Cave System (Burr *et al.* 2001, p. 284). To date, over 153 additional caves in Arkansas, Illinois, Indiana, Missouri, and Tennessee have been searched for grotto sculpin and epigean or hypogean forms of banded sculpin. Of these, banded sculpin was documented in 25 caves, but only fish in the Central Perryville and Mystery-Rimstone karst areas exhibited the cave adaptations characteristic of grotto sculpin (Burr *et al.* 2001, p. 284). The full extent of the species' range is unknown because not all reaches in occupied cave systems can be accessed and not all potential, suitable caves, springs, and surface streams have been surveyed (for example, Keyhole Spring; Moss and Pobst 2010, p. 152). We consider the geographic range of the grotto sculpin to be the extent of the Central Perryville and Mystery-Rimstone karst areas, which encompass approximately 222 km^2 (89 mi^2) (Service 2012 calculations based on Burr *et al.* 2001, p. 282 and Vandike 1985, p. 1).

There are no total population estimates for the grotto sculpin. Mystery (MC) and Running Bull (RBC) caves and their associated resurgence streams, Mystery Resurgence (MR) and Thunderhole Resurgence (TR), respectively, apparently have the largest populations of grotto sculpin (Adams *et al.* 2008, p. 4). A study conducted from August 2005 to October 2008 yielded a total of 6,265 captures (4,218 individuals) at those four sites (Day 2008, p. 12). The 2,684 (43 percent) captures in caves represented 1,642 individuals, whereas 3,581 (57 percent) captures in resurgences represented 2,576 individuals (Day 2008, pp. 13, 15). Of the captured fish, 2,986 (MC–894, RBC–154, MR–376, TR–1562) were tagged for a mark-recapture study. Mean recapture was higher in caves (46 percent) than resurgences (18 percent) (Day 2008, p. 13). Grotto sculpin densities were significantly lower in caves (0.037/m^2 (0.398/ft^2)) compared to resurgence streams (0.225/m^2 (2.42/ft^2)) (Day 2008, p. 13). Density at Thunderhole Resurgence was significantly higher (0.610/m^2 (6.57/ft^2)) than any other site surveyed (MC 0.036/m^2 (0.388/ft^2), RBC 0.113/m^2 (1.22/ft^2), MR 0.032/m^2 (0.344/ft^2)).

Capture success, recapture rates, and population density differ seasonally. The greatest number of grotto sculpin has been captured in summer, followed

by spring, fall, and winter (Adams *et al.* 2008, p. 5; Day 2008, p. 12). Overall recapture rates were highest in fall and winter (32 percent each) and lower in spring (25 percent) and summer (15 percent). Overall recapture rates also were significantly lower at resurgence sites than caves, regardless of season. Recapture rates at caves were highest in winter (52 percent) and lowest in fall (44 percent). Recapture rates at resurgence sites were highest in spring (15 percent) and lowest in winter (7 percent). Similar patterns of seasonal changes in density were observed in caves and resurgences. In both habitats, densities were highest in summer, nearly equal in fall and spring, and lowest in winter (Adams *et al.* 2008, p. 5).

Two mass mortalities of grotto sculpin have been documented in Perry County. The first occurred in Running Bull Cave in 2001, when the population was completely lost (Burr *et al.* 2001, p. 294; Adams 2005, p. 40). The second occurred in Mystery Cave in August 2005, and affected the uppermost 690 m (2,264 ft) of cave stream (Adams *et al.* 2008, p. 6). Both events were thought to have been caused by point-source pollution (Burr *et al.* 2001, p. 294; Adams *et al.* 2008, p. 6). Both caves were recolonized following the die-offs, and grotto sculpin were captured 2 years after the mortality event in Running Bull Cave (Adams *et al.* 2003, p. 7). Surveys were conducted as part of a research study immediately following the die-off in Mystery Cave (Adams *et al.* 2008, p. 6). From August 2005 through March 2006, no grotto sculpin were captured in the upstream sections of Mystery Cave. The first capture of a grotto sculpin after the die-off occurred in May 2006. The first recaptures of three individuals from three different stream sections (540, 560, and 570 m (1772, 1837, and 1870 ft)) occurred in July 2006. Stream sections that supported the earliest recolonization of grotto sculpin in the upper sections (0 to 690 m (0 to 2264 ft)) of Mystery Cave were the most downstream portion of the stream in which the die-off occurred (sections farthest away from the source of contamination). The grotto sculpin population in Mystery Cave increased over the next 3 years to more than 60 individuals in 2007 (Adams *et al.* 2008, p. 8).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

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

The grotto sculpin is a cave-adapted species that is endemic to karst habitats that provide consistent water flow, high organic input, and connection to surface streams, which allow for seasonal migrations to complete its life cycle. Nearly all of the land within the known range of the grotto sculpin is privately owned. Two exceptions are Ball Mill Resurgence Natural Area (19.5 ac (7.9 ha)) and Keyhole Spring and Resurgence near Blue Spring Branch; both properties are owned by the L–A–D Foundation (a private foundation dedicated to sustainable forest management and protection of natural and cultural areas in Missouri (*http://pioneerforest.org*) and managed by the Missouri Department of Conservation (MDC)). The municipality of Perryville is in the Central Perryville Karst Area and is within the recharge area of Crevice Cave. Thirty-six percent (15.6 km² (6.02 mi²)) of Perryville's total area of 43 km² (16.6 mi²) lies within the karst area, whereas 24 percent (10.4 km² (4.02 mi²)) lies within the southern portion of the recharge area of Crevice Cave (recharge area defined by Moss and Pobst 2012, pp. 151–152).

The karst in Perry County is characterized by thousands of sinkholes (Vandike 1985, p. 1) and over 700 caves (Fox *et al.* 2009, p. 5). Water quality in karst areas is highly vulnerable and can severely decline with rapid transmission of contaminants from the surface to the aquifer (Panno and Kelly 2004, p. 230). Moss and Pobst delineated recharge areas for known and potential grotto sculpin caves (2010, pp. 146–160) and evaluated the vulnerability of groundwater in the recharge areas to contamination (2010, pp. 161–190). Because the grotto sculpin is dependent not only on caves, but uses surface habitat in addition to caves, Moss and Pobst (2010, p. 161) evaluated hazards within and adjacent to recharge areas to best characterize impairment of cave and surface streams. They found all the recharge areas to be highly vulnerable and contain hazards from historical sinkhole dumps, agricultural practices without universal application of best management practices, ineffective private septic systems, and roads with contaminated runoff (Burr *et al.* 2001, p. 294; Moss and Pobst 2010, p. 183). They noted additional hazards in the recharge area for Crevice Cave not found elsewhere, such as hazardous waste generators, wastewater outflows, storm water outflows, and underground storage tanks for hazard waste, that compound potential threats to groundwater and drinking water (Moss and Pobst 2010, p. 184). Impacts to groundwater are not proportional to the area impacted in such a highly vulnerable landscape—a localized pollution event can impact all aquatic habitats downstream.

There are approximately 2 sinkholes per km² (6 per mi²) in Perry County and 7 sinkholes per km² (17 per mi²) in the Central Perryville and Mystery-Rimstone karst areas (Missouri Department of Natural Resources 2010, unpaginated). Recharge areas around grotto sculpin caves contain up to four times the number of sinkholes compared to other parts of the county or other karst areas. Cave recharge areas in the Central Perryville Karst contain an average of 8 sinkholes per km² (22 per mi²), whereas those in the Mystery-Rimstone Karst contain an average of 4 per km² (11 per mi²) (Missouri Department of Natural Resources 2010, unpaginated). Water flow in Perry County karst systems occurs by way of surface features, such as sinkholes and losing streams, as well as connectivity to the underlying aquifer (Aley 1976, p. 11; Fox *et al.* 2009, p. 5). Without adequate protection, sinkholes can funnel storm-runoff directly into cave systems in a short period of time (Aley 1976, p. 11; White 2002, p. 88; Fox *et al.* 2010, p. 8838).

Illegal Waste Disposal and Chemical Leaching—At least half of the sinkholes in Perry County have been or are currently used as dump sites for anthropogenic waste (Burr *et al.* 2001, p. 294). Although it is illegal to dump waste in open sites in Missouri, the practice continues today—sinkholes continue to be used as dump sites for household wastes, tires, and occasionally dead livestock (*http://dnr.mo.gov/env/swmp/dumping/enf_instruct.htm;* Pobst 2012, pers. comm). Moss and Pobst (2010, p. 169) observed that most historical farms in the sinkhole plain had at least one sinkhole that contained household and

farm waste. Waste material found in sinkholes includes, but is not limited to, household chemicals, sewage, and pesticide and herbicide containers (Burr *et al.* 2001, p. 294). Fox *et al.* (2010, p. 8838) found that Perry County cave streams were contaminated by a mixture of organic pollutants that included both current-use and legacy-use pesticides and their degradation products. They found high concentrations of heptachlor epoxide and trans-chlordane, which are degradation products of the legacy-use pesticides heptachlor and chlordane (Fox *et al.* 2010, p. 8839). Heptachlor and chlordane were banned in 1988, but can persist in the environment through storage in sediments above or below ground or leaking containers in sinkholes (ATSDR 1994a, unpaginated; ATSDR 2007a, unpaginated). In water, heptachlor readily undergoes hydrolysis to a compound, which is then readily processed by microorganisms into heptachlor epoxide (ATSDR 2007b, p. 98). Heptachlor and chlordane are highly persistent in soils, are almost insoluble in water, and will enter surface waters primarily though drift and surface run-off (ATSDR 1994a, unpaginated; ATSDR 2007a, unpaginated). Although not specifically tested on the grotto sculpin, both heptachlor and chlordane are highly toxic to most fish species tested, including warm-water species such as bluegill (*Lepomis macrochirus*) and fathead minnow (*Pimephales promelas*) (Johnson and Finley 1980, pp. 19, 43–44). Heptachlor caused degenerative liver lesions, enlargement of the red blood cells, inhibited growth, and mortality in bluegill (Andrews *et al.* 1966, pp. 301–305). Heptachlor, heptachlor epoxide, and chlordane have been shown to bioaccumulate in aquatic organisms such as fish, mollusks, insects, plankton, and algae (ATSDR 1994b, p. 172; ATSDR 2007b, p. 89).

Chemical leaching in sinkholes likely is a major contributor to the occurrence of legacy-use pesticides, such as dieldrin, in aquatic habitats (Fox *et al.* 2010, p. 8840). Dieldrin, a domestic pesticide used in the past to control corn pests and cancelled by the U.S. Department of Agriculture (USDA) in 1970 (ATSDR 2002, unpaginated), was found at levels that exceeded ambient water quality criterion by 17 times in Mertz Cave and Thunderhole Resurgence (Mystery-Rimstone Karst Area) (Fox *et al.,* p. 8839). Dieldrin is a known endocrine disruptor that bioaccumulates in animal fats, especially those animals that eat other animals and, therefore, is a concern for the grotto sculpin because it is the top predator in its cave habitat (ATSDR 2002, unpaginated; Fox *et al.* 2010, p. 8839). The grotto sculpin depends on several species of cave amphipods, including *Gammarus* sp. (Gerken 2007, pp. 16–17; Fox *et al.* 2010, p. 8839). Dieldrin has been detected in the amphipod *G. troglophilus* through tissue bioassays (Taylor *et al.* 2000, p. 10). Tarzwell and Croswell (1957, pp. 253–255) found that dieldrin was toxic to fathead minnow, bluegill, and green sunfish (*Lepomis cyanellus*). Whereas the species exhibited differences in susceptibility, individuals of all species tested ultimately experienced loss of equilibrium followed by death (Tarzwell and Croswell 1957, p. 255).

Sinkholes have also been used as disposal sites for dead livestock (Fox *et al.* 2009, p. 6; Moss and Pobst 2010, p. 170). Animal carcasses dumped into sinkholes and cave entrances are potentially diseased and could carry pathogens that could be unintentionally introduced into the groundwater system. Decomposing animals in source water for cave streams also can lower the dissolved oxygen and negatively impact aquatic organisms. One of two documented mass mortalities of the grotto sculpin was likely caused by a dead cow in the surface stream above Mystery Cave (Adams 2012, pers. comm.).

Contaminated Water—In cave streams sampled by Fox *et al.* (2010, p. 8838), time-weighted average (TWA) water concentrations of 20 chemicals were at levels above method detection limits (MDLs); 16 of the 20 chemicals originated from agricultural pest management activities. Acetochlor, diethatyl-ethyl, atrazine, and desethylatrazine (DEA) were detected at all sites during both May and June sampling periods. Pyrene, metolachlor, DEET, and pentachloroanisole were detected at all sites during sampling periods (Fox *et al.* 2010, p. 8838). There is a long list of potential impacts of these chemicals on fish, including reductions in olfactory sensitivity, immune function, and sex hormone concentrations; endocrine disruption; and increased predation and mortality due to adverse effects to behavior (Alvarez and Fuiman 2005, pp. 229, 239; Rohr and McCoy 2010, p. 30). The ubiquitous presence of current-use pesticides, such as atrazine, was not surprising based on the extensive agricultural land use in Perry County. Atrazine has been the most frequently detected herbicide in ground and surface waters in Perry County (Fox *et al.* 2010, p. 8838) and in a similar karst and agricultural landscape in Boone County, Missouri (Lerch 2011, p. 107); levels of corn production were similar in the two counties. Even at concentrations below U.S. Environmental Protection Agency (EPA) criteria for protection of aquatic life, atrazine has been shown to reduce egg production and cause gonadal abnormalities in fathead minnows (Tillett *et al.* 2010, pp. 8–9). Sex steroid biosynthesis pathways and gonad development in male goldfish (*Carassius auratus*) were impacted by atrazine in concentrations as low as 1 nanogram per liter (ng/L) (Spano *et al.* 2004, pp. 367–377). Concentrations of atrazine in Perry County ranged from 20 to 130 ng/L (Fox *et al.* 2010, p. 8838). Li *et al.* (2009, pp. 90–92) showed that environmentally relevant concentrations of acetochlor can decrease circulating thyroid hormone levels, decrease expression of thyroid hormone-related genes, affect normal larval development, and affect normal brain development. Pyrene is known to cause anemia, neuronal cell death, and peripheral vascular defects in larval fish (Incardona *et al.* 2003, p. 191). Wan *et al.* (2006, pp. 57–58) considered metolachlor to be slightly to moderately toxic to freshwater amphibians, crustaceans, and salmonid fishes. Wolf and Moore (2010, pp. 457, 464–465) demonstrated that sublethal concentrations of metolachlor adversely affected the chemosensory behavior of crayfish and likely impacted its ability to locate prey. These researchers also noted that this herbicide also caused physiological impairment that likely impacted locomotory behavior and predator avoidance responses. Due to the importance of chemosensory organs to the grotto sculpin, the presence of metolachlor in occupied streams may impact this fish's ability to locate prey.

Additional potential adverse effects to grotto sculpin from contaminants include increased susceptibility to fish disease (Arkoosh *et al.* 1998, p. 188), increased immunosuppression (Arkoosh *et al.* 1998, p. 188), disruption of the nervous system by inhibition of cholinesterase (Hill 1995, p. 244), and an increase in acute or chronic stress resulting in reduced reproductive success, alterations in blood and tissue chemistry, diuresis, osmoregulatory dysfunction, and reduction in growth (Wedemeyer *et al.* 1990, pp. 452–453). As a result, potential water contamination from various sources of point and non-point source pollution poses a significant, ongoing threat to the grotto sculpin.

Vertical Drains—Potential contaminant problems with sinkholes are further exacerbated by the presence and continued installation of vertical

drains across the agricultural landscape in Ste. Genevieve and Perry Counties (Perry County Soil and Water Conservation District (PCSWCD) 2012, unpaginated). Vertical drains are also known as ''stabilized sinkholes'' and are defined by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) as ''a well, pipe, pit, or bore in porous, underground strata into which drainage water can be discharged without contaminating groundwater resources'' (NRCS 2006, p. 1). This conservation practice is meant to reduce erosion by facilitating drainage of surface or subsurface water. Vertical drains often result in more land available to the farmer. As of 2012, the recharge areas for known and potential grotto sculpin habitat in the Central Perryville and Mystery-Rimstone karst areas contained an average of 2.5 vertical drains per km^2 (7 per mi^2), with the highest concentrations in the recharge areas for Keyhole Spring, Ball Mill Spring, and Mystery Cave (PCSWCD 2012, unpaginated). New vertical drains continue to be installed on the landscape at a rate consistent with the installation rate that occurred in the 1990s, with approximately 40 new vertical drains installed at 15 properties in Perry County in 2011 (PCSWCD 2012, unpaginated).

The NRCS (2006, p. 2) noted that ''significant additions to subsurface water sources may raise local water tables or cause undesirable surface discharges down-gradient from the vertical drain.'' The impact of vertical drains on groundwater has been studied on a limited basis and studies have directly linked groundwater and drinking water contamination with vertical drains (EPA 1999, unpaginated). According to the conditions set by the NRCS, this practice can only be applied when it will not contaminate groundwater or affect instream habitat by reducing surface water flows (NRCS 2010b, p. 1). The NRCS provides a cost-share of up to 75 percent for installation of vertical drains to stop erosion (NRCS 2010b; 2011; 2012) and has conservation practice and construction standards that include secure placement of the standpipe, appropriate fill material around the drainage pipe, and a filter system around the drain (NRCS 2006a, pp. 1–2; 2006b, pp. 1–3). Without implementation of the suite of standards, vertical drains might allow contaminated water to flow directly into caves without naturally occurring filtration (Pobst and Taylor 2007, p. 69). Vertical drains act as conduits for all surface water, contaminants, and sediment directly from the surface through the bedrock into underground caves, streams, and karst voids (Pobst and Taylor 2007, p. 69). Although USDA requires landowners to install a minimum of 7.62 m (25 ft) of grassed buffer around vertical drains to minimize erosion and the migration of nutrients and contaminants into the groundwater system, this guideline is not strictly followed (Moss and Pobst 2010, p. 170). Because vertical drains are potential targets for illegal dumpling of liquid hazardous wastes (Fox *et al.* 2010, p. 8839) and there is an absence of adequate buffers around some vertical drains, the migration of sediment and contaminants is easily facilitated (Moss and Pobst 2010, p. 171). Such a scenario is supported by Fox *et al.*'s (2010, pp. 8835–8840) contaminant study in the karst region of Perry County. The long list of harmful chemicals detected in the Fox *et al.* (2010, pp. 8835–8840) study is likely due to the migration of these contaminants directly from surface fields into the underground karst system through vertical drains and sinkholes.

Urbanization and Development—In addition to contamination from point sources of pollution and improper trash disposal, water quality of sculpin habitats is negatively impacted by urban growth of Perryville, located in the recharge area for Crevice Cave (Moss and Pobst 2010, p. 164). Crevice Cave had the lowest amount of cropland and grassland within its recharge and the most chemical detections. In contrast, Mystery Cave had the most cropland and grassland and fewest chemical detections (Fox *et al.* 2010, p. 8840). The only hazardous waste facility in the Central Perryville and Mystery-Rimstone karst areas is located in Perryville. The facility is permitted by the Missouri Department of Natural Resources as a large-volume hazardous waste generator. Additional hazards in Perryville include four other hazardous waste generators; nine underground storage tanks that could leak petroleum products; two National Pollutant Discharge Elimination System (NPDES) permits for wastewater outfalls; and seven NPDES permits for storm water discharge, leaking sewer lines, or lines that remain plumbed into the caves below (Missouri Department of Natural Resources (MDNR) 2010, unpaginated).

Most of the runoff water in areas that recharge aquatic habitats for the grotto sculpin moves quickly into the groundwater system with ineffective natural filtration, and the same is true for waste waters from septic systems (Aley 2012, pers. comm.). Contamination of groundwater by septic systems in karst areas has been documented on multiple occasions (Simon and Buikema 1997, pp. 387, 395; Panno *et al.* 2006, p. 60) because septic tank systems are poorly suited to karst landscapes (Aley 1976, p. 12). Panno and Kelly (2004, p. 229) listed septic systems as potential contributors of excess nitrogen to streams in the karst region of southern Illinois. Septic systems in the sinkhole plain can be direct conduits for introduction of septic effluent directly into the shallow karst aquifer (Panno *et al.* 2001, p. 114). In a karst area in southwest Missouri, poorly designed sewage treatment lagoons were allowing effluent from a small, rural school to seep into the only known location for the federally listed Tumbling Creek cavesnail (*Antrobia culveri*) (Aley 2003, unpaginated).

Most of the rural residents in the Central Perryville and Mystery-Rimstone karst areas employ on-site septic systems (for example, in the Mystery Cave area) (Aley 1976, p. 12). Failure of septic systems occurs in karst areas of southeast Missouri, such as those in Perry County, but detections are problematic because most failures are not obvious from the surface, but instead occur underground into the groundwater system (Aley 2012, pers. comm.). One instance of a septic system failure was observed by Aley (1976, p. 12) near Mystery Cave. Sewage was being discharged to a septic field within 100 ft (30.5 m) of the cave entrance and was contaminating the waters of the Mystery Cave system. Water samples collected by the Missouri Department of Conservation within the range of the grotto sculpin indicated the presence of *Escherichia coli* at high levels, which might correspond to high inputs of phosphorus from septic systems (Pobst 2010, pers. comm.). Taylor *et al.* (2000, pp. 13–16) found that fecal contamination of karst groundwater is a serious problem in southeast Missouri. Among sampling locations in southeast Missouri, water samples were taken from streams and springs in Perry County that included sites within the range of the grotto sculpin (Mertz Cave, Running Bull Cave, Thunderhole Resurgence, and Cinque Hommes Creek) (Taylor *et al.* 2000, pp. 48–49). High fecal bacterial loads were found in groundwater of grotto sculpin habitats and can be a combination of both human and animal wastes (Taylor *et al.* 2000, p. 14).

No animal feeding operations (AFOs) or concentrated animal feeding operations (CAFOs) are present in the recharge areas of grotto sculpin habitat (MDNR 2010), but there are smaller livestock feeding areas that are in sinkholes or near sinkhole drainage

points (Aley 1976, p. 12; Moss and Pobst 2010, p. 166). Large amounts of manure can be flushed through sinkholes and carry associated bacteria and pathogens into cave streams. Waste from mammalian sources, including humans and livestock, can increase nutrient loads and lower dissolved oxygen in the groundwater (Simon and Buikema 1997, p. 395; Panno *et al.* 2006, p. 60). Hypoxia resulting from eutrophication due to increases in nutrient load (especially phosphorus) can lead to mortality and sublethal effects by reducing the availability of oxygen needed by fish for locomotion, growth, and reproduction (Kramer 1987, p. 82; Gould 1989–1990, p. 467), Barton and Taylor (1996, p. 361) reported that low dissolved oxygen levels can cause changes in cardiac function, increased respiratory and metabolic activity, alterations in blood chemistry, mobilization of anaerobic energy pathways, upset in acid-base balance, reduced growth, and decreased swimming capacity of fish.

Sedimentation—Concerns with sedimentation (actual deposition of sediment, not the transport) and wash load (portion of the sediment in transport that is generally finer than the sediment) (as defined by Biedenharn *et al.* 2006, pp. 2–6) relative to impacts to grotto sculpin habitat are primarily the transport of contaminants and the deposition of excessive amounts of sediment in cave streams. Soils in the Central Perryville and Mystery-Rimstone karst areas are dominated by highly erosive loess. Sediment transported into the karst groundwater can include agricultural chemicals that are bound to soil particles as evidenced by findings of Fox *et al.* (2010, p. 8840). Fox *et al.* (2010, p. 8840) determined that turbidity of streams in grotto sculpin caves in Perry County was positively correlated with total chemical and DEA concentrations. Additionally, Gerken and Adams (2007, p. 76) noted that siltation was a major problem in grotto sculpin sites and postulated that silt likely reduced habitat available to this fish.

Excessive siltation in aquatic systems can be problematic for fish because it can change the overall structure of the habitat (Berkman and Rabeni 1986, pp. 291–292). Silt can fill voids in rock substrate that are integral components of habitat for reproduction and predator avoidance. The grotto sculpin occurs in habitats with some level of sediment deposition (Gerken 2007, pp. 16–17, 23–25). However, siltation beyond what occurred historically could limit the amount of suitable habitat available (Gerken 2007, pp. 27–28; Gerken and Adams 2007, p. 76), and the threshold of siltation that renders cave habitat unsuitable for grotto sculpin has not yet been determined.

Industrial Sand Mining—Industrial sand is also known as ''silica,'' ''silica sand,'' and ''quartz sand,'' and includes sands with high silicon dioxide content. Silica sand production in the United States was 29.3 million metric tons (Mt), an increase of 5.3 Mt from 2009 to 2010 (U.S. Geological Survey (USGS) 2012, p. 66.6). The Midwest leads the Nation in industrial sand and gravel production, accounting for 49 percent of the annual total (USGS 2012, p. 66.1). One end-use of silica sand is as a propping agent for hydraulic fracturing. Higher production of silica sand in 2010 was primarily attributable to an increasing demand for hydraulic fracturing sand because of continuing exploration and production of natural gas throughout the United States. Conventional natural gas sources have become less abundant, leading drilling companies to turn to deep natural gas and shale gas. Of the 29.3 Mt of silica sand sold or used in the United States, 12.1 Mt (41 percent) was used for hydraulic fracturing in the petroleum industry (USGS 2012, p. 66.10). As of 2010, the price per ton for industrial silica sand was $45.24 in the United States (USGS 2012, p. 66.11). In addition to new facilities, existing hydraulic fracturing sand operations increased production capacity to meet the surging demand for sand.

Mining for silica sand in Missouri occurs in the St. Peter Sandstone in Jefferson, Perry, and St. Louis Counties (USGS 2011, p. 27.2). The St. Peter Sandstone formation is directly adjacent to (to the west) the Joachim Dolomite formation that forms the karst habitat for the grotto sculpin in Perry County. The interface between these two formations generally comprises the western borders of the Central Perryville and Mystery-Rimstone karst areas. Four companies in Missouri produced 0.9 Mt of high-purity sand from the St. Peter Sandstone formation (USGS 2011, p. 27.2). The existing operation in Perry County lies 5.6 km (3.5 mi) northwest of Perryville and involves open pit mining on 101 ha (250 acres). This producer specializes in 40 to 70 and 70 to 140 size-grades that were used by the oil and gas well-servicing industry as a hydraulic fracture propping agent in shale formations (USGS 2010, p. 27.2).

Sand mining is typically accomplished using open pit or dredging methods with standard mining equipment and without the use of chemicals. Sand can be mined from outcrops or by removing overburden to reach subsurface deposits. Environmental impacts of sand mining are primarily limited to disturbance of the immediate area. The current operation in Perry County is partially within the Joachim Dolomite formation and at the western edge of the sinkhole plain with approximately four sinkholes occurring in the immediate vicinity. Erosion of soil and disturbed overburden could occur and increase the sediment loads in adjacent surface waters and cave streams via runoff. For example, a portion of the existing mining operation is within the Bois Brule watershed. Sediment-laden runoff could enter Blue Spring Branch, one of the surface streams occupied by the grotto sculpin. As described above, sedimentation can change the structure of grotto sculpin habitat and negatively impact reproduction and predator avoidance. Presence of the current facility, only 0.5 km (0.3 mi) and 1.6 km (1 mi) from the Central Perryville Karst and Crevice Cave recharge area, respectively, shows that such operations can and do occur in the Joachim Dolomite formation and immediately adjacent to grotto sculpin habitat. We currently are unaware of any plans for new facilities or expansions of current facilities. However, based on the presence of one existing operation, the occurrence of St. Peter Sandstone in Perry County, as well as recent growth of the hydraulic fracturing industry and associated increased demand for silica sand, it is likely that increased sand mining activity will occur in the future in areas where the grotto sculpin occurs. We consider sand mining to be a potentially significant threat to the species in the future.

Summary of Factor A

All of the recharge areas for caves occupied by the grotto sculpin are highly vulnerable and contain hazards from historical sinkhole dumps, agricultural practices without universal application of best management practices, ineffective private septic systems, and degraded runoff from roads. Hazardous waste facilities, outfalls for waste and storm water, and underground storage tanks are found in the recharge area for Crevice Cave that are not found in other parts of the species' range. Cave recharge areas in the Central Perryville Karst contain an average of 23 sinkholes per km^2 (58 per mi^2), whereas those in the Mystery-Rimstone Karst contain an average of 11 per km^2 (27 per mi^2). Water contamination from various sources of point and non-point source pollution poses a significant, ongoing threat to the grotto sculpin. Water flow in karst systems occurs by way of surface

features, such as sinkholes and losing streams, as well as connectivity to the underlying aquifer. Sinkholes can funnel storm-runoff that carries contaminants directly into cave systems in a short period of time and severely degrades water quality.

At least half of the sinkholes in Perry County have been, or are currently used as, dump sites for anthropogenic waste including household chemicals, sewage, pesticide and herbicide containers, and animal carcasses. Cave streams in Perry County are contaminated with current-use and legacy-use pesticides that enter cave systems through storm runoff or via leaching in sinkholes. The majority of chemicals that have TWAs at levels above MDLs originated from agricultural pest management activities and included acetochlor, diethatyl-ethyl, atrazine, and desethylatrazine (DEA), pyrene, metolachlor, DEET, and pentachloroanisole. Atrazine has been the most frequently detected herbicide in ground and surface waters in Perry County. Even at concentrations below EPA criteria for protection of aquatic life, atrazine has been shown to reduce egg production and cause gonadal abnormalities in fish.

Potential contaminant problems with sinkholes are further exacerbated by the presence and continued installation of vertical drains across the agricultural landscape. This practice, meant to reduce erosion by facilitating drainage of surface or subsurface water, results in more land available to the farmer. As of 2010, the recharge areas for known and potential grotto sculpin habitat in the Central Perryville and Mystery-Rimstone karst areas contain an average of 2.4 vertical drains per km^2 (6.2 per mi^2). Vertical drains have been linked directly to contamination of groundwater and water used for human consumption. Vertical drains also act as attractive nuisances because, like sinkholes, they are potential targets for illegal dumping of hazardous waste.

Risk from agricultural land use and point sources of pollution, such as sinkhole dumps, are not the only concern on the Perry County landscape. The recharge area for Crevice Cave contains the city of Perryville. Urban growth and hazards, such as hazardous waste facilities, underground storage tanks, wastewater discharges, and poorly maintained septic systems, in and around the city are threats to water quality in the range of the grotto sculpin. Potential threats in more rural areas of Perry County include introduction of manure and associated bacteria and pathogens into sinkholes from small livestock feeding areas. Such contaminants can increase nutrient loads and lower dissolved oxygen in the groundwater.

Concerns with sedimentation and wash load are primarily the transport of contaminants and the deposition of sediment in cave streams. Turbidity of cave streams is positively correlated with chemical concentrations, indicating that chemicals can bind to sediment particles and be transported by surface runoff. Siltation beyond what occurred historically could limit the amount of suitable habitat available; abnormally high deposition of sediment in cave systems can be problematic for aquatic life as it can fill voids in rock substrate that are integral components of grotto sculpin habitat.

Industrial sand mining is occurring in Perry County just outside the range of the grotto sculpin, but within the Bois Brule watershed. The mining operation near Perryville lies in the interface between the St. Peter Sandstone and Joachim Dolomite formations. Current mining operations could exacerbate erosion and sedimentation problems in the sinkhole plain and negatively impact grotto sculpin habitat. Furthermore, anticipated expansions of current operations or development of new operations to meet increasing demand of silica sand could pose a more serious threat in the future.

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

Although some specimens of the grotto sculpin have been taken for scientific investigations, we do not consider such collection activities to be at a level that poses a threat to the species. We do not have records of any individuals being taken for commercial, recreational, or educational purposes.

Factor C. Disease or Predation

Predation by invasive, epigean fish poses a threat to eggs, young-of-year, and juvenile grotto sculpin. Farm ponds are human-made features, as opposed to natural aquatic habitats, that often are stocked with both native and nonnative fishes for recreational purposes. Fish from farm ponds enter cave systems through sinkholes when ponds are unexpectedly drained (Burr *et al.* 2001, p. 284) or after high-precipitation events. Predatory fish were documented to occur in all of the caves occupied by the grotto sculpin, and include common carp (*Cyprinus carpio*), fathead minnow (*Pimephales promelas),* yellow bullhead (*Ameiurus natalis*), green sunfish (*Lepomis cyanellus*), bluegill (*Lepomis macrochirus*), and channel catfish (*Ictalurus punctatus*) (Burr *et al.* 2001, p. 284).

The migration and persistence of invasive, epigean fish species into cave environments poses an ongoing and pervasive threat to the grotto sculpin because of unnatural levels of predation on eggs, young-of-year, and juveniles. Predation beyond what occurs naturally among adult and juvenile grotto sculpin can reduce population levels to an unsustainable level and may render a population unrecoverable in the face of an unexpected mass mortality.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The primary causes of the grotto sculpin's decline are degradation of aquatic resources from illegal waste disposal in sinkhole dumps, chemical leaching, urban development, and sedimentation. Existing Federal, State, and local laws have not been able to prevent impacts to the grotto sculpin and its habitat, and the existing regulatory mechanisms are not expected to prevent causes of grotto sculpin decline in the future.

The grotto sculpin is not protected under the Missouri State Endangered Species Law (MO ST 252.240) because it has not been formally recognized as a distinct species, but is afforded some recognition by the Missouri Department of Conservation as a Missouri Species of Conservation Concern. All species in the State of Missouri are protected as biological diversity elements such that no harvest is permitted unless a method of legal harvest is described in the permissive Wildlife Code. No method of legal harvest is permitted for the grotto sculpin.

The Missouri Department of Natural Resources establishes water quality and solid waste standards that are protective of aquatic life. The Missouri Clean Water Law of 1972 (MO ST 644.006–644.141) addresses pollution of the waters of the State to prevent threats to public health and welfare; wildlife, fish and aquatic life; and domestic, agricultural, industrial, recreational, and other legitimate uses of water. It is unlawful for any person: (1) To cause pollution of any waters of the State or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the State; (2) to discharge any water contaminants into any waters of the State which reduce the quality of such waters below the water quality standards established by the commission; or (3) to violate any regulations regarding pretreatment and toxic material control, or to discharge any water contaminants into any waters of the State which exceed effluent regulations or permit provisions as

established by the commission or required by any Federal water pollution control act (MO ST 644.051). Based on documented levels of contaminants present in the cave streams of Perry County (Fox *et al.* 2010, pp. 8835–8841), the Missouri Clean Water Law of 1972 is insufficient to prevent water degradation in grotto sculpin habitat.

According to the Missouri State Waste Management Law of 1972 (MO ST 260.210), it is illegal to dump waste materials into sinkholes. Regulations under the Federal Clean Water Act of 1972 (CWA; 33 U.S.C. 1251 *et seq.*) would apply if a point-source for the pollution could be determined. Discrete pollution events that impact cave systems are problematic even if a point-source can be determined because it can be extremely difficult to assess damages to natural resources such as troglobitic biota that live underground. Cave systems are recharged by surface water and groundwater that typically travel several miles before resurfacing from cave openings and spring heads (Vandike 1985, p. 3).

Once a sinkhole has been modified to function as a vertical drain, it becomes a Class V Injection Well (alternatively known as an ''agricultural drainage well'' (ADW)) as defined by the EPA (1999, unpaginaged). The Safe Drinking Water Act of 1974 (42 U.S.C. 300f *et seq.*) and later amendments established the Federal Underground Injection Control (UIC) Program. The State of Missouri has obtained primacy from the UEPA for the UIC program, and the Class V Injection Well program derives its authorities from Missouri Clean Water Law (MO ST 644) (MDNR 2006, p. 2). By definition, ADWs can receive ''excess surface and subsurface water from agricultural fields, including irrigation tailwaters and natural drainage resulting from precipitation, snowmelt, floodwaters, etc. ADWs may also receive animal yard runoff, feedlot runoff, dairy runoff, or runoff from any other agricultural operation'' (USEPA 1999). In addition to potential threats from permitted injectants, ADWs are vulnerable to spills from manure lagoons and direct discharge from septic tanks, as well as release of agricultural substances, such as motor oil and pesticides (USEPA 1999). Data from water sampling indicate that nitrate is a primary constituent in ADW injectate and likely exceeds health standards (USEPA 1999). Other constituents that also have exceeded primary or secondary drinking water standards or health advisory levels are boron, sulfate, coliforms, pesticides (cyanazine, atrazine, alachlor, aldicarb, carbofuran, 1,2-dichloropropane, and dibromochloropropane), total dissolved solids, and chloride (USEPA 1999). Furthermore, studies have documented that ADWs contribute to, or cause, contamination of groundwater. Nitrate contamination of groundwater in agricultural areas has been documented, as has contamination from direct discharge of septic tanks (USEPA 1999). As noted above, Class V injection wells are covered under the Missouri Clean Water Law of 1972, but the existing regulations are inadequate to prevent deposition of contaminants documented in occupied grotto sculpin habitats of Perry County, as evidenced by the results of Fox *et al.* (2010, pp. 8835–8841).

There are no water quality ordinances in effect in Perry County beyond minimum State standards in the Code of State Regulations (19 CSR 20–3.015) and, therefore, no limitations for onsite septic construction as long as septic systems are built on properties greater than 1.2 ha (3 ac) and the system is at least 3.1 m (10 ft) from the property line. A more protective ordinance has been adopted in Monroe County, Illinois, where the soils and topography are very similar to Perry County (Monroe County Zoning Code 40–5–3, chapter 40–4–29). The ordinance in Monroe County prohibits placement of any substances or objects in sinkholes, alteration of sinkholes, and development in sinkholes. The stated purpose of the ordinance is, ''to reduce the frequency of structural damage to public and private improvements by sinkhole collapse or subsidence and to protect, preserve and enhance sensitive and valuable potable groundwater resource areas of karst topography, thus protecting the public health, safety and welfare and insuring orderly development within the County.'' Greene County, Missouri, also is in a sinkhole plain and has adopted special regulations relative to construction of onsite septic systems. They require that systems are constructed above the sinkhole flooding area, which is defined as ''the area below the elevation of the lowest point on the sinkhole rim or the areas inundated by runoff from a storm with an annual exceedance probability of 1 percent (100-year storm) and a duration of 24 hours (8 inches of rain in Green County)'' (Green County 2003, p. 3–9). The minimum standards in the Code of State Regulations (19 CSR 20–3.015) for water quality standards in Missouri are not protective enough to prevent the deposition of silt and contaminants into occupied grotto sculpin habitats, as reported by Gerken and Adams (2007, p. 76) and Fox *et al.* (2010, pp. 8835–8841).

Summary of Factor D

Despite some existing regulatory mechanisms that provide protection for the grotto sculpin and its habitat, the grotto sculpin continues to decline due to the effects of a wide array of threats (see Factors A, C, and E). Existing Federal and State water quality laws and State waste management law can be applied to protect water quality in surface and cave streams occupied by the grotto sculpin; however these laws have not been sufficient to prevent continued habitat degradation and population declines. Although harvest of grotto sculpin is not permitted in the Missouri Wildlife Code, the species has not been protected under Missouri Endangered Species Law because it has not been formally recognized as a distinct species. The existing regulatory mechanisms provide little direct protection of water quality in grotto sculpin habitat, which is the most significant threat to the species, and are inadequate to address threats to the species throughout its range. We have no information to indicate that the aforementioned regulations, which currently do not offer adequate protection to the grotto sculpin, will be revised or implemented in such a manner so that they would be adequate to provide protection for the species in the future.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Small, Isolated Populations—The existing grotto sculpin populations are small in size and range and its distribution is restricted to short stream reaches in two watersheds. The grotto sculpin's small population size makes it extremely susceptible to extirpation from a single catastrophic event (such as a toxic chemical spill or storm event that destroys its habitat), thus reducing the ability to recover from the cumulative effects of smaller chronic impacts to the population and habitat such as progressive degradation from water contamination.

Environmental stressors, such as habitat loss and degradation, can exacerbate potential problems associated with the species' endemism (*i.e.,* restricted to five cave systems in one county) and overall small population size, increasing the species' vulnerability to localized or rangewide extinction (Crnokrak and Roff 1999, p. 262; Hedrick and Kalinowski 1999, pp. 142–146). The isolation of subpopulations of the grotto sculpin

make it vulnerable to extinction and loss of genetic diversity caused by genetic drift, inbreeding depression, and stochastic events (Willis and Brown 1985, p. 316). Small, isolated populations are more susceptible to genetic drift, possibly leading to fixation where all except one allele is lost, and population bottlenecks leading to inbreeding (Frankham *et al.* 2002, pp. 178–187). Inbreeding depression can result in death, decreased fertility, smaller body size, loss of vigor, reduced fitness, various chromosome abnormalities, and reduced resistance to disease (Hedrick and Kalinowski 1999, pp. 139–142). Even though some populations fluctuate naturally, small and low-density populations are more likely to fluctuate below a minimum viable population (the minimum or threshold number of individuals needed in a population to persist in a viable state for a given interval) if they are influenced by stressors beyond those under which they have evolved (Shaffer 1981, p. 131; Shaffer and Samson 1985, pp. 148–150; Gilpin and Soule 1986, pp. 25–33). For example, grotto sculpin in Running Bull Cave exhibit the most distinct morphological adaptations to the cave environment and are the only individuals in the Cinque Hommes Creek drainage to have a rare genetic haplotype (Adams 2005, p. 49). One of the two known mass mortalities caused by a pollution event occurred in Running Bull Cave and temporarily eliminated grotto sculpin from the site. Grotto sculpin eventually recolonized the cave, but recolonization did not necessarily occur through local recruitment, but possibly through immigration by individuals from connected populations. Running Bull Cave might serve as either a primary site of population connectivity or interaction and act as a connecting stream between otherwise isolated localities (Mystery and Rimstone River Caves) (Day 2008, p. 52). Even though haplotype diversity post-extirpation was comparable to that previously measured (Day 2008, p. 54), it is possible that previously undocumented haplotypes were lost and will not be recovered. Day (2008, p. 54) notes that extirpation events of longer duration or greater severity could negatively impact overall genetic diversity. Furthermore, this scenario is illustrative of the potential for extirpation of entire subpopulations and the cascading effects on connected subpopulations.

Climate Change—Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (for example, temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (for example, habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change. As is the case with all stressors that we assess, even if we conclude that a species is currently affected or is likely to be affected in a negative way by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an ''endangered species'' or a ''threatened species'' under the Act. If a species is listed as an endangered or threatened species, knowledge regarding the vulnerability of the species to, and known or anticipated impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

The impact of climate change on the grotto sculpin is uncertain. The species is totally dependent on an adequate water supply and has specific habitat requirements (water depth and connectivity of caves and surface sites); we expect that climate change could significantly alter the quantity and quality of grotto sculpin habitat and thus impact the species in the future. This species relies on surface water for energy input into the cave system, recharge of groundwater, and availability of surface streams. Potential adverse effects from climate change include increased frequency and duration of droughts (Rind *et al.* 1990, p. 9983; Seager *et al.* 2007, pp. 1181–1184; Rahel and Olden 2008, p. 526) and changes in water temperature, which likely serves as a cue for reproduction in grotto sculpin (Adams 2005, pp. 10–11). Climate warming might also decrease groundwater levels (Schindler 2001, p. 22) or significantly reduce annual stream flows (Moore *et al.* 1997, p. 925; Hu *et al.* 2005, p. 9). In the Missouri Ozarks, it is projected that stream basin discharges may be significantly impacted by synergistic effects of changes in land cover and climate change (Hu *et al.* 2005, p. 9), and similar impacts are anticipated in the karst regions of Perry County, Missouri. Grotto sculpin require deep pools in caves, which could decrease in availability under drought conditions. Overall, shallower water or reduced flows could further concentrate contaminants present and lower dissolved oxygen in cave habitats.

Summary of Factor E

The small size and isolation of grotto sculpin populations, loss of genetic diversity, and effects from climate change could exacerbate other factors negatively affecting the species. These additional factors are particularly detrimental when combined with other factors, such as habitat and water quality degradation, and predation by invasive fish, which has a greater cumulative impact than would any of those factors acting independently (for example, compromised health from poor water quality might increase predation risk).

Proposed Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the grotto sculpin. Numerous major threats, acting individually or synergistically, continue today (see *Summary of Factors Affecting the Species*). The most substantial threats to the species come from the present or threatened destruction, modification, or curtailment of its habitat (Factor A). Although no clear estimates of historical population numbers for the grotto sculpin exist in order to determine whether or not dramatic population declines have occurred in the past, two mass mortalities have been documented since the early 2000s. Both mortality events are thought to have been caused by point-source pollution of surface waters that recharge cave streams occupied by the grotto sculpin.

The known factors negatively affecting the grotto sculpin have continued to impact the species' habitat since it was elevated to candidate status in 2002 (67 FR 40657; June 13, 2002). All of the recharge areas for known grotto sculpin habitat are considered

vulnerable. It is believed that the primary threats to the species are habitat destruction and modification from water quality degradation and siltation. In particular, documentation that a suite of chemicals and other contaminants is continuously entering the groundwater above levels that can be harmful to aquatic life is especially concerning. Potential sources and vehicles for introduction of pollution likely are industrialization, contaminated agricultural runoff, sinkhole dumps, and vertical drains installed without appropriate best management practices.

A variety of current- and legacy-use pesticides from agricultural runoff and sinkhole leaching, evidence of human waste from ineffective septic systems, and animal waste from livestock operations have been detected in grotto sculpin streams. These not only negatively affect the grotto sculpin directly but also the aquatic ecosystems and aquifer underlying the Perry County sinkhole plain.

Siltation beyond historical levels affects the grotto sculpin in a variety of ways, such as eliminating suitable habitat for all life stages, reducing dissolved oxygen levels, increasing contaminants (that bind to sediments), and reducing prey populations. Predation on eggs, larvae, and juveniles by nonnative epigean fish can further reduce population numbers and will be a more prominent threat if siltation continues to degrade cave habitats to the point where refugia from predatory fish are no longer available to the grotto sculpin.

The Act defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The grotto sculpin's endemism and isolated populations make it particularly susceptible to multiple, continuing threats and stochastic events that could cause substantial population declines, loss of genetic diversity, or multiple extirpations, leading ultimately to extinction of the species. Temporary extirpations of two of five known populations have occurred in the recent past. Recolonization after such mortality events is dependent on the presence and accessibility of source populations. Continued threats to the species not only impact individual populations, but also decrease the viability of source populations, and the likelihood that areas where the species has been extirpated will be recolonized. Furthermore, existing regulatory mechanisms provide little direct protection of water quality in grotto sculpin habitat, which is the most significant threat to the species. In addition to the individual threats, primarily those discussed under Factors A and E, each of which is sufficient to warrant the species' listing, the cumulative effect of Factors A, C, D, and E is such that the influence of threats on the grotto sculpin are significant throughout its entire range.

Overall, impacts from increasing threats, operating singly or in combination, are likely to result in the extinction of the species. Because these threats are placing the species in danger of extinction now and not only at some point in the foreseeable future, we determined it is endangered and not threatened. Therefore, on the basis of the best available scientific and commercial information, we propose listing the grotto sculpin as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is threatened or endangered throughout all or a significant portion of its range. The grotto sculpin proposed for listing in this rule is highly restricted in its range and the threats occur throughout its range. Therefore, we assessed the status of the species throughout its entire known range. The threats to the survival of the species occur throughout the species' range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and proposed determination applies to the species throughout its entire range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprised of species experts, Federal and State agencies, nongovernment organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Columbia Missouri Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, under section 6 of the Act, the State of Missouri would be eligible for Federal funds to implement management actions that promote the protection and recovery of the grotto sculpin. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the grotto sculpin is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the Department of Defense, U.S. Fish and Wildlife Service, and U.S. Forest Service; issuance of section 404 Clean Water Act permits by the U.S. Army Corps of Engineers; construction and management of gas pipeline and power line rights-of-way by the Federal Energy Regulatory Commission; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized discharge of chemicals, waste, or fill material into any waters in which the grotto sculpin is known to occur, or into any sinkholes or vertical drains that recharge waters in which the grotto sculpin is known to occur;

(2) Unauthorized modification of the channel or water flow of any surface stream, cave stream, or spring in which the grotto sculpin is known to occur; and

(3) Introduction of nonnative fish species that compete with or prey upon the grotto sculpin.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Columbia Missouri Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Requests for copies of the regulations concerning listed animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 5600 American Boulevard West, Suite 990, Bloomington, MN 55437–1458 (telephone 612–713–5343; facsimile 612–713–5292).

If the grotto sculpin is listed under the Act, the State of Missouri's Endangered Species Act (MO ST 252.240) is automatically invoked, which would also prohibit take of these species and encourage conservation by State government agencies. Further, the State may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species (MO ST 252.240). Funds for these activities could be made available under section 6 of the Act (Cooperation with the States). Thus, the Federal protection afforded to this species by listing it as an endangered species will be reinforced and supplemented by protection under State law.

Critical Habitat Designation for the Grotto Sculpin

Background

It is our intent to discuss below only those topics directly relevant to the designation of critical habitat for the grotto sculpin in this section of the proposed rule.

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 is listed are included in a critical habitat designation if they contain physical or biological features (1) 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 and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are 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 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.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to collection or vandalism under Factor B for grotto sculpin. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7 of the Act, in new areas

for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species.

The primary regulatory effect of critical habitat is the section 7(a)(2) requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat if there is a Federal nexus (Federal funds are involved or a Federal permit is required) involving actions that could adversely impact water quality parameters for this species. Various conservation measures or actions initiated and implemented under section 7(a)(1) of the Act may be useful in improving the water quality of aquatic habitats occupied by this species. In the case of the grotto sculpin, these aspects of critical habitat designation would potentially benefit the conservation of the species. Therefore, as we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the grotto sculpin.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the grotto sculpin is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the grotto sculpin.

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 that are essential to the conservation of the species 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, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the grotto sculpin from studies of this species' habitat, ecology, and life history. The physical and biological features required for the grotto sculpin are derived from biological needs of the species as described in the Background section of this proposal, and based on published literature (Burr *et al.* 2001, pp. 279–276; Gerken and Adams 2008, pp. 74–78), unpublished reports, and professional opinions by recognized experts. While little is known of the specific habitat requirements for this species, the best available information shows that the species requires adequate water quality, water quantity, water flow, a stable stream channel, minimal sedimentation, organic input into caves during rain events, and a sufficient prey base for juveniles (Burr *et al.* 2001, pp. 291, 294–295; Gerken and Adams 2008, pp. 74–76). Due to the complex nature of the multiple karst regions in Perry County, diverse hydrologic components will be essential to the conservation of grotto sculpin; these include cave streams, resurgences, springs, surface streams, and surface and subterranean interconnected or interspatial habitats (Vandike 1985, pp. 1–10; Day 2008, pp. 22–24). To identify the physical and biological features essential to the grotto sculpin, we have relied on current conditions at locations where the species survives and the information available on this species.

Space for Individual and Population Growth and for Normal Behavior

The specific space requirements for the grotto sculpin are unknown, but given the mixture of habitats used by different life stages of this fish (Burr *et al.* 2001, p. 284; Gerken and Adams 2008, p. 76), space is not likely a limiting factor; however, silt and various pollutants may affect the species' overall distribution and abundance (Burr *et al.* 2001, p. 294; Gerken and Adams 2008, p. 76). Grotto sculpin occupy cave streams, resurgences (also known as ''spring branches''; Vandike 1985, p. 10), springs, and surface streams (Adams 2012, pers. comm.; Burr *et al.* 2001, p. 284). They occupy pools and riffles with moderate flows and variable depths (4 to 33 centimeters (cm) (1.6 to 13 in)) (Burr *et al.* 2001, p. 284). Although grotto sculpin have been documented to occur over a variety of substrates (for example, silt, gravel, cobble, rock rubble, and bedrock), the presence of cobble or pebble is necessary for spawning (Burr *et al.* 2001, p. 284; Adams *et al.* unpub. data). Grotto sculpin tend to be associated with high availability of invertebrate prey, deeper cave pools, substrate containing cobble, and some level of sustained water flow (Gerken 2007, pp. 16–17). Surface habitat used by grotto sculpin is characterized by an abundance of amphipods and isopods. In caves, grotto sculpin occupy deeper pools with cobble, and with a relatively high abundance of amphipods and isopods. Although usually in lower abundance, grotto sculpin also occupy shallow cave pools where the substrate consists of silt deposits deeper than 1.9 cm (0.8 in) (Gerken 2007, p. 16). Resurgences are used by juvenile grotto sculpin as nursery areas, where they maximize growth before migrating upstream into caves to reproduce or downstream to surface streams (Day 2008, p. 18).

Habitat conditions described above provide space, cover, shelter, and sites for foraging, breeding, reproduction, and growth of offspring for the grotto sculpin. These habitats are found in caves streams, resurgences, springs, and surface streams; therefore, we identify those elements as physical or biological features essential to the conservation for grotto sculpin. Additionally, interconnected karst areas and interstitial spaces that allow for the free flow of water between occupied surface and subsurface habitats are primary components of essential physical and biological features for the grotto sculpin.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Although the specific food items of grotto sculpin have not been determined, they are likely similar to the diet of banded sculpin. Prey items of the banded sculpin include ephemeropterans, dipterans, chronomids, gastropods, amphipods, isopods, fish, spiders, aquatic oligochaetes, caddisflies, damselfly larvae, ostracods, stoneflies, beetles, crayfish, and salamanders (Phillips and Kilambi 1996, pp. 69–72; Pflieger 1997, p. 253; Tumlinson and Cline 2002, pp. 111–112; Niemiller *et al.* 2006, p. 43). Prey availability is related to the organic input that is transported with sediment and other organic materials via sinkholes into stream habitats (Burr *et al.* 2001, p. 291). An abundance of aquatic invertebrates is necessary to support a viable population of grotto sculpin (Niemiller *et al.* 2006, p. 43; Gerken and Adams 2008, p. 75). Therefore, based on this information, we identify the availability of appropriate organic input supporting the aquatic invertebrate prey base to be a primary component of the essential physical and biological features for the grotto sculpin.

The grotto sculpin occurs in pools and riffles of cave streams, resurgences, springs, and surface streams (Burr *et al.* 2001, pp. 280–284; Adams 2012, pers. comm.). It can occur over multiple substrates including sand, silt, gravel, pebble, cobble, breakdown, and bedrock, although the association with silt might be due to the prevalence of sediment within occupied habitat rather than a preference for such substrates (Vandike 1985, p. 38; Burr *et al.* 2001, p. 284; Gerken 2007, pp. 13, 22–25; Gerken and Adams 2008, pp. 76–77).

Optimum water temperature, flow rates, and water depth in occupied streams have not been established for grotto sculpin and vary widely depending on life stage and location (*e.g.,* pools of cave streams versus flowing water in resurgences or surface streams) (Gerken 2007, pp. 20–27). Water depth varied, but ranged between 4 and 33 cm (1.6 and 13.0 in) and flow rates were between .05 and 6.67 cm/sec (0.2 and 2.6 in/sec) (Burr *et al.* 2001, p. 284; Gerken 2007, p. 17).

Occupied cave streams, resurgences, springs, surface streams, interconnected karst areas, and interstitial spaces should have reduced levels of silt, sustained water flows, high dissolved oxygen levels, and reduced amounts of organic and inorganic contaminants. Interconnected karst areas and interstitial spaces should be free of debris and have reduced levels of silt to allow for free flow of water between occupied habitats. Water quality standards for contaminants should follow guidelines established by the EPA, except for ammonia and copper. Water quality criteria for ammonia and copper should follow minimum levels reported by Wang *et al.* (2007, pp. 2048–2055) and established for juvenile freshwater mussels (less than 4.6 parts per billion copper per liter and less than 370 parts per billion ammonia expressed as nitrogen per liter).

Optimum water quality parameters have not been determined for the grotto sculpin. Habitat information for other species that inhabit cave streams and springs in Missouri (such as the endangered Tumbling Creek cavesnail) may be used as suitable surrogates for the grotto sculpin. In the absence of information specific to the grotto sculpin's water quality needs, we believe the criteria established for the Tumbling Creek cavesnail are also suitable for the grotto sculpin. Therefore, we recommend the following water quality parameters for the grotto sculpin: an average daily discharge of 0.07 to 150 cubic feet per second (cfs); water temperature of cave streams, springs, resurgences, and surface streams should be between 55 and 62 °F (12.78 and 16.67 °C); dissolved oxygen levels should equal or exceed 4.5 milligrams per liter; and turbidity of an average monthly reading should not exceed 200 Nephelometric Units (units used to measure sediment discharge) and should not persist for a period greater than 4 hours. Adequate water flow, temperature, and quality (as defined above) are essential for normal behavior, growth, and viability during all life stages of the grotto sculpin. Therefore, based on the information above, we identify adequate water flow, temperature, and quality to be physical and biological features essential to the conservation for the grotto sculpin.

Cover or Shelter

Burr *et al.* (2001, p. 284) noted that grotto sculpin occur in the open as well as under rocks. Rocks within cave streams allow the grotto sculpin to avoid predators (Gerken 2007, p. 25); at least six different species of piscivorous, predatory fish occur within occupied grotto sculpin habitat (Burr *et al.* 2001, p. 284). Additionally, rocks provide a substrate for egg laying (Gerken 2007, p. 2; Adams 2005, p. 10). In addition to rocks, large cobble has been identified as an important component of sculpin habitat (Gerken 2007, pp. 22–27).

Due to the wide variety of habitats used by grotto sculpin depending on age and season (Burr *et. al* 2001, pp. 283–284; 294; Gerken 2007, pp. 27–30; Gerken and Adams 2008, pp. 75–76), occupied underground and surface aquatic habitats including associated transitional aquatic habitats are all essential physical or biological features for the species. The grotto sculpin requires cave and surface streams with a stable stream bottom and solid bedrock and stable stream banks to maintain a stable horizontal dimension and vertical profile of pool and riffle habitats. A mixture of bottom substrates, including sand, gravel, pebbles, cobble, ceiling breakdown areas and larger rocks, is necessary to provide cover and attachment surfaces for egg masses. Additionally, bottom substrates must not be covered with excessive amounts of silt.

Therefore, based on the information above, we identify the following as primary components of the physical or biological features essential to the conservation of the grotto sculpin: cave streams, resurgences, springs, surface streams, and interconnected areas between surface and subterranean habitats with stable bottom and banks; rocks or large cobble to provide cover; and substrates consisting of fine gravel with coarse gravel or cobble, or bedrock with sand and gravel, with low amounts of fine sand and sediments within the interstitial spaces of the substrates.

Sites for Breeding, Reproduction, or Rearing

Adams (2005, pp. 10; Adams *et al.* 2008, p. 8; Gerken 2007, pp. 19–21) demonstrated that grotto sculpin spawn in caves but some young-of-the-year move to resurgences or surface streams and spend much of their lives away from caves. Juvenile grotto sculpin likely move out of caves to avoid predation by adult sculpin (Gerken 2007, p. 19) or to take advantage of higher levels of prey in such habitats (Burr *et al.* 2001, p. 291; Gerken 2007, pp. 19–20; Day 2008, pp. 18–21). Gerken (2007, p. 19) and Day (2008, p. 18) postulated that juvenile grotto sculpin use resurgences and surface streams as nursery areas to gain size by taking advantage of increased food resources. At some point in their maturation process, juvenile sculpin move from resurgences and surface streams into caves to complete their life cycle (Gerken 2007, p. 19; Day 2008, p. 18). Based on the information above, consistent connectivity between cave streams and resurgences or surface streams is a primary component of the physical or biological features essential to the conservation for the grotto sculpin.

Primary Constituent Elements (PCEs) for the Grotto Sculpin

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the grotto sculpin in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

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 grotto sculpin are:

(1) Geomorphically stable stream bottoms and banks (stable horizontal dimension and vertical profile) with riffles, runs, pools, and transition zones between these stream features.

(2) Instream flow regime with an average daily discharge between 0.07 and 150 cubic feet per second (cfs), inclusive of surface runoff, cave streams, resurgences, springs, and occupied surface streams and all interconnected karst areas with flowing water.

(3) Water temperature between 12.8 and 16.7 °C (55 and 62 °F), dissolved oxygen 4.5 milligrams or greater per liter, and turbidity of an average monthly reading of no more than 200 Nephelometric Turbidity Units for a duration not to exceed 4 hours.

(4) Adequate water quality characterized by low levels of contaminants. Adequate water quality is defined as the quality necessary for normal behavior, growth, and viability of all life stages of the grotto sculpin.

(5) Bottom substrates consisting of a mixture of sand, gravel, pebble, cobble, solid bedrock, larger cobble and rocks for cover, with low amounts of sediments.

(6) Abundance of aquatic invertebrate prey base to support the different life stages of the grotto sculpin.

(7) Connected underground and surface aquatic habitats that provide for all life stages of the grotto sculpin, with sufficient water levels to facilitate movement of individuals among habitats.

With this proposed designation of critical habitat, we intend to identify the physical and biological features essential to the conservation of the species, through the identification of the primary constituent elements sufficient to support the life-history requirements of the species. All units proposed as critical habitat are currently occupied by the grotto sculpin and contain the primary constituent elements sufficient to support the life-history needs of the grotto sculpin.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features that are essential to the conservation of the species and that may require special management considerations or protection.

The four units we are proposing for designation as critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the species.

Although little area within the proposed critical habitat units is presently under special management or protection provided by a legally operative plan or agreement for the conservation of the grotto sculpin, some landowners within the recharge zones of caves occupied by the species have worked cooperatively with the MDC in the implementation of various conservation measures that facilitate good water quality. Keyhole Spring and Ball Mill Spring have both been purchased by the L–A–D Foundation, and these water sources are managed by MDC (Moss and Pobst 2010, pp. 152–153). Management of areas within the recharge areas of Keyhole and Ball Mill springs will provide some conservation benefits to the grotto sculpin.

A landowner agreement between MDC and the Missouri Caves and Karst Conservancy in 2011 will facilitate conservation actions at Berome Moore Cave (Pobst 2011a, pp. 1–2). These include access to the cave to conduct research and monitor population numbers of grotto sculpin; livestock fencing to prohibit access to sinkholes, reduce nutrient runoff, and facilitate erosion control; and the planting of warm-season grasses to benefit wildlife. Various debris and trash have been removed from multiple sinkholes within the recharge zones of cave streams occupied by grotto sculpin (Pobst 2011b, pp. 1–3), and additional access agreements are being pursued with other interested landowners to control entrances to caves occupied by the species (Pobst 2011a, p. 1).

Although best management practices (BMPs) have not been specifically developed for the grotto sculpin, guidelines established by MDC (2000, p. 1) for the Ozark cavefish (*Amblyopsis rosae*) would contribute to the conservation of the sculpin because both species occur in similar habitats.

Various activities in or adjacent to the critical habitat units described in this proposed rule may affect one or more of the physical or biological features and may require special management considerations or protection. Some of these activities include, but are not limited to, those previously discussed in the ''Summary of Factors Affecting the Species.'' Features in all of the proposed critical habitat units may require special management due to threats associated with activities that could be sources of contamination that adversely affect water quality of habitats occupied by grotto sculpin; with significant changes in the existing flow regime of caves streams, resurgences, springs, or surface streams occupied by grotto sculpin; with significant alteration in the quantity of groundwater and alteration of spring discharge sites; with alterations to septic systems that could adversely affect water quality; and with other watershed and floodplain disturbances that release sediments or nutrients into the water. Other activities that may affect essential features in the proposed critical habitat unit include those listed in the ''Effects of Critical Habitat Designation'' section below.

In summary, we find that the areas we are proposing as critical habitat contain the features essential to the conservation of the grotto sculpin and that these features may require special management considerations or protections. Special management considerations or protections may be required to eliminate, or to reduce to negligible levels, the threats affecting each unit and to preserve and maintain the essential features that the proposed critical habitat units provide to the grotto sculpin. There are multiple threats to the grotto sculpin in all four units proposed as critical habitat. These include industrial sand mining and degraded water quality due to various sources of contamination and siltation. Additional discussions of threats facing individual sites, where applicable, are provided in the individual unit descriptions.

Criteria Used To Identify Proposed Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species to determine areas within the geographical area

currently occupied by the species that contain the physical and biological features essential to the conservation of the grotto sculpin. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are not currently proposing to designate any areas outside the geographical area occupied by the species because occupied areas are sufficient for the conservation of the species.

In order to determine which sites are currently occupied, we used information from surveys conducted by Burr *et al.* (2001, pp. 280–286), Adams (2005, pp. 11–13), Day (2008, pp. 9–11; 62–66), Gerken (2007, pp. 5–8), and Gerken and Adams (2008, pp. 74–76), and dye tracing studies conducted by Moss and Pobst (2010, pp. 146–160, 177, 180–192). Currently, occupied habitat for the species includes all caves streams, resurgences, springs, and surface streams associated with the recharge areas for the Moore Cave System, the Crevice Cave System, Mystery Cave, Rimstone River Cave, Running Bull Cave, and Hot Caverns; as well as Thunder Hole Resurgence, Mystery Cave Resurgence, Cinque Hommes Creek, and Blue Spring Branch. After identifying the specific locations occupied by the grotto sculpin, we determined the appropriate area of occupied segments of aquatic habitats essential for the conservation of the species. These areas are collectively contained within the Central Perryville and Mystery-Rimstone karst areas as described by House (1976, pp. 13–14) and Burr *et al.* (2001, pp. 280–282).

Although there are underground portions within the Central Perryville and Mystery-Rimstone karst areas that are inaccessible to humans, all underground aquatic habitats within the recharge zones of the Moore Cave System, the Crevice Cave System, Mystery Cave, Rimstone River Cave, Running Bull Cave, Thunder Hole Resurgence, Mystery Cave Resurgence, Cinque Hommes Creek, and Blue Spring Branch are believed to be occupied by the grotto sculpin. Areas delineated within the Central Perryville and Mystery-Rimstone karst areas are believed to comprise the entire known range of the grotto sculpin. We are not proposing to designate any areas outside of those mentioned above, because the species is believed to be a local endemic, and surveys in other nearby cave streams and springs have failed to find additional populations (Burr *et al.* 2001, pp. 283–284).

Although the total area within the Central Perryville and Mystery Cave-Rimstone karst areas is estimated to encompass approximately 222 km^2 (89 mi^2) (Service calculations from Vandike 1985, p. 1 and Burr *et al.* 2001, p. 282) and the above-ground recharge areas of the Moore Cave System, the Crevice Cave System, Mystery Cave, Rimstone River Cave, Running Bull Cave, and Thunderhole Resurgence have been estimated to be 93.95 km^2 (36.28 mi^2) (Moss and Pobst 2010, pp. 183–186), and are important to maintain the condition of sculpin habitat, non-aquatic areas within such areas do not themselves contain the physical and biological features essential to the conservation of the species.

We have determined that all of the areas proposed as critical habitat are currently occupied and contain sufficient elements of physical and biological features to support life-history processes essential for the conservation of the species. Other than all caves streams, resurgences, springs, and surface streams associated with the recharge areas for the Moore Cave System, the Crevice Cave System, Mystery Cave, Rimstone River Cave, Running Bull Cave, Thunder Hole Resurgence, Mystery Cave Resurgence, Cinque Hommes Creek, and Blue Spring Branch, we are currently unaware of any other areas occupied by the grotto sculpin. Therefore, we are unable to determine which additional areas, if any, may be appropriate to include in the proposed critical habitat for this species. All of the areas proposed as critical habitat are within the known historical range of the species, and we are not proposing to designate any areas outside the geographical area currently occupied by the species. At this time, we believe that the occupied areas are sufficient for the conservation of the species.

When determining proposed 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 the grotto sculpin. 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 proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, 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 the physical or biological features in the adjacent critical habitat.

Units are proposed for designation based on sufficient elements of physical or biological features being present to support grotto sculpin life-history processes. All units contain all of the identified elements of physical or biological features and support multiple life-history processes.

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. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–ES–R3–2012–0065, on our Internet site *http://www.fws.gov/midwest/Endangered,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

We are proposing four units, totaling approximately 94 km^2 (36.28 mi^2) plus 31 kilometers (19.2 miles) of surface stream as critical habitat for the grotto sculpin. Critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the grotto sculpin. The first unit encompasses all aquatic habitat within the recharge areas of the Moore Cave System, the Crevice Cave System, Ball Mill Spring and Keyhole Spring totaling approximately 46 km^2 (17.61 mi^2). The second unit covers all aquatic habitat within the recharge areas of Mystery Cave, Rimstone River Cave, Running Bull Cave, and Thunderhole Resurgence, totaling approximately 48 km^2 (18.67 mi^2). The third unit envelops approximately 6.4 km (4.0 mi) of Blue Spring Branch from its emergence within the Moore Cave System to its confluence with Bois Brule Creek (Burr *et al.* 2001, pp. 280–281; Moss and Pobst 2010, p. 183). The fourth unit entails approximately 24 km (15.2 mi) of Cinque Hommes Creek from its emergence near Mystery Cave and Resurgence to its confluence with Bois Brule Creek (Burr *et al.* 2001, pp. 280–281; Moss and Pobst 2010, p. 185).

Although the exact extent of occupied aquatic habitat by grotto sculpin within the recharge areas is not known due to the inaccessibility of underground karst, we presume all aquatic habitats within the entire 94 km² (36.28 mi²) recharge could reasonably be occupied, and thus propose to designate the entire area as critical habitat. It should be implied that all references to the delineated boundaries of critical habitat for Units One and Two within cave and resurgence recharge zones apply only to those areas of aquatic habitat, because only these areas contain the physical and biological features essential to the conservation of the grotto sculpin.

We present brief descriptions for the four units and reasons why they meet the definition of critical habitat below. For occupied aquatic habitats proposed as critical habitat, the approximate area of recharge areas of Tom and Berome Moore Caves, Crevice Cave, Mystery Cave, Rimstone River Cave, Running Bull Cave, and Thunderhole Resurgence, as well as upstream and downstream boundaries for Blue Spring Branch and Cinque Hommes Creek, are described generally below; more precise descriptions, as best can be determined, are provided in the Proposed Regulation Promulgation section at the end of this proposed rule. The approximate area and ownership of each proposed critical habitat unit is shown in Table 1.

TABLE 1—OCCUPANCY AND OWNERSHIP OF THE PROPOSED CRITICAL HABITAT UNITS FOR THE GROTTO SCULPIN

[Area estimates reflect all land within critical habitat unit boundaries.]

Unit	Location	Occupied	Private ownership		State, county, city ownership		Total
			sq. km (sq. mi)	km (mi)	sq. km (sq. mi)	km (mi)	
1	Central Perryville Karst Area	Yes	35 (14)	0	11 (4)	0	46 (18)
2	Mystery-Rimstone Karst Area	Yes	48 (19)	0	1 (1)	0	48 (19)
3	Blue Spring Branch	Yes	0	6 (4)	0	0	6 (4)
4	Cinque Hommes Creek	Yes	0	24 (14)	0	0	24 (14)
						karst area	94 (36)
Total			83 (32)	31 (19)	11 (4)	stream	31 (19)

Note: Area sizes may not sum due to rounding.

All units are considered currently occupied and all units contain all or some components of all four physical and biological features, and are therefore essential to the conservation of the species. The grotto sculpin and its habitat may require special management considerations or protections to address activities that are sources of contamination; changes in the existing flow regime of caves streams, resurgences, springs, or surface streams occupied by grotto sculpin; alteration in the quantity of groundwater and alteration of spring discharge sites; alterations to septic systems that could adversely affect water quality; and other watershed and floodplain disturbances that release sediments or nutrients into the water. Land use in the four units is similar and is primarily agriculture (row cropping and livestock production), rural or residential development, and industrial mining and quarrying. The majority of all proposed units are privately owned, with the exception of two municipalities: Perryville in Unit 1, and Longtown in Unit 2.

Unit 1: Central Perryville Karst Area, Perry County, Missouri

Unit 1 includes all aquatic habitats within the recharge area of the Moore Cave System, the Crevice Cave System, Ball Mill Spring, and Keyhole Spring. The entire area covers approximately 45.61 km² (17.61 mi²). The Moore Cave System Recharge Area encompasses approximately 10.23 km² (3.95 mi²) and drains north from the edge of Perryville and discharges at Blue Spring on Blue Spring Branch; it can overflow from an adjacent spring called Blue Spring Overflow or Blue Spring Resurgence (Moss and Pobst 2010, pp. 147, 183). The recharge area of Crevice Cave includes Mertz Cave and Resurgence, Zahner Cave, Doc White Spring, Hogpen Spring, Herberlie Resurgence, Circle Drive Resurgence, Rob Roy Sink, Rozier Sink, Edgemont Sink, Shoe Factory Sink, and Lurk Sink, and has been estimated to be approximately 30.33 km² (11.71 mi²) (Moss and Pobst 2010, pp. 151–152). Ball Mill Spring feeds portions of the Blue Spring Branch (a separate proposed critical habitat unit (Unit 3) outlined below) and the recharge area for this water source is approximately 1.71 km² (0.66 mi²) (Moss and Pobst 2010, p. 153). Keyhole Spring includes Keyhole Resurgence, and the total recharge area has been estimated to be 3.34 km² (1.29 mi²) (Moss and Pobst 2010, p. 152). The recharge area for Crevice Cave contains the city of Perryville. In addition to the threats that may require special management considerations or protections outlined above for all units, this unit is negatively affected by urban growth and development that might impact water quality, such as hazardous waste facilities, underground storage tanks, wastewater discharges, and poorly maintained septic systems in and around the city (Pobst and Taylor 2008, p. 69; Moss and Pobst 2010, p. 164).

Unit 2: Mystery-Rimstone Karst Area, Perry County, Missouri

Unit 2 includes all aquatic habitats within the recharge zone of Mystery Cave, Rimstone River Cave, Running Bull Cave, and Thunderhole Resurgence, and incorporates an area of approximately 48.34 km² (18.67 mi²). Mystery Cave includes Mystery Resurgence, Mystery Overflow Spring, Maple Leaf Cave, and Miller Spring, and the total area of its recharge area is approximately 18.26 km² (7.05 mi²) (Moss and Pobst 2010, p. 154). The recharge area of Rimstone River Cave covers 24.53 km² (9.47 mi²), and the main features within it include Lost Creek Cave, Weinrich Onyx Cave, Onyx Annex Cave, Twin Cave, and Snow Caverns (Moss and Pobst 2010, p. 158). The recharge area for Running Bull Cave extends from Maple Leaf Cave to Thunderhole Resurgence and encompasses 2.74 km² (1.06 mi²) (Moss and Pobst 2010, p. 159). Thunderhole Resurgence receives water from multiple sources and, during high water events, some of the caves mentioned previously can contribute water to this resurgence (Moss and Pobst 2010, pp. 154, 159–160). Under high flow conditions, the Mystery Cave groundwater system overflows to Thunderhole Resurgence (Moss and Pobst 2010, p. 160). The total base flow recharge area of Thunderhole Resurgence is approximately 5.57 km² (2.15 mi²).

Unit 3: Blue Spring Branch, Perry County, Missouri

Unit 3 includes approximately 6.4 km (4.0 mi) of the surface portions of Blue Spring Branch from points downstream of the Moore Cave System to its confluence with Bois Brule Creek (Burr *et al.* 2002, pp. 280–281; Moss and Pobst 2010, pp. 147, 183). Blue Spring Branch is the principal resurgence stream for caves identified above within the Moore Cave System (Burr *et al.* 2001, p. 284).

Unit 4: Cinque Hommes Creek, Perry County, Missouri

Unit 4 includes approximately 24.4 km (15.2 mi) of Cinque Hommes Creek that generally flows in a northeast direction from near Interstate 55 south-southeast of Perryville to its confluence with Bois Brule Creek (Adams 2005, p. 90; Burr *et al.* 2001, p. 281).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of 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 (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, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the grotto sculpin. 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 grotto sculpin. These activities include, but are not limited to:

(1) Actions that would cause an increase in sedimentation to areas of all cave streams, resurgences, springs, or surface streams occupied by the grotto sculpin. Such activities could include, but are not limited to, surface soil disturbance associated with construction; agriculture and forestry practices; mining operations; maintenance of secondary or non-paved roads within the recharge areas of occupied caves; or actions that result in run off into occupied surface streams. These activities could eliminate or reduce habitats necessary for the growth and reproduction of the species by causing excessive sedimentation resulting in a decrease in dissolved oxygen levels, serving as a method of transport of hazardous chemicals that bind to soil particles, smothering egg

masses, or eliminating interstitial spaces needed by grotto sculpin.

(2) Actions that would significantly alter the existing flow regime of cave streams, resurgences, springs, or surface streams occupied by the grotto sculpin including all aquatic habitats within cave or resurgence recharge areas. Such activities could include, but are not limited to, high water demands needed for agricultural, residential, commercial, and industrial development.

(3) Actions that would significantly alter water chemistry or water quality (for example, changes to temperature or pH, introduction of contaminants, or excess nutrients) in cave streams, resurgences, springs, or surface streams occupied by the grotto sculpin, including all aquatic habitats within cave or resurgence recharge areas. Such activities could include, but are not limited to, the release of chemicals or biological pollutants; pesticides or herbicides used for agriculture; hormones or antibiotics associated with animal husbandry operations; sand mining operations associated with hydraulic fracturing; disposal of dead animals and trash in sinkholes; and bacteria and nutrients from human sewage and animal manure. These activities could alter water conditions that are beyond the tolerances of the species and result in direct or cumulative adverse effects on the species and its life cycle. These activities could eliminate or reduce habitats necessary for the growth and reproduction of the species by causing eutrophication, leading to excessive filamentous algal growth. Excessive filamentous algal growth can cause extreme decreases in nighttime dissolved oxygen levels through vegetation respiration, and cover the bottom substrates and the interstitial spaces needed by sculpin. Introduction of harmful chemicals into aquatic habitats occupied by the grotto sculpin could result in adverse impacts to reproduction (*e.g.,* cholinesterase inhibition) or mortality of the species or its food base.

(4) Actions that could accidentally introduce nonnative species into occupied cave streams via tile or vertical drains. These activities could introduce potential predators, outcompeting fish (for example, catfish), or aquatic parasites and disease.

(5) Actions that could significantly alter the prey base of grotto sculpin. Despite the fact that an excess of naturally occurring organic material in aquatic habitats occupied by the grotto sculpin can be deleterious, some level of energy input is important for maintaining the prey base of grotto sculpin. A balance must be maintained that allows for some level of organic input that provides a food source for grotto sculpin prey, but not at such levels that impede reproduction and growth of grotto sculpin or at levels that introduce harmful chemicals and nutrients into occupied aquatic habitats.

(6) Activities with a Federal nexus that may affect areas outside of critical habitat, such as development; road construction and maintenance; oil, gas, and utility easements; industrial sand mining associated with the removal of mineral deposits used in hydraulic fracturing (or fracking); forest and pasture management; herbicide and pesticide use or the migration and movement of sediment associated with crop production; and effluent discharges. These actions would be subject to review under section 7 of the Act if they may affect grotto sculpin, because Federal agencies must consider both effects to the species and effects to critical habitat independently. The Service should be consulted regarding disturbances to areas both within the proposed critical habitat units as well as areas within the recharge area of cave streams occupied by the sculpin, including resurgences, springs, and surface streams that contribute to in-stream flows, especially during times when water levels in occupied habitats are abnormally low (during droughts), because these activities may impact the essential features of proposed critical habitat. The prohibitions of section 9 of the Act against the take of listed species also continue to apply both inside and outside of designated critical habitat.

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 geographic 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.''

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation for the grotto sculpin.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall 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 and commercial 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 legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. 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.

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 are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

We will announce the availability of our draft economic analysis as soon as it is completed. During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

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 where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the grotto sculpin are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to exert his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts 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.

In preparing this proposal, we have determined that there are currently no HCPs or other management plans for the grotto sculpin, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not propose to exert his discretion to exclude any areas from the final designation based on other relevant impacts.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed listing and proposed critical habitat designation are based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our proposed listing and designation of critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **ADDRESSES** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Persons needing reasonable accommodations to attend and participate in a public hearing or meeting should contact the Columbia Missouri Ecological Services Field Office at 573–234–2132 as soon as possible. To allow sufficient time to process requests, please call no later than one week before the hearing or meeting date. Information regarding this proposed rule is available in alternative formats upon request.

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 not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of 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 such businesses as

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 whether small entities may be affected, we will consider 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.

Importantly, the incremental impacts of a rule must be both significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed 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.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. 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 ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. 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 this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief 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 incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies, which are not by definition small business entities. As such, we certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

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. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use. Industrial sand mining and development activities occur or could potentially occur in all of the proposed critical habitat units for the grotto sculpin. However, compliance with State regulatory requirements or voluntary BMPs would be expected to minimize impacts of industrial sand mining and development in the areas of proposed critical habitat for this species. The measures for industrial sand mining and development are likely not considered a substantial cost compared with overall project costs and are predictably being implemented by mining companies. No other activities associated with energy supply, distribution, or use are anticipated within the proposed critical habitat. We do not expect the designation of this proposed critical habitat 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. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

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 would 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 and neither would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments and, as such, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate.

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 grotto sculpin in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this proposed designation of critical habitat for the grotto sculpin would not pose significant takings implications for lands within or affected by the proposed designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact 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 proposed critical habitat designation with appropriate State resource agencies in Missouri. The designation of critical habitat in areas currently occupied by the grotto sculpin may impose nominal additional regulatory restrictions, and therefore may have some incremental impacts on State and local governments and their activities. The designation may have some benefit to these 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. 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 requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the grotto sculpin within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as endangered or threatened under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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 in connection with designating critical habitat under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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 that are currently occupied by the grotto sculpin that contain the features essential for conservation of the species, and no tribal lands unoccupied by the grotto sculpin that are essential for the conservation of the species. Therefore, we are not proposing to designate critical habitat for the grotto sculpin on tribal lands.

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 Columbia, Missouri Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Columbia Missouri Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h) by adding an entry for ''Sculpin, grotto'' in alphabetical order under FISHES to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Sculpin, grotto	*Cottus* sp. nov.	U.S.A. (MO)	Entire	E		17.95(e)	NA
*	*	*	*	*	*		*

3. In § 17.95, amend paragraph (e) by adding an entry for ''Grotto Sculpin (*Cottus* sp. nov.),'' in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Grotto Sculpin (*Cottus* sp. nov.)

(1) Critical habitat units are depicted for Perry County, Missouri, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the grotto sculpin consist of:

(i) Geomorphically stable stream bottoms and banks (stable horizontal dimension and vertical profile) with riffles, runs, pools, and transition zones between these stream features.

(ii) Instream flow regime with an average daily discharge between 0.07 and 150 cubic feet per second (cfs), inclusive of surface runoff, cave streams, resurgences, springs, and occupied surface streams and all interconnected karst areas with flowing water.

(iii) Water temperature between 12.8 and 16.7 °C (55 and 62 °F), dissolved oxygen 4.5 milligrams or greater per liter, and turbidity of an average monthly reading of no more than 200 Nephelometric Turbidity Units for a duration not to exceed 4 hours.

(iv) Adequate water quality characterized by low levels of contaminants. Adequate water quality is defined as the quality necessary for normal behavior, growth, and viability of all life stages of the grotto sculpin.

(v) Bottom substrates consisting of a mixture of sand, gravel, pebble, cobble, solid bedrock, larger cobble, and rocks for cover, with low amounts of sediments.

(vi) Energy input from naturally occurring organic sources that provide habitat for the prey base that is needed by different life stages of the grotto sculpin.

(vii) Connected underground and surface aquatic habitats that provide for all life stages of the grotto sculpin, with sufficient water levels to facilitate movement of individuals among habitats.

(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 the effective date of this rule.

(4) *Critical habitat units index map.* The map was developed from National Geographic USA Topographic maps (© National Geographic Society 2010). Upstream and downstream limits for critical habitat surface stream units were identified by degree, minute, second. Extent for critical habitat underlying recharge areas was defined by spatial data layers of recharge area delineations by Moss and Pobst (2010). 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 at the Service's internet site *http://www.fws.gov/midwest/Endangered, http://www.regulations.gov* at Docket No. FWS–R3–ES–2012–0065, and at the field office responsible for this designation. 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.

(5) Index map of critical habitat units for the grotto sculpin follows:

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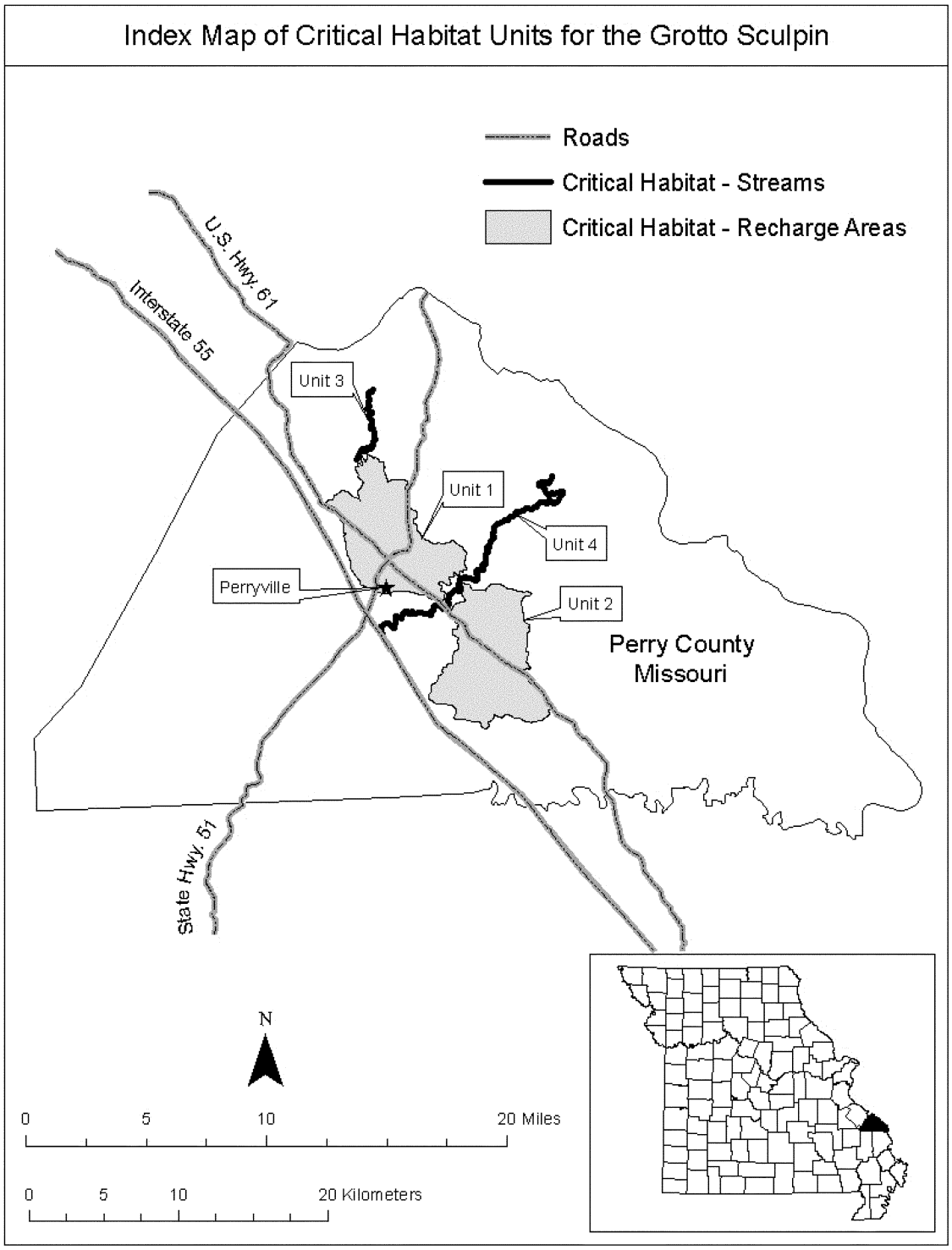
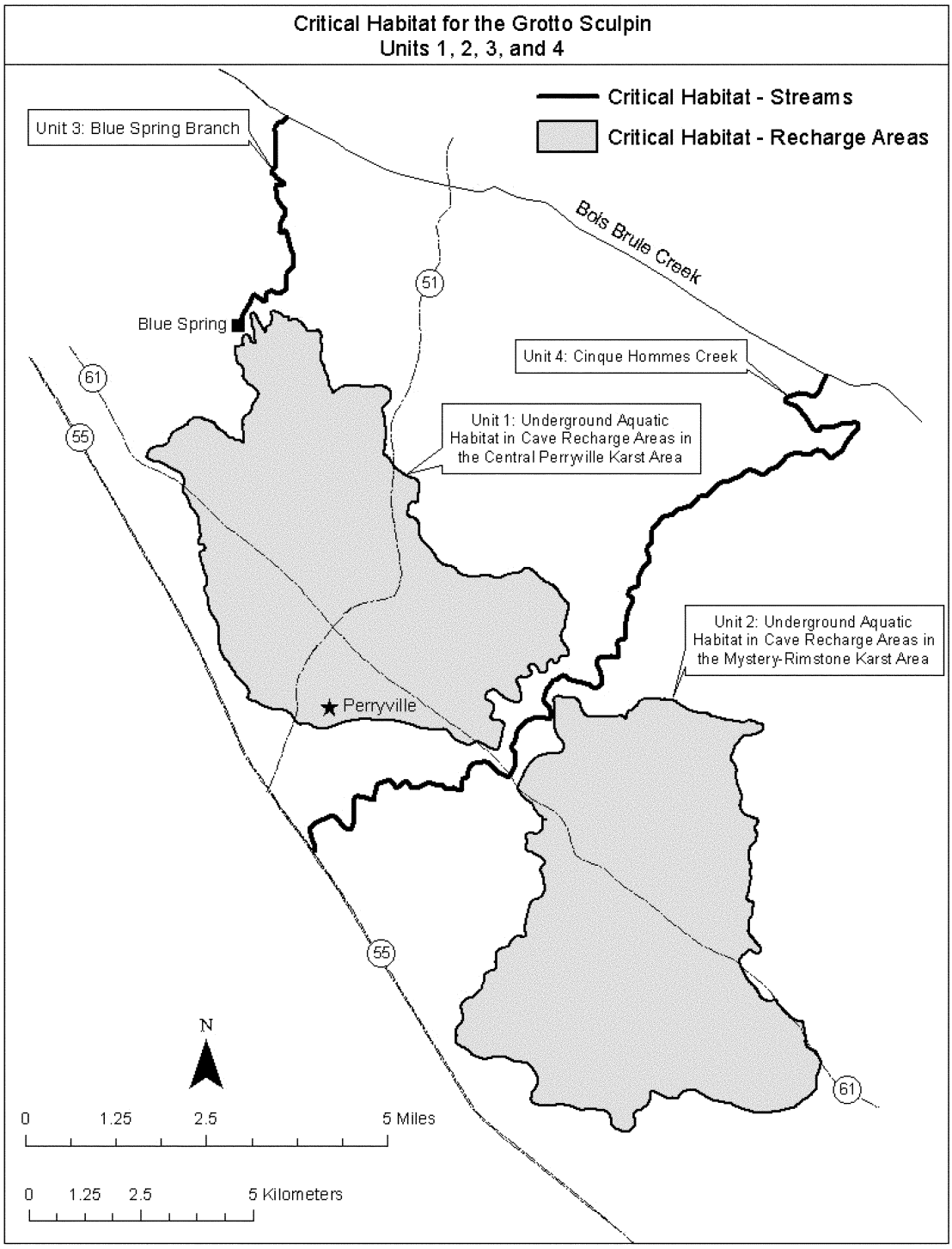


(6) Unit 1: Central Perryville Karst Area, Perry County, Missouri.

(i) Unit 1 includes all underground aquatic habitats in the recharge areas of the Moore and Crevice cave systems, Ball Mill Spring, and Keyhole Spring. The Unit extends as far north as, and parallels, Blue Spring Branch. The western boundary of Unit 1 roughly parallels the division between the St. Peter Sandstone and Joachim Dolomite formations. The southern extent is approximately Edgemont Boulevard in Perryville. The southeastern boundary parallels Cinque Hommes Creek and crosses State Highway E approximately 1.5 miles east of Perryville. The boundary runs northeast from State Highway E to cross Missouri Route 51 near County Road 624 and continue northeast to Ball Mill Spring.

(ii) Map of Units 1, 2, 3, and 4 follows:



(7) Unit 2: Cave streams, resurgences, and springs within the Mystery-Rimstone Karst Area of Perry County, Missouri.

(i) Unit 2 includes all underground aquatic habitats in the recharge areas of Mystery, Rimstone, and Running Bull caves, and Thunderhole Resurgence. The northern extend of the Unit County Road 316 from Stump Cemetery to State Highway P and Mystery Resurgence on Cinque Hommes Creek. The northwestern boundary of Unit 2 parallels Cinque Hommes Creek between Mystery Resurgence and the intersection of Route P and U.S. Route 61. The western boundary of Unit 2 roughly parallels the division between the St. Peter Sandstone and Joachim Dolomite formations and turns southeast near the intersection of State Highway B and County Road 502. The Unit extends as far south as County Road 512 and continues east from the intersection of County Road 512 and County Road 510 to U.S. Route 61 approximately 1.5 miles south of Longtown. The eastern boundary follows U.S. Route 61 north to Longtown and continues north to County Road 316 near Stump Cemetery.

(ii) Map of Unit 2 is provided at paragraph (6)(ii) of this entry.

(8) Unit 3: Blue Spring Branch, Perry County, Missouri.

(i) Unit 3 includes the channel in Blue Spring Branch from the resurgence of Mystery Cave (089°53′43.10″ W long., 037°48′12.45″ N lat.) to its confluence with Bois Brule Creek (089°52′54.04 W long., 037°50′40.25″ N lat.).

(ii) Map of Unit 3 is provided at paragraph (6)(ii) of this entry.

(9) Unit 4: Cinque Hommes Creek, Perry County, Missouri.

(i) Unit 4 includes the channel in Cinque Hommes Creek from Interstate 55 (089°52′50.77″ W long., 037°41′48.54″ N lat.) to its confluence with Bois Brule Creek (089°44′50.98″ W long., 037°47′19.22″ N lat.).

(ii) Map of Unit 4 is provided at paragraph (6)(ii) of this entry.

* * * * *

Dated: September 10, 2012.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–23742 Filed 9–26–12; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Listing of the Mount Charleston Blue Butterfly as Endangered and Proposed Listing of Five Blue Butterflies as Threatened Due to Similarity of Appearance; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2012–0069; 4500030114]

RIN 1018–AY52

Endangered and Threatened Wildlife and Plants; Proposed Listing of the Mount Charleston Blue Butterfly as Endangered and Proposed Listing of Five Blue Butterflies as Threatened Due to Similarity of Appearance

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list the Mount Charleston blue butterfly (*Plebejus shasta charlestonensis*) as an endangered species under the Endangered Species Act of 1973, as amended (Act). We also propose to list the lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and the two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*) as threatened due to similarity of appearance to the Mount Charleston blue, with a special rule pursuant to section 4(d) of the Act. We solicit additional data, information, and comments that may assist us in making a final decision on this proposed action. In addition, we propose to make nonsubstantive, administrative changes to a previously published listing and special rule regarding five other butterflies to correct some inadvertent errors and to make these two special rules more consistent.

DATES: We will accept comments received or postmarked on or before November 26, 2012. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by November 13, 2012.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter Docket No. FWS–R8–ES–2012–0069, which is the docket number for this rulemaking. 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–R8–ES–2012–0069, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MS 2042–PDM, Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Edward D. Koch, Field Supervisor, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 1340 Financial Blvd., Suite 234, Reno, Nevada 89502, by telephone 775–861–6300 or by facsimile 775–861–6301. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

This document consists of: (1) A proposed rule to list the Mount (Mt.) Charleston blue butterfly (*Plebejus shasta charlestonensis*) (formerly in genus *Icaricia*) as an endangered species and a proposed rule to list the lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and the two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*) as threatened due to similarity of appearance to the Mt. Charleston blue butterfly; (2) a prudency determination regarding critical habitat designation for the Mt. Charleston blue butterfly; and (3) nonsubstantive, administrative corrections to a previously published listing of the Miami blue butterfly (*Cyclargus thomasi bethunebakeri*) and special rule regarding the cassius blue butterfly (*Leptotes cassius theonus*), ceraunus blue butterfly (*Hemiargus ceraunus antibubastus*), and nickerbean blue butterfly (*Cyclargus ammon*).

Why we need to publish a rule. Under the Endangered Species Act (Act), a species may warrant protection through listing if it is an endangered or threatened species throughout all or a significant portion of its range. If a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within one year. Critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designations and revisions of critical habitat can only be completed by issuing a rule.

This rule proposes endangered status for the Mt. Charleston blue butterfly and proposes threatened status for the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and two Spring Mountains dark blue butterflies based on similarity of appearance to the Mt. Charleston blue butterfly. This rule also finds that designation of critical habitat for the Mt. Charleston blue butterfly is not prudent at this time.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. We have determined that the Mt. Charleston blue butterfly is threatened by:

- Habitat loss and degradation due to fire suppression and succession, implementation of recreation development projects and fuels reduction projects, and nonnative plant species (Factor A);
- Collection (Factor B);
- Inadequate regulatory mechanisms (Factor D); and
- Drought and extreme precipitation events, which are predicted to increase as a result of climate change (Factor E).

We have additionally determined that five species of blue butterflies warrant listing based on similarity of appearance to the Mt. Charleston blue butterfly:

- Lupine blue butterfly;
- Reakirt's blue butterfly;
- Spring Mountains icarioides blue butterfly; and
- Two Spring Mountains dark blue butterflies.

Further, we have determined that it is not prudent to designate critical habitat for the Mt. Charleston blue butterfly because the benefits are clearly outweighed by the expected increase in threats associated with a critical habitat designation:

- Publication of maps and descriptions of specific critical habitat

areas will pinpoint populations more precisely than does the rule;

• Publishing the exact locations of the butterfly's habitat will further facilitate unauthorized collection and trade. Its rarity makes the Mt. Charleston blue butterfly extremely attractive to collectors; and

• Purposeful or inadvertent activities have already damaged some habitat. Many locations are difficult for law enforcement personnel to regularly access and patrol.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

This document consists of: (1) A proposed rule to list the Mount (Mt.) Charleston blue butterfly (*Plebejus shasta charlestonensis*) (formerly in genus *Icaricia*) as an endangered species and a proposed rule to list the lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and the two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*) as threatened due to similarity of appearance to the Mt. Charleston blue butterfly; and (2) a prudency determination regarding critical habitat designation for the Mt. Charleston blue butterfly.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(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) Biological, commercial and noncommercial trade or collection, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(5) Any information on the biological or ecological requirements of the species, and ongoing conservation measures for the species and its habitat.

(6) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(7) Specific information on:

(a) The amount and distribution of Mt. Charleston blue butterfly and its habitat;

(b) What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range currently occupied by the species;

(c) Where these features are currently found;

(d) Whether any of these features may require special management considerations or protection;

(e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why; and

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(8) Land use designations and current or planned activities in the areas occupied by the species or potential habitat and their possible impacts to the Mt. Charleston blue butterfly.

(9) Information on the projected and reasonably likely impacts of climate change on the Mt. Charleston blue butterfly or its habitat.

(10) Threats to the Mt. Charleston blue butterfly from collection of or commercial trade involving the lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and the two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*), due to the Mt. Charleston blue's similarity in appearance to these species.

(11) Effects of and necessity of establishing the proposed 4(d) special rule to establish prohibitions on collection of, or commercial trade involving, the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and two Spring Mountains dark blue butterflies.

(12) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(13) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(14) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

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.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the

basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described 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 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.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

In 1991 and 1994, the U.S. Fish and Wildlife Service (Service) included the Mt. Charleston blue butterfly in a compilation of taxa for review and potential addition to the Lists of Endangered and Threatened Wildlife and Plants (56 FR 58804, November 21, 1991; 59 FR 58982, November 15, 1994). The Mt. Charleston blue butterfly was formerly referred to as the Spring Mountains blue (butterfly) (56 FR 58804, November 21, 1991; 59 FR 58982, November 15, 1994), but this common name is no longer used to avoid confusion with other butterflies having similar common names. In both years, the Mt. Charleston blue butterfly was assigned to ''Category 2,'' meaning that a proposal to list was potentially appropriate, but adequate data on biological threats or vulnerabilities were not currently available. The trend for Mt. Charleston blue butterfly was described as ''declining'' in 1991 and 1994 (56 FR 58804; 59 FR 58982). These notices stressed that Category 2 species were not proposed for listing by the notice, nor were there any plans to list those Category 2 species unless supporting information became available.

In the February 28, 1996, Candidate Notice of Review (61 FR 7595), we adopted a single category of candidate defined as ''Those species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list but issuance of the proposed rule is precluded.'' In previous Candidate Notices of Review, species and subspecies matching this 1996 definition were known as Category 1 candidates for listing. Thus, the Service no longer considered Category 2 species and subspecies as candidates and did not include them in the 1996 or any subsequent Candidate Notices of Review. The decision to stop considering Category 2 species and subspecies as candidates was designed to reduce confusion about the status of these species and subspecies and to clarify that we no longer regarded these species and subspecies as candidates for listing.

On October 20, 2005, we received a petition dated October 20, 2005, from The Urban Wildlands Group, Inc., requesting that we emergency list the Mt. Charleston blue butterfly as an endangered or threatened species. In a letter to the petitioner dated April 20, 2006, we stated that our initial review did not indicate that an emergency situation existed, but that if conditions changed, an emergency rule could be developed. On May 30, 2007, we published a 90-day petition finding (72 FR 29933) in which we concluded that the petition provided substantial information indicating that listing of the Mt. Charleston blue butterfly may be warranted, and we initiated a status review. On April 26, 2010, CBD amended its complaint in *Center for Biological Diversity* v. *Salazar, U.S. Fish and Wildlife Service,* Case No.: 1:10–cv–230–PLF (D.D.C.), adding an allegation that the Service failed to issue its 12-month petition finding on the Mount Charleston blue butterfly within the mandatory statutory timeframe. On March 8, 2011, we published a 12-month finding (76 FR 12667) in which we concluded that listing the Mt. Charleston blue butterfly was warranted, but precluded by higher priority listing actions. On October 26, 2011, we listed the Mt. Charleston blue butterfly as a new candidate in the Candidate Notice of Review (76 FR 66370).

Endangered Species Status for Mt. Charleston Blue Butterfly

Background

It is our intent to discuss below only those topics directly relevant to the listing of the Mt. Charleston blue butterfly as an endangered species in this section of the proposed rule.

Taxonomy and Subspecies Description

The Mt. Charleston blue butterfly is a distinct subspecies of the wider ranging Shasta blue butterfly (*Plebejus shasta*), which is a member of the Lycaenidae family. Pelham (2008, pp. 25–26) recognized seven subspecies of Shasta blue: *P. s. shasta, P. s. calchas, P. s. pallidissima, P. s. minnehaha, P. s. charlestonensis, P. s. pitkinensis,* and *P. s. platazul* in ''A catalogue of the butterflies of the United States and Canada with a complete bibliography of the descriptive and systematic literature'' published in volume 40 of the Journal of Research on the Lepidoptera (2008, pp. 379–380). The Mt. Charleston blue butterfly is known only from the high elevations of the Spring Mountains, located approximately 25 miles (mi) (40 kilometers (km)) west of Las Vegas in Clark County, Nevada (Austin 1980, p. 20; Scott 1986, p. 410). The first mention of the Mt. Charleston blue butterfly as a unique taxon was in 1928 by Garth (p. 93), who recognized it as distinct from the species Shasta blue (Austin 1980, p. 20). Howe (in 1975, Plate 59) described specimens from the Spring Mountains as the *P. s. shasta* form *comstocki.* However, in 1976, Ferris (p. 14) placed the Mt. Charleston blue butterfly with the wider ranging Minnehaha blue subspecies. Finally, Austin asserted that Ferris had not included populations from the Sierra Nevada in his study, and in light of the geographic isolation and distinctiveness of the Shasta blue population in the Spring Mountains and the presence of at least three other well-defined races (subspecies) of butterflies endemic to the area, it was appropriate to name this population as the subspecies Mt. Charleston blue butterfly (*P. s. charlestonensis*) (Austin 1980, p. 20).

Our use of the genus name *Plebejus,* rather than the synonym *Icaricia,* reflects recent treatments of butterfly taxonomy (Opler and Warren 2003, p. 30; Pelham 2008, p. 265). The Integrated Taxonomic Information System (ITIS) recognizes the Mt. Charleston blue butterfly as a valid subspecies based on Austin (1980) (Retrieved April 2, 2012, from the Integrated Taxonomic Information System on-line database, *http://www.itis.gov*). The ITIS is hosted by the United States Geological Survey (USGS) Center for Biological Informatics (CBI) and is the result of a partnership of Federal agencies formed to satisfy their mutual needs for scientifically credible taxonomic information.

As a subspecies, the Mt. Charleston blue butterfly is similar to other Shasta blue butterflies, with a wingspan of 0.75 to 1 inch (in) (19 to 26 millimeters (mm)) (Opler 1999, p. 251). Males and females of Mt. Charleston blue are dimorphic (occurring in two distinct forms). The upperside of males is dark to dull iridescent blue, and females are brown with a blue overlay. The species has a discal black spot on the forewing and a row of submarginal black spots on the hindwing. The underside is gray, with a pattern of black spots, brown blotches, and pale wing veins to give it a mottled appearance. The underside of the hindwing has an inconspicuous band of submarginal metallic spots (Opler 1999, p. 251). Based on morphology, the Mt. Charleston blue butterfly is most closely related to the Great Basin populations of Minnehaha blue butterfly (Austin 1980, p. 23), and it can be distinguished from other Shasta blue butterfly subspecies by the presence of sharper and blacker postmedian spots on the underside of the hindwing (Scott 1986, p. 410).

The Mt. Charleston blue butterfly is similar in appearance to five other sympatric (occupying the same or overlapping geographic areas without interbreeding) butterflies that occur roughly in the same habitats: lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and the two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*). The lupine blue butterfly (also commonly referred to as the Acmon blue, Texas blue, or Southwestern blue butterfly) is the most similar to the Mt. Charleston blue butterfly (Boyd and Austin 1999, p. 44). The Mt. Charleston blue butterfly is distinguished from the lupine blue butterfly by a less broad and distinct orange band on the hindwing (Boyd and Austin, p. 44), and the postmedian spots on the underside of the hindwing are brown rather than black (Scott 1986, p. 410). The Reakirt's blue butterfly is similar in size or slightly smaller than the Mt. Charleston blue butterfly and is identified by black underside hindwing spots at the hind corner and large round black underside forewing spots (Scott 1986, p. 413; Opler 1999, pp. 230, 251). The Spring Mountains icarioides blue butterfly is larger than the Mt. Charleston blue butterfly and usually lacks the upperside forewing dash (Scott 1986, p. 409). In addition the underside hindwing postmedian spots of the Spring Mountains icarioides blue butterfly are typically ringed with white (Scott 1986, p. 409). The two Spring Mountains dark blue butterflies and the Spring Mountains icarioides blue butterfly lack the metallic marginal spots on the underside hindwing that is present on the Mt. Charleston blue butterfly (Scott 1986, p. 403; Brock and Kaufmann 2003, pp. 134, 136, 140). The two Spring Mountains dark blue butterflies have a more prominent orange band on the hindwing and do not have black dashes in the middle of the upperside forewing and hindwing as the Mt. Charleston blue butterfly does (Brock and Kaufmann 2003, pp. 136, 140; Scott 1986, pp. 403, 410).

Distribution

Based on current and historical occurrences or locations (Austin 1980, pp. 20–24; Weiss *et al.* 1997, Map 3.1; Boyd and Murphy 2008, p. 4, Pinyon 2011, Figure 9–11; Thompson *et al.* 2012, p. 99), the geographic range of the Mt. Charleston blue butterfly is in the upper elevations of the Spring Mountains, centered on lands managed by the U.S. Forest Service (Forest Service) in the Spring Mountains National Recreation Area of the Humboldt-Toiyabe National Forest within Upper Kyle and Lee Canyons, Clark County, Nevada. The majority of the occurrences or locations are along the upper ridges in the Mt. Charleston Wilderness and in Upper Lee Canyon area, while a few are in Upper Kyle Canyon. Table 1 lists the various locations of the Mt. Charleston blue butterfly that constitute the subspecies' current and historical range. Estimates of population size for Mt. Charleston blue butterfly are not available, so the occurrence data summarized in Table 1 represent the best scientific information on distribution of Mt. Charleston blue butterfly and how that distribution has changed over time.

TABLE 1—LOCATIONS OR OCCURRENCES OF THE MT. CHARLESTON BLUE BUTTERFLY SINCE 1928, AND THE STATUS OF THE BUTTERFLY AT THE LOCATIONS

[Survey efforts are variable through time]

Location name	First/last time observed	Most recent survey year(s) (even if not observed)	Status	Primary references
1. South Loop Trail, Upper Kyle Canyon.	1928/2011	2007, 2008, 2010, 2011.	Known occupied; adults consistently observed.	Weiss *et al.* 1997; Kingsley 2007; Boyd 2006; Datasmiths 2007; SWCA 2008; Pinyon 2011; Thompson *et al.* 2012.
2. Las Vegas Ski and Snowboard Resort (LVSSR), Upper Lee Canyon.	1963/2010	2007, 2008, 2010, 2011.	Known occupied; adults consistently observed.	Weiss *et al.* 1994; Weiss *et al.* 1997; Boyd and Austin 2002; Boyd 2006; Newfields 2006; Datasmiths 2007; Boyd and Murphy 2008;Thompson *et al.* 2012.
3. Foxtail, Upper Lee Canyon ...	1995/1998	2006, 2007, 2008	Presumed occupied; adults intermittently observed.	Boyd and Austin 1999; Boyd 2006; Datasmiths 2007; Boyd and Murphy 2008.
4. Youth Camp, Upper Lee Canyon.	1995/1995	2006, 2007, 2008	Presumed occupied; adults intermittently observed.	Weiss *et al.* 1997; Boyd 2006; Datasmiths 2007; Boyd and Murphy 2008.
5. Gary Abbott, Upper Lee Canyon.	1995/1995	2006, 2007, 2008	Presumed occupied; adults intermittently observed.	Weiss *et al.* 1997; Boyd 2006; Datasmiths 2007; Boyd and Murphy 2008.
6. Lower LVSSR Parking, Upper Lee Canyon.	1995/2002	2007, 2008	Presumed occupied; adults intermittently observed.	Weiss *et al.* 1997; Boyd 2006; Datasmiths 2007; Boyd and Murphy 2008.

TABLE 1—LOCATIONS OR OCCURRENCES OF THE MT. CHARLESTON BLUE BUTTERFLY SINCE 1928, AND THE STATUS OF THE BUTTERFLY AT THE LOCATIONS—Continued

[Survey efforts are variable through time]

Location name	First/last time observed	Most recent survey year(s) (even if not observed)	Status	Primary references
7. Mummy Spring, Upper Kyle Canyon.	1995/1995	2006	Presumed occupied; adults intermittently observed.	Weiss *et al.* 1997; Boyd 2006.
8. Lee Meadows, Upper Lee Canyon.	1965/1995	2006, 2007, 2008	Presumed occupied; adults intermittently observed.	Weiss *et al.* 1997; Boyd 2006; Datasmiths 2007; Boyd and Murphy 2008.
9. Bristlecone Trail	1990/2011	2007, 2011	Presumed occupied	Weiss *et al.* 1995; Weiss *et al.* 1997; Kingsley 2007; Thompson *et al.* 2012.
10. Bonanza Trail	1995/1995	2006, 2007	Presumed occupied	Weiss *et al.* 1997; Boyd 2006; Kingsley 2007.
11. Upper Lee Canyon holotype	1963/1976	2006, 2007	Presumed extirpated	Weiss *et al.* 1997; Boyd 2006; Datasmiths 2007.
12. Cathedral Rock, Kyle Canyon.	1972/1972	2007	Presumed extirpated	Weiss *et al.* 1997; Datasmiths 2007.
13. Upper Kyle Canyon Ski Area.	1965/1972	1995	Presumed extirpated	Weiss *et al.* 1997.
14. Old Town, Kyle Canyon	1970s	1995	Presumed extirpated	The Urban Wildlands Group, Inc. 2005.
15. Deer Creek, Kyle Canyon	1950	unknown	Presumed extirpated	Howe 1975.
16. Willow Creek	1928	unknown	Presumed extirpated	Weiss *et al.* 1997; Thompson and Garrett 2010.

We presume that the Mt. Charleston blue butterfly is extirpated from a location when it has not been recorded at that location through formal surveys or informal observation for more than 20 years. We selected a 20-year time period because it would likely allow for local extirpation and recolonization events (metapopulation dynamics) to occur and would be enough time for succession or other vegetation shifts to render the habitat unsuitable (see discussion in Biology and Habitat sections below). Using this criterion, the Mt. Charleston blue butterfly is considered to be ''presumed extirpated'' from 6 of the 16 known locations (Locations 11–16 in Table 1) (Service 2006b, pp. 8–9). Of the remaining 10 locations, 8 locations or occurrences are ''presumed occupied'' by the subspecies (Locations 3–10 in Table 1) and the first 2 locations are ''known occupied'' (Locations 1–2 in Table 1) (Service 2006b, pp. 7–8). We note that the probability of detection of Mt. Charleston blue butterflies at a particular location in a given year is affected by factors other than the butterfly's abundance, such as survey effort and weather, both of which are highly variable from year to year.

The presumed occupied category is defined as a location within the current known range of the subspecies where adults have been intermittently observed and there is a potential for diapausing (a period of suspended growth or development similar to hibernation) larvae to be present. The butterfly likely exhibits metapopulation dynamics at these locations. In this situation, the subspecies is subject to local extirpation, with new individuals emigrating from nearby ''known occupied'' habitat, typically during years when environmental conditions are more favorable to emergence from diapause and the successful reproduction of individuals (see discussion in ''Habitat'' section below). At some of these presumed occupied locations (Locations 4, 5, 7, 8, and 10 in Table 1), the Mt. Charleston blue butterfly has not been recorded through formal surveys or informal observation since 1995 by Weiss *et al.* (1997, pp. 1–87). Of the presumed occupied locations, 3, 6, and 9 have had the most recent observations (observed in 1998, 2002, and 2011, respectively) (Table 1). Currently, we consider the occurrence at Mummy Spring as presumed occupied because it has been intermittently observed; however, this location is not near known occupied habitat and may be extirpated.

We consider the remaining two Mt. Charleston blue butterfly locations or occurrences to be ''known occupied'' (Locations 1 and 2 in Table 1). Known occupied locations have had successive observations during multiple years of surveys and occur in high-quality habitat. The South Loop Trail location in Upper Kyle Canyon (Location 1 in Table 1) is considered known occupied because: (1) The butterfly was observed on the site in 1995, 2002, 2007, 2010, and 2011 (Service 2007, pp. 1–2; Kingsley 2007, p. 5; Pinyon 2011, pp. 17–19; Thompson *et al.* 2012, p. 99); (2) the high quality of the habitat is in accordance with host plant densities of 10 plants per square meter as described in Weiss *et al.* (1997, p. 31) (Kingsley 2007, pp. 5 and 10; Thompson *et al.* 2012, p. 99); and (3) in combination with the observations and high-quality habitat, the habitat is in an area of relatively large size (SWCA 2008, pp. 2 and 5; Pinyon 2011, p. Figure 8). The South Loop Trail area is the most important remaining population area for the Mt. Charleston blue butterfly (Boyd and Murphy 2008, p. 21). The South Loop Trail runs along the ridgeline between Griffith Peak and Charleston Peak and is located within the Mt. Charleston Wilderness. This area was mapped using a global positioning system unit and included the larval host plant, *Astragalus calycosus* var. *calycosus* (Torrey's milkvetch), as well as occurrences of two known nectar plants, *Hymenoxys lemmonii* (Lemmon's bitterweed) and *Erigeron clokeyi* (Clokey fleabane) (SWCA 2008, pp. 2 and 5; Pinyon 2011, p. 11). The total area of the South Loop Trail location is 60 acres (ac) (24 hectares (ha)).

We consider the Las Vegas Ski and Snowboard Resort location (LVSSR) in Upper Lee Canyon (Location 2 in Table

1) to be ''known occupied'' because: (1) The butterfly was first recorded at LVSSR in 1963 (Austin 1980, p. 22) and has been consistently observed at LVSSR every year between 1995 and 2006 (with the exception of 1997 when no surveys were performed (Service 2007, pp. 1–2)) and in 2010 (Thompson and Garrett 2010, p. 5); and (2) the ski runs contain two areas of high-quality butterfly habitat in accordance with host plant densities of 10 plants per square meter as described in Weiss *et al.* (1997, p. 31). These areas are LVSSR #1 (2.4 ac (0.97 ha)) and LVSSR #2 (1.3 ac (0.53 ha)), which have been mapped using a global positioning system unit and field-verified. Thus, across its current range, the Mt. Charleston blue butterfly is known to persistently occupy less than 64 ac (26 ha) of known occupied habitat.

Status and Trends

While there are no estimates of the size of the Mt. Charleston blue butterfly population, the best available information indicates a declining trend for this subspecies, as discussed below. Prior to 1980, descriptions of the Mt. Charleston blue butterfly status and trends were characterized as usually rare (Austin and Austin 1980, p. 30). The Mt. Charleston blue butterfly is known to be rare because few have been observed since the 1920's, even though there have been many collections and studies of butterflies in the Spring Mountains, particularly since the 1950's (Boyd and Austin 1999, p. 2).

It is important to note that year-to-year fluctuations in population numbers do occur (most likely due to variations in precipitation and temperature that affect both the Mt. Charleston blue butterfly and its larval host plant (Weiss *et al.* 1997, pp. 2–3 and 31–32)). However, the failure to detect Mt. Charleston blue butterflies at many of the known historical locations during the past 20 years, especially in light of increased survey efforts in recent years (since 2006), indicates a reduction in the butterfly's distribution and likely decrease in total population size. In addition, five additional locations may be presumed extirpated in 2015, if surveys continue to fail to detect Mt. Charleston blue butterflies (these include Youth Camp, Gary Abbott, Lee Meadows, Bonanza Trail, and Mummy Spring, Table 1). Mt. Charleston blue butterflies were last observed at these sites in 1995, which was the last year reported as a good year (Boyd and Murphy 2008, p. 22) for Mt. Charleston blue butterflies, as indicated by the numbers observed at LVSSR (121 counted during 2 surveys each of 2 areas), and presence detected at 7 other locations (Weiss 1996, p. 4; Weiss *et al.* 1997, Table 2).

Survey information indicates that the numbers of recently observed Mt. Charleston blue butterflies are extremely low because butterflies have become increasingly difficult to detect. Zonneveld *et al.* (2003) determined that observable population size is interdependent with survey days and detection probability. Thus, the decreasing observations of Mt. Charleston blue butterflies after repeated visits in any year, after multiple years of surveying, indicates a declining and smaller population. In 2006, surveys within presumed occupied habitat at LVSSR located one individual butterfly adjacent to a pond that holds water for snowmaking (Newfields 2006, pp. 10, 13, and C5). In a later report, the accuracy of this observation was questioned and considered inaccurate (Newfields 2008, p. 27).

In 2006, Boyd (2006, pp. 1–2) conducted focused surveys for the subspecies at nearly all previously known locations and within potential habitat along Griffith Peak, North Loop Trail, Bristlecone Trail, and South Bonanza Trail but did not observe the butterfly at any of these locations. In 2007, surveys were again conducted in previously known locations in Upper Lee Canyon and LVSSR, but no butterflies were recorded (Datasmiths 2007, p. 1; Newfields 2008, pp. 21–24). In 2007, two Mt. Charleston blue butterflies were sighted on different dates at the same location on the South Loop Trail in Upper Kyle Canyon (Kingsley 2007, p. 5). In 2008, butterflies were not observed during focused surveys of Upper Lee Canyon and the South Loop Trail (Boyd and Murphy 2008, pp. 1–3; Boyd 2008, p. 1; SWCA 2008, p. 6), although it is possible that adult butterflies may have been missed on the South Loop Trail because the surveys were performed very late in the season. No formal surveys were conducted in 2009; however, no individuals were observed during the few informal attempts made to observe the species (Service 2009).

In 2010, the Mt. Charleston blue butterfly was observed during surveys at LVSSR and the South Loop Trail area. One adult was observed in Lee Canyon at LVSSR on July 23, 2010, but no other adults were detected at LVSSR during surveys conducted on August 2, 9, and 18, 2010 (Thompson and Garrett 2010, pp. 4–5). The Mt. Charleston blue butterfly was not observed at LVSSR in 2011 (Thompson *et al.* 2012, p. 99). Adults were most recently observed in 2010 and 2011 at the South Loop Trail area. According to reports from surveys conducted in July and August of 2011 at the South Loop Trail area (Thompson *et al.* 2012, p. 99; Pinyon 2011, pp. 17–19), the highest total number of adults counted among the days this area was surveyed was 17 on July 28, 2010, and 13 on August 12, 2011 (Pinyon 2011, p. 17). Final reports have not been completed by Thompson *et al.* for the 2011 surveys and the results here are considered preliminary. Based on the available survey information, the low number of sightings in recent years is likely the result of declining population size.

Habitat

Weiss *et al.* (1997, pp. 10–11) describe the natural habitat for the Mt. Charleston blue butterfly as relatively flat ridgelines above 2,500 m (8,200 ft), but isolated individuals have been observed as low as 2,000 m (6,600 ft). Boyd and Murphy (2008, p. 19) indicate that areas occupied by the subspecies featured exposed soil and rock substrates with limited or no canopy cover or shading and flat to mild slopes. Like most butterfly species, the Mt. Charleston blue butterfly is dependent on plants both during larval development (larval host plants) and the adult butterfly flight period (nectar plants). The Mt. Charleston blue butterfly requires areas that support *Astragalus calycosus* var. *calycosus,* the only known larval host plant for the subspecies (Weiss *et al.* 1994, p. 3; Weiss *et al.* 1997, p. 10; Datasmiths 2007, p. 21), as well as primary nectar plants. *A. c.* var. *calycosus* and *Erigeron clokeyi* are the primary nectar plants for the subspecies; however, butterflies have also been observed nectaring on *Hymenoxys lemmonii* and *Aster* sp. (Weiss *et al.* 1994, p. 3; Boyd 2005, p. 1; Boyd and Murphy 2008, p. 9).

The best available habitat information relates mostly to the Mt. Charleston blue butterfly's larval host plant, with little to no information available characterizing the butterfly's interactions with its known nectar plants or other elements of its habitat; thus, the habitat information discussed in this document centers on *Astragalus calycosus* var. *calycosus.* Studies are currently underway to better understand the habitat requirements and preferences of the Mt. Charleston blue butterfly (Thompson *et al.* 2011, p. 99). *Astragalus c.*var. *calycosus* is a small, low-growing, perennial herb that has been observed growing in open areas between 5,000 to 10,800 ft (1,520 to 3,290 m) in subalpine, bristlecone, and mixed-conifer vegetation communities of the Spring Mountains (Nachlinger

and Leary 2007, p. 36). Within the alpine and subalpine range of the Mt. Charleston blue butterfly, Weiss *et al.* (1997, p. 10) observed the highest densities of *A. c.* var. *calycosus* in exposed areas and within canopy openings and lower densities in forested areas.

Weiss *et al.* (1997, p. 31) describe favorable habitat for the Mt. Charleston blue butterfly as having high densities (more than 10 plants per square meter) of *Astragalus calycosus* var. *calycosus.* Weiss *et al.* (1995, p. 5) and Datasmiths (2007, p. 21) indicate that, in some areas, butterfly habitat may be dependent on old or infrequent disturbances that create open areas. Vegetation cover within disturbed patches naturally becomes higher over time through succession, gradually becoming less favorable to the butterfly. Therefore, we conclude that open areas with relatively little grass cover and visible mineral soil and high densities of host plants support the highest densities of butterflies (Boyd 2005, p. 1; Service 2006a, p. 1). During 1995, an especially high-population year (a total of 121 butterflies were counted during surveys of 2 areas at LVSSR on 2 separate dates, where each survey for each area takes approximately 22 minutes to complete for a single observer (Weiss 1996, p. 4)), Mt. Charleston blue butterflies were observed in small habitat patches and in open forested areas where *A. c. var. calycosus* was present in low densities, on the order of 1 to 5 plants per square meter (Weiss *et al.* 1997, p. 10; Newfields 2006, pp. 10 and C5). Therefore, areas with lower densities of the host plant may also be important to the subspecies, as these areas may be intermittently occupied or may be important for dispersal.

Fire suppression and other management practices have likely limited the formation of new habitat for the Mt. Charleston blue butterfly, as discussed below. The Forest Service began suppressing fires on the Spring Mountains in 1910 (Entrix 2007, p. 111). Throughout the Spring Mountains, fire suppression has resulted in higher densities of trees and shrubs (Amell 2006, pp. 2–3) and a transition to a closed-canopy forest with shade-tolerant understory species (Entrix 2007, p. 112) that is generally less suitable for the Mt. Charleston blue butterfly. Boyd and Murphy (2008, pp. 23 and 25) hypothesized that the loss of presettlement vegetation structure over time has caused the Mt. Charleston blue butterfly's metapopulation dynamics to collapse in Upper Lee Canyon. Similar losses of suitable butterfly habitat in woodlands and their negative effect on butterfly populations have been documented (Thomas 1984, pp. 337–338). The disturbed landscape at LVSSR provides important habitat for the Mt. Charleston blue butterfly (Weiss *et al.* 1995, p. 5; Weiss *et al.* 1997, p. 26). Periodic maintenance (removal of trees and shrubs) of the ski runs has effectively arrested forest succession on the ski slopes and serves to maintain conditions favorable to the Mt. Charleston blue butterfly, and to its host and nectar plants. However, the ski runs are not specifically managed to benefit habitat for this subspecies, and operational activities regularly modify Mt. Charleston blue butterfly habitat or prevent host plants from reestablishing in disturbed areas.

Biology

The Mt. Charleston blue butterfly has been described as biennial where it diapauses as an egg the first winter and as a larvae near maturity the second winter (Ferris and Brown, pp. 203–204; Scott 1986, p. 411); however, Emmel and Shields (1978, p. 132) suggested that diapause was passed as partly grown larva because freshly hatched eggshells were found near newly laid eggs (indicating that the eggs do not overwinter). The Mt. Charleston blue butterfly is generally thought to diapause at the base of its larval host plant, *Astragalus calycosus* var. *calycosus,* or in the surrounding substrate (Emmel and Shields 1978, p. 132). The pupae of some butterfly species are known to persist in diapause up to 5 to 7 years (Scott 1986, p. 28). The number of years the Mt. Charleston blue butterfly can remain in diapause is unknown. Experts have speculated that the Mt. Charleston blue butterfly may only be able to diapause for two seasons (Murphy 2006, p. 1; Boyd and Murphy 2008, p. 21). However, in response to unfavorable environmental conditions, it is hypothesized that a prolonged diapause period may be possible (Scott 1986, pp. 26–30; Murphy 2006, p. 1; Datasmiths 2007, p. 6; Boyd and Murphy 2008, p. 22).

The typical flight and breeding period for the butterfly is early July to mid-August with a peak in late July, although the subspecies has been observed as early as mid-June and as late as mid-September (Austin 1980, p. 22; Boyd and Austin 1999, p. 17; Forest Service 2006a, p. 9). As with most butterflies, the Mt. Charleston blue butterfly typically flies during sunny conditions, which are particularly important for this subspecies given the cooler air temperatures at high elevations (Weiss *et al.* 1997, p. 31). Excessive winds also deter flight of most butterflies, although Weiss *et al.* (1997, p. 31) speculate that this may not be a significant factor for the Mt. Charleston blue butterfly given its low-to-the-ground flight pattern.

Like all butterfly species, both the phenology (timing) and number of Mt. Charleston blue butterfly individuals that emerge and fly to reproduce during a particular year are reliant on the combination of many environmental factors that may constitute a successful (''favorable'') or unsuccessful (''poor'') year for the subspecies. Other than observations by surveyors, little information is known regarding these aspects of the subspecies' biology, since the key determinants for the interactions among the Mt. Charleston blue butterfly's flight and breeding period, larval host plant, and environmental conditions have not been specifically studied. Observations indicate that above- or below-average precipitation, coupled with above- or below-average temperatures, influence the phenology of this subspecies (Weiss *et al.* 1997, pp. 2–3 and 32; Boyd and Austin 1999, p. 8) and are likely responsible for the fluctuation in population numbers from year to year (Weiss *et al.* 1997, pp. 2–3 and 31–32).

Most butterfly populations exist as regional metapopulations (Murphy *et al.* 1990, p. 44). Boyd and Austin (1999, pp. 17 and 53) indicate this is true of the Mt. Charleston blue butterfly. Small habitat patches tend to support smaller butterfly populations that are frequently extirpated by events that are part of normal variation (Murphy *et al.* 1990, p. 44). According to Boyd and Austin (1999, p. 17), smaller colonies of the Mt. Charleston blue butterfly may be ephemeral in the long term, with the larger colonies of the subspecies more likely than smaller populations to persist in ''poor'' years, when environmental conditions do not support the emergence, flight, and reproduction of individuals. The ability of the Mt. Charleston blue butterfly to move between habitat patches has not been studied; however, field observations indicate the subspecies has low vagility (capacity or tendency of a species to move about or disperse in a given environment), on the order of 10 to 100 meters (m) (33 to 330 feet (ft)) (Weiss *et al.* 1995, p. 9), and nearly sedentary behavior (Datasmiths 2007, p. 21; Boyd and Murphy 2008, pp. 3 and 9). Furthermore, dispersal of lycaenid butterflies, in general, is limited and on the order of hundreds of meters (Cushman and Murphy 1993, p. 40). Based on this information, the likelihood of long-distance dispersal is

low for the Mt. Charleston blue butterfly, and its susceptibility to being affected by habitat fragmentation caused by forest succession is high (discussed further in Factor A).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

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

Below, we evaluate several factors that negatively impact the Mt. Charleston blue butterfly's habitat, including fire suppression, fuels reduction, succession, introduction of nonnative species, recreation, and development. We also examine available conservation measures in the form of conservation agreements and plans, which may offset some of these threats.

Fire Suppression, Succession, and Nonnative Species

Butterflies have extremely specialized habitat requirements (Thomas 1984, p. 337). Changes in vegetation structure and composition as a result of natural processes are a serious threat to butterfly populations because these changes can disrupt specific habitat requirements (Thomas 1984, pp. 337–341; Thomas *et al.* 2001, pp. 1791–1796). Cushman and Murphy (1993, p. 4) determined 28 at-risk lycaenid butterfly species, including the Mt. Charleston blue butterfly, to be dependent on one or two closely related host plants. Many of these host plants are dependent on early successional environments. Butterflies that specialize on such plants must track an ephemeral resource base that itself depends on unpredictable and perhaps infrequent ecosystem disturbances. For such butterfly species, local extinction events are both frequent and inevitable (Cushman and Murphy 1993, p. 4). The Mt. Charleston blue butterfly may, in part, depend on disturbances that open up the subalpine canopy and create conditions more favorable to its host plant, *Astragalus calycosus* var. *calycosus,* and nectar resources (Weiss *et al.* 1995, p. 5; Boyd and Murphy 2008, pp. 22–28) (see Habitat section, above).

Datasmiths (2007, p. 21) also suggest suitable habitat patches of *Astragalus calycosus* var. *calycosus* are often, but not exclusively, associated with older or infrequent disturbance. Weiss *et al.* (1995, p. 5) note that a colony once existed on the Upper Kyle Canyon Ski Area (Location 11 in Table 1), but since the ski run was abandoned no butterflies have been collected there since 1965. Boyd and Austin (2002, p. 13) observe that the butterfly was common at Lee Meadows (Location 8 in Table 1) in the 1960s, but became uncommon at the site because of succession and a potential lack of disturbance. Using an analysis of host plant density, Weiss *et al.* (1995 p. 5) concluded that Lee Meadows does not have enough host plants to support a population over the long term (minimally 5–10 host plants per square meter). Disturbances such as fire promote open understory conditions for *A. c.* var. *calycosus* to grow and reduce fragmentation of Mt. Charleston blue butterfly habitat.

Fire suppression in the Spring Mountains has resulted in long-term successional changes, including increased forest area and forest structure (higher canopy cover, more young trees, and more trees intolerant of fire) (Nachlinger and Reese 1996, p. 37; Amell 2006, pp. 6–9; Boyd and Murphy 2008, pp. 22–28; Denton *et al.* 2008, p. 21; Abella *et al.* 2011, pp. 10, 12). Frequent low-severity fires would have maintained an open forest structure characterized by uneven-aged stands of fire-resistant *Pinus ponderosa* (ponderosa pine) trees (Amell 2006, p. 5) in lower elevations. The lower-elevation habitats of the Mt. Charleston blue butterfly are the most affected by fire suppression, as indicated by Provencher's 2008 Fire Regime Condition Class analysis of the Spring Mountains (p. 18); there has been an increase in area covered by forest canopy and an increase in stem densities with more trees intolerant of fire within the lower-elevation Mt. Charleston blue butterfly habitat.

Large-diameter *Pinus ponderosa* trees with multiple fire scars in Upper Lee and Kyle Canyons indicate that low-severity fires historically burned through mixed-conifer forests within the range of the Mt. Charleston blue butterfly (Amell 2006, p. 3). There are no empirical estimates of fire intervals or frequencies in the Spring Mountains but it is presumed to be similar to *Pinus ponderosa* forests in other regions where it has been reported to be 4 to 20 or 2 to 39 years (Barbour and Minnich 2000 as cited in Amell 2006, p. 3; Denton *et al.* 2008, p. 23). Open mixed-conifer forests in the Spring Mountains were likely characterized by more abundant and diverse understory plant communities compared to current conditions (Entrix 2007, pp. 73–78). These successional changes have been hypothesized to have contributed to the decline of the Mt. Charleston blue butterfly because of reduced densities of larval and nectar plants, decreased solar radiation, and inhibited butterfly movements that subsequently determine colonization or recolonization processes (Weiss *et al.* 1997, p. 26; Boyd and Murphy 2008, pp. 22–28).

Boyd and Murphy (2008, p. 23) note that important habitat characteristics required by Mt. Charleston blue butterfly— *Astragalus calycosus* var. *calycosus* and preferred nectar plants occurring together in open sites not shaded by tree canopies—would have occurred more frequently across a more open forested landscape, compared to the current denser forested landscape. Not only would the changes in forest structure and understory plant communities result in habitat loss, degradation, and fragmentation for the Mt. Charleston blue butterfly across a broad spatial scale, a habitat matrix dominated by denser forest also may be impacting key metapopulation processes by reducing probability of recolonization following local population extirpations in remaining patches of suitable habitat (Boyd and Murphy 2008, p. 25).

The introduction of forbs, shrubs, and nonnative grasses can be a threat to the butterfly's habitat because these species can compete with, and decrease, the quality and abundance of larval host plant and adult nectar sources. This has been observed for many butterfly species including the Quino checkerspot butterfly (*Euphydryas editha quino*) (62 FR 2313; January 16, 1997) and Fender's blue butterfly (*Plebejus* (= *Icaricia*) *icarioides fenderi*) (65 FR 3875; January 25, 2000). Succession, coupled with the introduction of nonnative species, is also believed to be the reason the Mt. Charleston blue butterfly is no longer present at the old town site in Kyle Canyon (Location 12 in Table 1) and at the Mt. Charleston blue butterfly

holotype (the type specimen used in the original description of a species or subspecies) site in Upper Lee Canyon (Location 9 in Table 1) (Urban Wildlands Group, Inc. 2005, p. 3; Boyd and Austin 1999, p. 17).

Introduction of nonnative species within its habitat negatively impacts the quality of the Mt. Charleston blue butterfly's habitat. As mentioned previously (see Habitat section), periodic maintenance (removal of trees and shrubs) of the ski runs has effectively arrested succession on the ski slopes and maintains conditions that can be favorable to the Mt. Charleston blue butterfly. However, the ski runs are not specifically managed to benefit habitat for this subspecies and its habitat requirements, and operational activities (including seeding of nonnative species) regularly modify Mt. Charleston blue butterfly habitat or prevent host plants from reestablishing in disturbed areas. According to Weiss *et al.* (1995, pp. 5–6), the planting of annual grasses and *Melilotus* (sweetclover) for erosion control at LVSSR is a threat to Mt. Charleston blue butterfly habitat. Titus and Landau (2003, p. 1) observed that vegetation on highly and moderately disturbed areas of the LVSSR ski runs are floristically very different from natural openings in the adjacent forested areas that support this subspecies. Seeding nonnative species for erosion control was discontinued in 2005; however, because of erosion problems during 2006 and 2007, and the lack of native seed, LVSSR resumed using a nonnative seed mix, particularly in the lower portions of the ski runs (not adjacent to Mt. Charleston blue butterfly habitat) where erosion problems persist.

The best available information indicates that, in at least four of the six locations where the Mt. Charleston blue butterfly historically occurred, suitable habitat is no longer present due to vegetation changes attributable to succession, the introduction of nonnative species, or a combination of the two.

Recreation, Development, and Other Projects

As discussed in the *Distribution* section above, the Mt. Charleston blue butterfly is a narrow endemic subspecies that is currently known to occupy two locations and presumed to occupy eight others. One of the two areas where Mt. Charleston blue butterflies have been detected in recent years is the LVSSR. Several ground-disturbing projects occurred within Mt. Charleston blue butterfly suitable habitat at LVSSR between 2000 and 2011 (see 76 FR 12667, pp. 12672, 12673). These projects were small spatial scale (ground disturbance was less than about 10 acres each) but are known to have impacted suitable habitat and possibly impacted individual Mt. Charleston blue butterflies (eggs, larvae, pupae, or adults). In addition to these recreation development projects at LVSSR, a small area of suitable habitat and possibly individual Mt. Charleston blue butterflies were impacted by a water system replacement project in Upper Lee Canyon in 2003, and a small area of suitable habitat (less than 1 acre) was impacted by a stream restoration project at Lee Meadows in 2011. It is difficult to know the full extent of impacts to the Mt. Charleston blue butterfly's habitat as a result of these projects because Mt. Charleston blue butterfly habitat was not mapped nor were some project areas surveyed prior to implementation.

Three future projects also may impact Mt. Charleston blue butterfly habitat in Upper Lee Canyon. These projects are summarized below:

(1) A March 2011 Master Development Plan for LVSSR proposes to improve, upgrade, and expand the existing facilities to provide year-round recreational activities. The plan proposes to increase snow trails, beginner terrain, and snowmaking reservoir capacity and coverage, widen existing ski trails, replace and add lifts, and develop ''gladed'' areas for sliding that would remove deadfall timber to reduce fire hazards (Ecosign 2011, I–3—I–4, IV–5—IV–7). The plan proposes to add summer activities including lift-accessed sightseeing and hiking, nature interpretive hikes, evening stargazing, mountain biking, conference retreats and seminars, weddings, family reunions, mountain music concerts, festivals, climbing walls, bungee trampoline, beach and grass volleyball, a car rally, and other activities (Ecosign 2008, pp. I–3—I–4). Widening existing ski trails and increasing snowmaking reservoir capacity (Ecosign 2011, p. IV–5, Figure 21a) would impact the Mt. Charleston blue butterfly at a known occupied and at a presumed occupied location (Location 2 and 5 in Table 1). Summer activities would impact the Mt. Charleston blue butterfly and its known occupied and presumed occupied habitat by attracting visitors in higher numbers during the time of year when larvae and host plants are especially vulnerable to trampling (Location 2 in Table 1). The LVSSR Master Development Plan, which has been accepted by the Forest Service, considered Mt. Charleston blue butterfly habitat during development of the plan. Impacts to Mt. Charleston blue butterfly habitat from the LVSSR Master Development Plan will be addressed further during the National Environmental Policy Act (NEPA) process (discussed further in Factor D) (Forest Service 2011a, p. 3).

(2) The Old Mill/Dolomite/McWilliams Reconstruction Projects to improve camping and picnic areas in Upper Lee Canyon are currently being planned and evaluated under NEPA (discussed further in Factor D) (Forest Service 2011c pp. 1–4). Project details are limited because planning is currently underway; however, the Service has met with the Forest Service and provided recommendations to consider for analysis of potential direct and indirect impacts of these projects to the Mt. Charleston blue butterfly and its potential habitat within or in close proximity to the project area (Datasmiths 2007, Figure 1; Forest Service 2011c, Project Map; Forest Service 2011f, pp. 1–5; Service 2011, p. 1). The recommendations provided by the Service will assist with the development of a proposed action that will avoid or minimize adverse effects to the Mt. Charleston blue butterfly and its potential habitat.

(3) The Foxtail Group Picnic Area Reconstruction Project is currently being planned and evaluated under NEPA (discussed further in Factor D) (Forest Service 2011g, pp. 1–4). Project details are limited because planning is currently underway; however, the Service has met with the Forest Service and provided recommendations for minimizing potential direct and indirect impacts of these projects to the Mt. Charleston blue butterfly and its habitat (Datasmiths 2007, Figure 1; Forest Service 2011f, pp. 1–5; Forest Service 2011g, Project Map; Service 2011, p. 1).

Fuel Reduction Projects

In December 2007, the Forest Service approved the Spring Mountains National Recreation Area Hazardous Fuels Reduction Project (Forest Service 2007a, pp. 1–127). This project resulted in tree removals and vegetation thinning in three presumed occupied Mt. Charleston blue butterfly locations in Upper Lee Canyon, including Foxtail Ridge, Lee Canyon Youth Camp, and Lee Meadows, and impacted approximately 32 ac (13 ha) of presumed occupied habitat that has been mapped in Upper Lee Canyon (Locations 3, 4 and 8 in Table 1) (Forest Service 2007a, Appendix A-Map 2; Datasmiths 2007, p. 26). Manual and mechanical clearing of shrubs and trees will be repeated on a 5- to 10-year rotating basis and will result in direct

impacts to the Mt. Charleston blue butterfly and its habitat, including crushing or removal of host plants and diapausing larvae (if present). Implementation of this project began in the spring of 2008 throughout the Spring Mountains National Recreation Area, including Lee Canyon, and the project is nearly completed for its initial implementation (Forest Service 2011a, p. 2).

Although Boyd and Murphy (2008, p. 26) recommended increased forest thinning to improve habitat quality for the Mt. Charleston blue butterfly, the primary goal of this project was to reduce wildfire risk to life and property in the Spring Mountains National Recreation Area wildland urban interface (Forest Service 2007a, p. 6), not to improve Mt. Charleston blue butterfly habitat. Mt. Charleston blue butterflies require larval host plants in exposed areas not shaded by forest canopy cover because canopy cover reduces solar exposure during critical larval feeding periods (Boyd and Murphy 2008, p. 23). Although the fuel reduction project incorporated measures to minimize impacts to the Mt. Charleston blue butterfly and its habitat, shaded fuel breaks created for this project may not be open enough to create or significantly improve Mt. Charleston blue butterfly habitat. Also, shaded fuel breaks for this project are concentrated along access roads, property boundaries, campgrounds, picnic areas, administrative sites, and communications sites, and are not of sufficient spatial scale to improve habitat that does not occur within close proximity to these landscape features and reduce the threat identified above resulting from fire suppression and succession.

Although this project may result in increased understory herbaceous plant productivity and diversity, there are short-term risks to the Mt. Charleston blue butterfly's habitat associated with project implementation. In recommending increased forest thinning to improve Mt. Charleston blue butterfly habitat, Boyd and Murphy (2008, p. 26) cautioned that thinning treatments would need to be implemented carefully to minimize short-term disturbance impacts to the Mt. Charleston blue butterfly and its habitat. Individual butterflies (larvae, pupae, and adults), and larval host plants and nectar plants, may be crushed during project implementation. In areas where thinned trees are chipped (mastication), layers of wood chips may become too deep and impact survival of Mt. Charleston blue butterfly larvae and pupae, as well as larval host plants and nectar plants. Soil and vegetation disturbance during project implementation also would result in increases in weeds and disturbance-adapted species, such as *Chrysothamnus* spp. (rabbitbrush), and these plants would compete with Mt. Charleston blue butterfly larval host and nectar plants.

Conservation Agreement and Plans That May Offset Habitat Threats

A conservation agreement was developed in 1998 to facilitate voluntary cooperation among the Forest Service, the Service, and the State of Nevada Department of Conservation and Natural Resources in providing long-term protection for the rare and sensitive flora and fauna of the Spring Mountains, including the Mt. Charleston blue butterfly (Forest Service 1998, pp. 1–50). The Conservation Agreement was in effect for a period of 10 years after it was signed on April 13, 1998 (Forest Service *et al.* 1998, pp. 44, 49), was renewed in 2008 (Forest Service 2008), and coordination between the Forest Service and Service has continued. Many of the conservation actions described in the conservation agreement have been implemented; however, several important conservation actions that would have directly benefited the Mt. Charleston blue butterfly have not been implemented. Regardless, many of the conservation actions in the conservation agreement (for example, inventory and monitoring) would not directly reduce threats to the Mt. Charleston blue butterfly or its habitat.

In 2004, the Service and Forest Service signed a memorandum of agreement that provides a process for review of activities that involve species covered under the 1998 Conservation Agreement (Forest Service and Service 2004, pp. 1–9). Formal coordination through this memorandum of agreement was established to: (1) Jointly develop projects that avoid or minimize impacts to listed, candidate, and proposed species, and species under the 1998 conservation agreement; and (2) to ensure consistency with commitments and direction provided for in recovery planning efforts and in conservation agreement efforts. More than half of the past projects that impacted Mt. Charleston blue butterfly habitat were reviewed by the Service and Forest Service under this review process, but several were not. Some efforts under this memorandum of agreement have been successful in reducing or avoiding project impacts to the Mt. Charleston blue butterfly, while other efforts have not. Examples of projects that have reduced or avoided impacts to the Mt. Charleston blue butterfly include the Lee Meadows Restoration Project (discussed above in Recreation, Development, and Other Projects under Factor A) and the Bristlecone Trail Habitat Improvement Project (Forest Service 2007c, pp. 1–7; Forest Service 2007d, pp. 1–14; Service 2007, p. 1–2). A new conservation agreement is currently being developed for the Spring Mountains National Recreation Area (SMNRA).

The loss or modification of known occupied and presumed occupied Mt. Charleston blue butterfly habitat in Upper Lee Canyon, as discussed above, has occurred in the past. However, more recently, the Forest Service has suspended decisions on certain projects that would potentially impact Mt. Charleston blue butterfly habitat (see discussion of lower parking lot expansion and new snowmaking lines projects under Recreation, Development, and Other Projects, above).

In addition, the Forest Service has reaffirmed its commitment to collaborate with the Service in order to avoid implementation of projects or actions that would impact the viability of the Mt. Charleston blue butterfly (Forest Service 2010c). This commitment includes: (1) Developing a mutually agreeable process to review future proposed projects to ensure that implementation of these actions will not lead to loss of population viability; (2) reviewing proposed projects that may pose a threat to the continued viability of the subspecies; and (3) jointly developing a conservation agreement (strategy) that identifies actions that will be taken to ensure the conservation of the subspecies (Forest Service 2010c). The Forest Service and the Fish and Wildlife Service are currently in the process of developing the conservation agreement.

The Mt. Charleston blue butterfly is a covered species under the 2000 Clark County Multiple Species Habitat Conservation Plan (MSHCP). The Clark County MSHCP identifies two goals for the Mt. Charleston blue butterfly: (a) ''Maintain stable or increasing population numbers and host and larval plant species''; and (b) ''No net unmitigated loss of larval host plant or nectar plant species habitat'' (RECON 2000a, Table 2.5, pp. 2–154; RECON 2000b, pp. B158–B161). The Forest Service is one of several signatories to the Implementing Agreement for the Clark County MSHCP, because many of the activities from the 1998 Conservation Agreement were incorporated into the MSHCP. Primarily, activities undertaken by the Forest Service focused on conducting

surveying and monitoring for butterflies. Although some surveying and monitoring occurred through contracts by the Forest Service, Clark County, and the Service, a butterfly monitoring plan was not fully implemented.

Recently, the Forest Service has been implementing the LVSSR Adaptive Vegetation Management Plan (Forest Service 2005b, pp. 1–24) to provide mitigation for approximately 11 ac (4.45 ha) of impacts to presumed occupied butterfly habitat (and other sensitive wildlife and plant species habitat) resulting from projects that the Forest Service implemented in 2005 and 2006. Under the plan, LVSSR will revegetate impacted areas using native plant species, including *Astragalus calycosus* var. *calycosus.* However, this program is experimental and has experienced difficulties due to the challenges of native seed availability and propagation. Under the plan, *A. c.* var. *calycosus* is being brought into horticultural propagation. These efforts are not likely to provide replacement habitat to the Mt. Charleston blue butterfly for another 5 years (2016–2018), because of the short alpine growing season.

Summary of Factor A

The Mt. Charleston blue butterfly is currently known to occur in two locations: the South Loop Trail area in upper Kyle Canyon and LVSSR in Upper Lee Canyon. In addition, the Mt. Charleston blue butterfly is presumed to occupy eight locations: Foxtail, Youth Camp, Gary Abbott, Lower LVSSR Parking, Lee Meadows, Bristlecone Trail, Bonanza Trail, and Mummy Spring. Habitat loss and modification, as a result of fire suppression and long-term successional changes in forest structure, implementation of recreational development projects and fuels reduction projects, and nonnative species, are continuing threats to the butterfly's habitat in Upper Lee Canyon. Recreational area reconstruction projects currently planned also may negatively impact Mt. Charleston blue butterfly habitat in Upper Lee Canyon. In addition, proposed future activities under a draft Master Development Plan at LVSSR may impact the Mt. Charleston blue butterfly and its habitat in Upper Lee Canyon.

Because of its likely small population size, projects that impact even relatively small areas of occupied habitat could threaten the long-term population viability of Mt. Charleston blue butterfly. The continued loss or modification of presumed occupied habitat would further impair the long-term population viability of the Mt. Charleston blue butterfly in Upper Lee Canyon by removing diapausing larvae (if present) and by reducing the ability of the Mt. Charleston blue butterfly to disperse during favorable years. The successional advance of trees, shrubs, and grasses, and the spread of nonnative species are continuing threats to the subspecies in Upper Lee Canyon. The Mt. Charleston blue butterfly is presumed extirpated from at least three of the six historical locations (Upper Lee Canyon holotype, Upper Kyle Canton Ski Area, and Old Town), likely due to successional changes and the introduction of nonnative plants. Nonnative forbs and grasses are a threat to the subspecies and its habitat at LVSSR.

There are agreements and plans in place (including the 2008 Spring Mountains Conservation Agreement and the 2000 Clark County Multiple Species Habitat Conservation Plan) that are intended to conserve the Mt. Charleston blue butterfly and its habitat. Future voluntary conservation actions could be implemented in accordance with the terms of these agreements and plans but will be largely dependent on the level of funding available to the Forest Service for such work. Conservation actions (for example, mechanical thinning of timber stands and prescribed burns to create openings in the forest canopy suitable for the Mount Charleston blue butterfly and its host and nectar plants) could reduce to some degree the ongoing adverse effects to the butterfly of vegetative succession promoted by alteration of the natural fire regime in the Spring Mountains. The Forest Service's commitment to collaboratively review proposed projects to minimize impacts to the Mt. Charleston blue butterfly may reduce the threat posed by activities under the Forest Service's control, although we are unable to determine the potential effectiveness of this new strategy at this time. Therefore, based on the current distribution and recent, existing, and likely future trends in habitat loss, we find that the present and future destruction, modification, and curtailment of its habitat or range is a threat to the Mt. Charleston blue butterfly.

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

Rare butterflies and moths are highly prized by collectors, and an international trade exists in specimens for both live and decorative markets, as well as the specialist trade that supplies hobbyists, collectors, and researchers (Collins and Morris 1985, pp. 155–179; Morris *et al.* 1991, pp. 332–334; Williams 1996, pp. 30–37). The specialist trade differs from both the live and decorative market in that it concentrates on rare and threatened species (U.S. Department of Justice [USDJ] 1993, pp. 1–3; *United States* v. *Skalski et al.,* Case No. CR9320137, U.S. District Court for the Northern District of California [USDC] 1993, pp. 1–86). In general, the rarer the species, the more valuable it is; prices can exceed $25,000 for exceedingly rare specimens. For example, during a 4-year investigation, special agents of the Service's Office of Law Enforcement executed warrants and seized over 30,000 endangered and protected butterflies and beetles, with a total wholesale commercial market value of about $90,000 in the United States (USDJ 1995, pp. 1–4). In another case, special agents found at least 13 species protected under the Act, and another 130 species illegally taken from lands administered by the Department of the Interior and other State lands (USDC 1993, pp. 1–86; Service 1995, pp. 1–2).

Several listings of butterflies as endangered or threatened species under the Act have been based, at least partially, on intense collection pressure. Notably, the Saint Francis' satyr (*Neonympha mitchellii francisci*) was emergency-listed as an endangered species on April 18, 1994 (59 FR 18324). The Saint Francis' satyr was demonstrated to have been significantly impacted by collectors in just a 3-year period (59 FR 18324). The Callippe and Behren's silverspot butterflies (*Speyeria callippe callippe* and *Speyeria zerene behrensii*) were listed as endangered species on December 5, 1997 (62 FR 64306), partially due to overcollection. The Blackburn's sphinx moth (*Manduca blackburni*) was listed as an endangered species on February 1, 2000 (65 FR 4770), partially due to overcollection by private and commercial collectors. Most recently, the Miami blue butterfly (*Cyclargus thomasi bethunebakeri*) was emergency-listed as an endangered species (76 FR 49542; August 10, 2011), with collection being one of the primary threats.

Butterflies in small populations are vulnerable to harm from collection (Gall 1984, p. 133). A population may be reduced to below sustainable numbers by removal of females, reducing the probability that new colonies will be founded. Collectors can pose threats to butterflies because they may be unable to recognize when they are depleting colonies below the thresholds of survival or recovery (Collins and Morris 1985, pp. 162–165). There is ample evidence of collectors impacting other imperiled and endangered butterflies

(Gochfeld and Burger 1997, pp. 208–209), host plants (Cech and Tudor 2005, p. 55), and even contributing to extirpations (Duffey 1968, p. 94). For example, the federally endangered Mitchell's satyr (*Neonympha mitchellii mitchellii*) is believed to have been extirpated from New Jersey due to overcollection (57 FR 21567; Gochfeld and Burger 1997, p. 209).

Rare butterflies can be highly prized by insect collectors, and collection is a known threat to some butterfly species, such as the Fender's blue butterfly (65 FR 3882; January 25, 2000). In particular, small colonies and populations are at the highest risk. Overcollection or repeated handling and marking of females in years of low abundance can seriously damage populations through loss of reproductive individuals and genetic variability (65 FR 3882; January 25, 2000). Since the publication of the 12-month finding (76 FR 12667) in 2011, we have discovered information that indicates butterfly collecting is a threat for the Mt. Charleston blue butterfly and that collectors seek diminutive butterflies. In areas of the southwestern United States surrounding the range of the Mt. Charleston blue butterfly, other diminutive lycaenid butterflies such as Western-tailed blue butterfly (*Everes amyntula*), Pygmy blue butterfly (*Brephidium exilis*), Ceraunus blue butterfly (*Hemiargus ceraunus*), and Boisduval's blue butterfly (*Plebejus icariodes* ssp.) have been confiscated from commercial traders who illegally collected them (U.S. Attorney's Office 1994, pp. 4, 8, 16; Alexander 1996, pp. 1–6). Furthermore, we have information that diminutive butterfly collecting is occurring within the Spring Mountains (Service 2012, pp. 1–4). Because diminutive butterflies are sought, the inadvertent collection of Mt. Charleston blue butterflies has likely occurred and is expected to continue.

When Austin first described the Mt. Charleston blue butterfly in 1980 (Austin 1980, p. 22), he indicated that collectors regularly visited areas close to the known collection sites of the Mt. Charleston blue butterfly. Records indicate collection has occurred in several locations within the Spring Mountains, with Lee Canyon being among the most popular areas for butterfly collecting (Table 2; Austin 1980, p. 22; Service 2012, p. 2). Butterfly collectors may sometimes remove the only individual of a subspecies observed during collecting trips, even if it is known to be a unique specimen (Service 2012, p. 3). In many instances, a collector may not know he has a particularly rare or scarce species until after collection and subsequent identification takes place. The best available information indicates that Mt. Charleston blue butterflies have been collected for personal use (Service 2012, p. 2).

TABLE 2—NUMBERS OF MT. CHARLESTON BLUE BUTTERFLY SPECIMENS COLLECTED BY AREA, YEAR, AND SEX

Collection area	Year	Male	Female	Unknown	Total
Mt. Charleston	1928			*~700	*~700
Willow Creek	1928	15	19		34
Lee Canyon	1963	8	6	8	22
	1976	1			1
	2002	1			1
Kyle Canyon	1965	3			3
Cathedral Rock	1972			1	1
Deer Creek Rd	1950	2			2
South Loop	2007			1	1
Total		30	25	10	65

References: Garth 1928, p. 93; Howe 1975, Plate 59; Austin 1980, p. 22; Austin and Austin 1980, p. 30; Kingsley 2007, p. 4; Service 2012, p. 2

* = Collections by Frank Morand as reported in Garth 1928, p. 93. Not included in totals.

In some cases, private collectors often have more extensive collections of particular butterfly species than museums (Alexander 1996, p. 2). Butterfly collecting (except those with protected status) for noncommercial (recreational and personal) purposes does not require a special use authorization (Forest Service 1998b, p. 1; Joslin 1998, p. 74). However, within the SMNRA, Lee Canyon, Cold Creek, Willow Creek, and upper Kyle Canyon have been identified since 1996 as areas where permits are required for any butterfly collecting (Forest Service 1998, pp. 28, E9). However, no permits have been issued for collecting in these areas.

On Forest Service-administered lands, a special use permit is required for the commercial collection of butterflies (36 CFR 251.50), which would include collections for research, museums, universities, or professional societies (Forest Service 2003, pp. 2–3). There are no records indicating that special use permits have been issued for commercial collecting of Mt. Charleston blue butterflies in the Spring Mountains (S. Hinman 2011, pers. comm.); however, as discussed above, unauthorized commercial collecting has occurred in the past.

For most butterfly species, collecting is generally thought to have less of an impact on butterfly populations compared to other threats. Weiss *et al.* (1997, p. 29) indicated that, in general, responsible collecting posed little harm to populations. However, when a butterfly population is very small, any collection of butterflies results in the direct mortality of individuals and may greatly affect the population's viability and ability to recover. Populations already stressed by other factors may be severely threatened by intensive collecting (Thomas 1984, p. 345; Miller 1994, pp. 76, 83; New *et al.* 1995, p. 62). Thomas 1984 (p. 345) suggested that closed, sedentary populations of less than 250 adults are most likely to be at risk from overcollection.

In summary, due to the small number of discrete populations, overall small metapopulation size, close proximity to roads and trails, restricted range, and evidence of ongoing collection, we have determined that collection is a threat to the subspecies now and will continue to be in the future.

Factor C. Disease or Predation

We are not aware of any information regarding impacts from either disease or predation on the Mt. Charleston blue butterfly. Therefore, we do not find that disease or predation is a threat to the Mt. Charleston blue butterfly or likely to become a threat.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether existing regulatory mechanisms are inadequate to address the threats to the species discussed under the other factors. Section 4(b)(1)(A) of the Act requires the Service to take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species * * *.'' In relation to Factor D under the Act, we interpret this language to require the Service to consider relevant Federal, State, and tribal laws, regulations, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the species. We give strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

Having evaluated the significance of the threat as mitigated by any such conservation efforts, we analyze under Factor D the extent to which existing regulatory mechanisms are inadequate to address the specific threats to the species. Regulatory mechanisms, if they exist, may reduce or eliminate the impacts from one or more identified threats. In this section, we review existing State and Federal regulatory mechanisms to determine whether they effectively reduce or remove threats to the Mt. Charleston blue butterfly.

The Mt. Charleston blue butterfly occurs primarily on Federal land under the jurisdiction of the Forest Service; therefore, the discussion below focuses on Federal laws. There is no available information regarding local land use laws and ordinances that have been issued by Clark County or other local government entities for the protection of the Mt. Charleston blue butterfly. Nevada Revised Statutes sections 503 and 527 offer protective measures to wildlife and plants, but do not include invertebrate species such as the Mt. Charleston blue butterfly. Therefore, no regulatory protection is offered under Nevada State law. Please note that actions adopted by local groups, States, or Federal entities that are discretionary, including conservation strategies and guidance, are not regulatory mechanisms and were discussed above in the Conservation Agreement and Plans That May Offset Habitat Threats section in Factor A, above.

Mt. Charleston blue butterflies have been detected in only two general areas in recent years—the South Loop Trail area, where adult butterflies were recently detected during the summer of 2010 and 2011, and at LVSSR in 2010. The Forest Service manages lands designated as wilderness under the Wilderness Act of 1964 (16 U.S.C. 1131–1136). With respect to these areas, the Wilderness Act states the following: (1) New or temporary roads cannot be built; (2) there can be no use of motor vehicles, motorized equipment, or motorboats; (3) there can be no landing of aircraft; (4) there can be no other form of mechanical transport; and (5) no structure or installation may be built. As such, Mt. Charleston blue butterfly habitat in the South Loop Trail area is protected from direct loss or degradation by the prohibitions of the Wilderness Act. Mt. Charleston blue butterfly habitat at LVSSR and elsewhere in Lee Canyon and Kyle Canyon is located outside of the Mt. Charleston Wilderness, and thus is not subject to protections afforded by the Wilderness Act.

The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*), requires Federal agencies, such as the Forest Service, to describe proposed agency actions, consider alternatives, identify and disclose potential environmental impacts of each alternative, and involve the public in the decisionmaking process. Federal agencies are not required to select the NEPA alternative having the least significant environmental impacts. A Federal agency may select an action that will adversely affect sensitive species provided that these effects are identified in a NEPA document. The NEPA itself is a disclosure law, and does not require subsequent minimization or mitigation of actions taken by Federal agencies. Although Federal agencies may include conservation measures for the Mt. Charleston blue butterfly as a result of the NEPA process, such measures are not required by the statute. The Forest Service is required to analyze its projects, listed under Factor A, above, in accordance with the NEPA.

The SMNRA is one of 10 districts of the Humboldt-Toiyabe National Forest and was established by Public Law 103–63, dated August 4, 1993 (the Spring Mountains National Recreation Area Act, 16 U.S. C. 460hhh *et seq.*). The Federal lands of the SMNRA are managed by the Forest Service in Clark and Nye Counties, Nevada, for the following purposes:

(1) To preserve the scenic, scientific, historic, cultural, natural, wilderness, watershed, riparian, wildlife, threatened and endangered species, and other values contributing to public enjoyment and biological diversity in the Spring Mountains of Nevada;

(2) To ensure appropriate conservation and management of natural and recreational resources in the Spring Mountains; and

(3) To provide for the development of public recreational opportunities in the Spring Mountains for the enjoyment of present and future generations. Habitat of the Mt. Charleston blue butterfly is predominantly in the SMNRA and one of several resources considered by the Forest Service under the guidance of its land management plans.

The National Forest Management Act (NFMA) of 1976, as amended (16 U.S.C. 1600 *et seq.*), provides the principal guidance for the management of activities on lands under Forest Service jurisdiction through associated land and resource management plans for each forest unit. Under NFMA and other Federal laws, the Forest Service has authority to regulate recreation, vehicle travel and other human disturbance, livestock grazing, fire management, energy development, and mining on lands within its jurisdiction. Current guidance for the management of Forest Service lands in the SMNRA is under the Toiyabe National Forest Land and Resource Management Plan and the Spring Mountains National Recreation Area General Management Plan (Forest Service 1996). In June 2006, the Forest Service added the Mt. Charleston blue butterfly, and three other endemic butterflies, to the Regional Forester's Sensitive Species List, in accordance with Forest Service Manual 2670. The Forest Service's objective in managing sensitive species is to prevent listing of species under the Act, maintain viable populations of native species, and develop and implement management objectives for populations and habitat of sensitive species. Projects listed in Factor A, above, have been guided by these Forest Service plans, policies, and guidance. These plans, policies, and guidance notwithstanding, removal or degradation of known occupied and presumed occupied butterfly habitat has occurred as a result of projects approved by the Forest Service in Upper Lee Canyon. Additionally, this guidance has not been effective in reducing other threats to the Mt. Charleston blue butterfly (for example, invasion of nonnative plant species and commercial and personal collection activities) (Weiss *et al.* 1995, pp. 5–6, Titus and Landau 2003, p. 1; Boyd and Murphy 2008, p. 6; Service 2012, pp. 1–4).

Since the Mt. Charleston blue butterfly is designated a sensitive species, Standard 0.28 of the Land and Resource Management Plan for the Spring Mountains requires a collecting permit issued by the Regional Forester (except for traditional use by American Indians) (Forest Service 1996, p. 18). Furthermore, Standard 11.6 indicates that collecting, regardless of species, in specific areas, including Cold Creek, Lee Canyon, upper Kyle Canyon, and Willow Creek, also requires a permit (Forest Service 1996, p. 31). These items, identified as ''standards,'' are constraints or mitigation measures that must be followed as directed by the General Management Plan (Forest Service 1996, p. 2). Collection permits are not required for activities contracted by, or performed under, agreement with the Forest Service. Additional information obtained since publication of the 12-month finding indicates that collecting has occurred before and after the Mt. Charleston blue butterfly was designated a sensitive species (see Factor B); however, no permits have been issued to date (Service 2012, p. 1–4; Shawnee Hinman, pers. comm. March 22, 2012).

Summary of Factor D

Although Mt. Charleston blue butterfly habitat at the South Loop Trail area is to be afforded protection by prohibitions of the Wilderness Act from many types of habitat-disturbing actions, in fact, habitat-disturbance activities (such as those associated with recreation) have occurred in other locations and may continue to occur. Projects conducted under the current management plans have disturbed habitat, and may occur again in the future.

The current existing regulatory mechanism designed to regulate the collection of Mt. Charleston blue butterflies is not effectively addressing or ameliorating the threat of collection to the Mt. Charleston blue butterfly, because of inadequate enforcement. Specifically, the Mt. Charleston blue butterfly is designated a sensitive species by the Forest Service, and, since 2006, a permit has been required for the noncommercial collection of this subspecies. This requirement provides limited protection, however, because collections of this and other species of butterflies have taken place without permits being issued. As discussed above, we have evidence of nonpermitted collection. Therefore, existing law, regulation, and policy have not prevented the collection of Mt. Charleston blue butterflies (see Factor B, Table 2).

In addition, Mt. Charleston blue butterflies occur in extremely small populations that are limited in distribution and are vulnerable to collections, projects, or actions that impact populations or even relatively small areas of occupied or suitable habitat. Therefore, we conclude that there is an inadequacy in the existing regulatory mechanisms designed to protect the Mt. Charleston blue butterfly from threats discussed in this finding (Factor A and B above).

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Our analyses under the Endangered Species Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

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 (e.g., 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). IPCC models are at a landscape scale and project that precipitation will decrease in the southwestern United States (IPCC 2007b, p. 8, Table SPM.2). The IPCC reports that temperature increases and rising air and ocean temperature is unquestionable (IPCC 2007a, p. 4). Site-specific models project temperatures in Nevada are likely to increase as much as 2.8 degrees Celsius (5 degrees Fahrenheit) by the 2050s (TNC 2011, p. 1). Precipitation variability in the Mojave Desert region is linked spatially and temporally with events in the tropical and northern Pacific Oceans (El Niño and La Niña) (USGS 2004, pp. 2–3). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change as it affects the Mt. Charleston blue butterfly.

The Mt. Charleston blue butterfly population has declined since the last high-population year in 1995 (a total of 121 butterflies were counted during surveys of 2 areas at LVSSR on 2 separate dates (Weiss 1996, p. 4)). This subspecies has a limited distribution, and population numbers are likely small. Small butterfly populations have a higher risk of extinction due to random environmental events (Shaffer 1981, p. 131; Shaffer 1987, pp. 69–75; Gilpin and Soule 1986, pp. 24–28). Weather extremes can cause severe butterfly population reductions or extinctions (Murphy *et al.* 1990, p. 43; Weiss *et al.* 1987, pp. 164–167; Thomas *et al.* 1996, pp. 964–969). Given the limited distribution and likely low population numbers of the Mt. Charleston blue butterfly, late-season snowstorms, severe summer monsoon thunderstorms, and drought have the potential to adversely impact the subspecies.

Late-season snowstorms have caused alpine butterfly extirpations (Ehrlich *et al.* 1972, pp. 101–105), and false spring conditions followed by normal winter snowstorms have caused adult and pre-diapause larvae mortality (Parmesan 2005, pp. 56–60). In addition, high rainfall years have been associated with butterfly population declines (Dobkin *et al.* 1987, pp. 161–176). Extended periods of rainy weather can also slow larval development and reduce overwintering survival (Weiss *et al.* 1993, pp. 261–270). Weiss *et al.* (1997, p. 32) suggested that heavy summer monsoon thunderstorms adversely impacted Mt. Charleston blue butterflies during the 1996 flight season. During the 2006 and 2007 flight season, severe summer thunderstorms may have affected the flight season at LVSSR and the South Loop Trail (Newfields 2006,

pp. 11 and 14; Kingsley 2007, p. 8). Additionally, drought has been shown to lower butterfly populations (Ehrlich *et al.* 1980, pp. 101–105; Thomas 1984, p. 344). Drought can cause butterfly host plants to mature early and reduce larval food availability (Ehrlich *et al.* 1980, pp. 101–105; Weiss 1987, p. 165). This has likely affected the Mt. Charleston blue butterfly. Murphy (2006, p. 3) and Boyd (2006, p. 1) both assert a series of drought years, followed by a season of above-average snowfall and then more drought, could be a reason for the lack of butterfly sightings in 2006. Continuing drought could be responsible for the lack of sightings in 2007 and 2008 (Datasmiths 2007, p. 1; Boyd 2008, p. 2). Based on this evidence, we believe that the Mt. Charleston blue butterfly has likely been affected by unfavorable climatic changes in precipitation and temperature that are both ongoing and projected to continue into the future.

High-elevation species like the Mt. Charleston blue butterfly may be particularly susceptible to some level of habitat loss due to global climate change exacerbating threats already impacting the subspecies (Peters and Darling 1985, p. 714; Hill *et al.* 2002, p. 2170). The Intergovernmental Panel on Climate Change (IPCC) has high confidence in predictions that extreme weather events, warmer temperatures, and regional drought are very likely to increase in the northern hemisphere as a result of climate change (IPCC 2007, pp. 15–16). Climate models show the southwestern United States has transitioned into a more arid climate of drought that is predicted to continue into the next century (Seager *et al.* 2007, p. 1181). In the past 60 years, the frequency of storms with extreme precipitation has increased in Nevada by 29 percent (Madsen and Figdor 2007, p. 37). Changes in local southern Nevada climatic patterns cannot be definitively tied to global climate change; however, they are consistent with IPCC-predicted patterns of extreme precipitation, warmer than average temperatures, and drought (Redmond 2007, p. 1). Therefore, we think it likely that climate change will impact the Mt. Charleston blue butterfly and its high-elevation habitat through predicted increases in extreme precipitation and drought. Alternating extreme precipitation and drought may exacerbate threats already facing the subspecies as a result of its small population size and threats to its habitat.

Summary of Factor E

Small butterfly populations have a higher risk of extinction due to random environmental events (Shaffer 1981, p. 131; Gilpin and Soule 1986, pp. 24–28; Shaffer 1987, pp. 69–75). Because of its small population and restricted range, the Mt. Charleston blue butterfly is vulnerable to random environmental events; in particular, the Mt. Charleston blue butterfly is threatened by extreme precipitation events and drought. In the past 60 years, the frequency of storms with extreme precipitation has increased in Nevada by 29 percent (Madsen and Figdor 2007, p. 37), and it is predicted that altered regional patterns of temperature and precipitation as a result of global climate change will continue (IPCC 2007, pp. 15–16). Throughout the entire range of the Mt. Charleston blue butterfly, altered climate patterns could increase the potential for extreme precipitation events and drought, and may exacerbate the threats the subspecies already faces given its small population size and the threats to the alpine environment where it occurs. Based on this information, we find that other natural or manmade factors are affecting the Mt. Charleston blue butterfly such that these factors are a threat to the subspecies' continued existence.

Proposed Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Mt. Charleston blue butterfly. The Mt. Charleston blue butterfly is sensitive to environmental variability with the butterfly population rising and falling in response to environmental conditions (see Status and Trends section). The best available information suggests the Mt. Charleston blue butterfly population has been in decline since 1995, the last year the subspecies was observed in high numbers, and that the population is now likely extremely small (see Status and Trends section). To some extent, the Mt. Charleston blue butterfly, like most butterflies, has evolved to survive periods of unfavorable environmental conditions as diapausing larvae or pupae (Scott 1986, pp. 26–30). The pupae of some butterfly species are known to persist in diapause up to 5 to 7 years (Scott 1986, p. 28). The number of years the Mt. Charleston blue butterfly can remain in diapause is unknown. It has been speculated that the Mt. Charleston blue butterfly may only be able to diapause for two seasons in a row (Murphy 2006, p. 1; Boyd and Murphy 2008, p. 21); however, a longer diapause period may be possible (Murphy 2006, p. 1; Datasmiths 2007, p. 6; Boyd and Murphy 2008, p. 22). The best available information suggests environmental conditions from 2006 to 2009 have not been favorable to the Mt. Charleston blue butterfly (see Status and Trends section).

Surveys are planned for 2012 to further determine the status and provide more knowledge about the ecology of the Mt. Charleston blue butterfly. Threats facing the Mt. Charleston blue butterfly, discussed above under listing Factors A, B, D, and E, increase the risk of extinction of the subspecies, given its few occurrences in a small area. The loss and degradation of habitat due to fire suppression and succession; the implementation of recreational development projects and fuels reduction projects; and the increases in nonnative plants (see Factor A), along with the persistent, ongoing threat of collection of the subspecies for commercial and noncommercial purposes (see Factor B) and the inadequacy of existing regulatory mechanisms to prevent these impacts (see Factor D), will increase the inherent risk of extinction of the remaining few occurrences of the Mt. Charleston blue butterfly. These threats are likely to be exacerbated by the impact of climate change, which is anticipated to increase drought and extreme precipitation events (see Factor E). The Mt. Charleston blue butterfly is currently in danger of extinction because only small populations are known to occupy 2 of 18 historical locations, its status at 8 other locations where it is presumed to be occupied may be nearing extirpation, and the threats are ongoing and persistent at all known and presumed occupied locations.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the Mt. Charleston blue butterfly is presently in danger of extinction throughout its entire range, based on the immediacy, severity, and scope of the threats described above and its limited distribution of two known occupied locations and eight presumed occupied locations nearing extirpation. The Mt. Charleston blue butterfly thus meets the definition of an endangered species rather than threatened species because (1) It has been extirpated from six locations and eight others are imminently near extirpation; (2) it is limited to only two small populations; and (3) these small populations are facing severe and imminent threats. Therefore, on the basis of the best

available scientific and commercial information, we propose listing the Mt. Charleston blue butterfly as endangered in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is a threatened or endangered species throughout all or a significant portion of its range. The Mt. Charleston blue butterfly proposed for listing in this rule is highly restricted in its range and the threats occur throughout its range. Therefore, we assessed the status of the subspecies throughout its entire range. The threats to the survival of the subspecies occur throughout the subspecies' range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and proposed determination applies to the subspecies throughout its entire range, and we did not further evaluate a significant portion of the subspecies' range.

Available Conservation Measures

Conservation measures provided to species listed as an endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that are designed to achieve recovery of the species, objective, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Additionally, recovery plans contain estimated time and costs to carry out measures that are needed to achieve the goal and intermediate steps toward that goal. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from the Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Nevada would be eligible for Federal funds to implement management actions that promote the protection and recovery of the Mt. Charleston blue butterfly. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the Mt. Charleston blue butterfly is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape altering activities on Federal lands administered by the Forest Service.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened

wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens of the species at least 100 years old, as defined by section 10(h)(1) of the Act;

(2) Introduction of nonnative species or the unauthorized release of biological control agents that compete with or attack any life stage of the Mt. Charleston blue butterfly, such as the introduction of nonnative ant, wasp, fly, beetle, or other insect species to the State of Nevada; or

(3) Unauthorized modification of known occupied or presumed occupied habitats of the Mt. Charleston blue butterfly that support larval host and nectar plants.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Requests for copies of the regulations concerning listed animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 2800 Cottage Way, Suite W–2606, Sacramento, California, 95825–1846 (telephone 916–414–6464; facsimile 916–414–6486).

Critical Habitat and Prudency Determination for the Mt. Charleston Blue Butterfly

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.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, we designate critical habitat at the time we determine that a species is an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species. We have determined that both circumstances apply to the Mt Charleston blue butterfly. This determination involves a weighing of the expected increase in threats associated with a critical habitat designation against the benefits gained by a critical habitat designation. An explanation of this ''balancing'' evaluation follows.

Increased Threat to the Subspecies by Designating Critical Habitat

Designation of critical habitat requires the publication of maps and a narrative description of specific critical habitat areas in the **Federal Register**. The degree of detail in those maps and boundary descriptions is greater than the general location descriptions provided in this proposal to list the species as endangered. We are concerned that designation of critical habitat would more widely announce the exact location of the butterflies to poachers, collectors, and vandals and further facilitate unauthorized collection and trade. Due to its extreme rarity (a low number of individuals, combined with small areas inhabited by the remaining metapopulation), this butterfly is highly vulnerable to collection. Disturbance and other harm from humans are also serious threats to the butterfly and its habitat (see Factor B above). At this time, removal of any individuals or damage to habitat would have devastating consequences for the survival of the subspecies. These threats would be exacerbated by the publication of maps and descriptions in the **Federal Register** and local newspapers outlining the specific locations of this critically imperiled butterfly. Maps and descriptions of critical habitat, such as those that would appear in the **Federal Register** if critical habitat were designated, are not now available to the general public. Please note that while we have listed area and trail names of historically occupied, presumed occupied, and currently occupied locations, these lists do not indicate specific locations, and the actual currently known occupied locations are a portion of the much larger-scale areas listed in the tables in this document.

We have specific evidence of taking for this subspecies, and the noncommercial collection of butterflies from the Spring Mountains in Nevada is ongoing (Service 2012, pp. 1–5). As a subspecies endemic to the Spring Mountains, the Mt. Charleston blue butterfly is sought by collectors who may not be aware of specific locations where it is found (Service 2012, pp. 1–5). While we are not aware of a specific market for butterflies from the Spring Mountains, there have been collections documented (collected, collected and sold, and collected with intent to sell) in nearby surrounding areas such as the Death Valley National Park, Grand Canyon National Park, and Kaibab National Forest (U.S. Attorney's Office, 1993, pp. 2–3). A great deal of effort is made by collectors to conceal collection activities that may be legal or illegal, so as not to draw attention to the collectors (U.S. Attorney's Office, 1993, pp. 1–86). Some collections in nearby areas have been for commercial purposes (U.S. Attorney's Office, 1993, pp. 1–86).

Additionally, we are aware of a market for butterflies that look similar to the Mt. Charleston blue butterfly, including one of the species proposed for listing due to similarity of appearance. It is clear that a demand currently exists for both imperiled butterflies and those similar in appearance to the Mt. Charleston blue. Due to the small number of discrete populations, overall small metapopulation size, accessibility of some occupied habitats, and restricted range, we find that collection is a threat to the Mt. Charleston blue butterfly and could occur at any time. Even limited collection from the remaining metapopulation would have deleterious effects on the reproductive and genetic viability of the subspecies and thus could contribute to its extinction. Identification of critical habitat would increase the severity of this threat by depicting the exact locations where the subspecies may occur and more widely publicizing this information, exposing the fragile population and its habitat to greater risks.

Identification and publication of critical habitat maps would also likely increase enforcement problems. Although take prohibitions exist, effective enforcement is difficult. As discussed in Factors B, D, and elsewhere above, the threat of collection exists, and areas are already difficult to patrol. Areas within the Mt. Charleston Wilderness are remote and accessible mainly by a steep and long ascent, making the areas difficult for law enforcement personnel to patrol and monitor. Designation of critical habitat could facilitate further use and misuse of sensitive habitats and resources, and create additional difficulty for law enforcement personnel in an already challenging environment. Overall, we find that designation of critical habitat will increase the likelihood and severity of the threats of unauthorized collection of the subspecies and destruction of sensitive habitat, as well as exacerbate enforcement issues.

Benefits to the Subspecies From Critical Habitat Designation

It is true that designation of critical habitat for the Mt. Charleston blue butterfly within the Spring Mountains would have some beneficial effects. Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of that species' critical habitat. Critical habitat only provides protections where there is a Federal nexus; that is, those actions that come under the purview of section 7 of the Act. Critical habitat designation has no application to actions that do not have a Federal nexus. Section 7(a)(2) of the Act mandates that Federal agencies, in consultation with the Service, evaluate the effects of their proposed actions on any designated critical habitat. Similar to the Act's requirement that a Federal agency action not jeopardize the continued existence of listed species, Federal agencies have the responsibility not to implement actions that would destroy or adversely modify designated critical habitat. Critical habitat designation alone, however, does not require that a Federal action agency implement specific steps toward species recovery.

All areas known to support the Mt. Charleston blue butterfly since 1995 are or have been on Federal lands; these areas are currently being managed for multiple uses. Management efforts are reviewed by the Forest Service and the Service to consider Mt. Charleston blue butterfly conservation needs. Because the butterfly exists only as two occupied and eight presumed occupied, small metapopulations, any future activity involving a Federal action that would destroy or adversely modify occupied critical habitat would also likely jeopardize the subspecies' continued existence. Consultation with respect to critical habitat would provide additional protection to a species only if the agency action would result in the destruction or adverse modification of the critical habitat but would not jeopardize the continued existence of the species. In the absence of a critical habitat designation, areas that support the Mt. Charleston blue butterfly will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as appropriate. Federal actions affecting the Mt. Charleston blue butterfly, even in the absence of designated critical habitat areas, will still benefit from consultation pursuant to section 7(a)(2) of the Act and may still result in jeopardy findings. Another potential benefit to the Mt. Charleston blue butterfly from designating critical habitat is that it could serve to educate landowners, State and local government agencies, and the general public regarding the potential conservation value of the area. In addition, designation of critical habitat could inform State agencies and local governments about areas that could be conserved under State laws or local ordinances. However, since awareness and education involving the Mt. Charleston blue is already well underway, designation of critical habitat would likely provide only minimal incremental benefits. Therefore, designation of specific areas as critical habitat that are currently occupied or recently occupied is unlikely to provide measurable benefit to the subspecies.

Increased Threat to the Subspecies Outweighs the Benefits of Critical Habitat Designation

Upon reviewing the available information, we have determined that the designation of critical habitat would increase the threat to the Mt. Charleston blue butterfly from unauthorized collection. At the same time, we have determined that a designation of critical habitat is likely to confer little measurable benefit to the subspecies beyond that provided by listing. Results of consultations on Federal actions affecting the Mt. Charleston blue butterfly, should it be listed under the Act, would likely be no different with critical habitat than without its designation. Overall, we find that the risk of increasing significant threats to the subspecies by publishing location information in a critical habitat designation greatly outweighs the benefits of designating critical habitat.

In conclusion, we find that the designation of critical habitat is not prudent, in accordance with 50 CFR 424.12(a)(1), because the Mt. Charleston blue butterfly is threatened by collection, and designation can reasonably be expected to increase the degree of these threats to the subspecies and its habitat. Critical habitat designation could provide some benefit to the subspecies, but these benefits are significantly outweighed by the increased risk of collection pressure and enforcement problems that could result from depicting, through publicly available maps and descriptions, exactly where this extremely rare butterfly and its habitat occurs.

Similarity of Appearance

Section 4(e) of the Act authorizes the treatment of a species, subspecies, or population segment as an endangered or threatened species if: ''(a) Such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species; (b) the effect of this substantial difficulty is an additional threat to an endangered or threatened

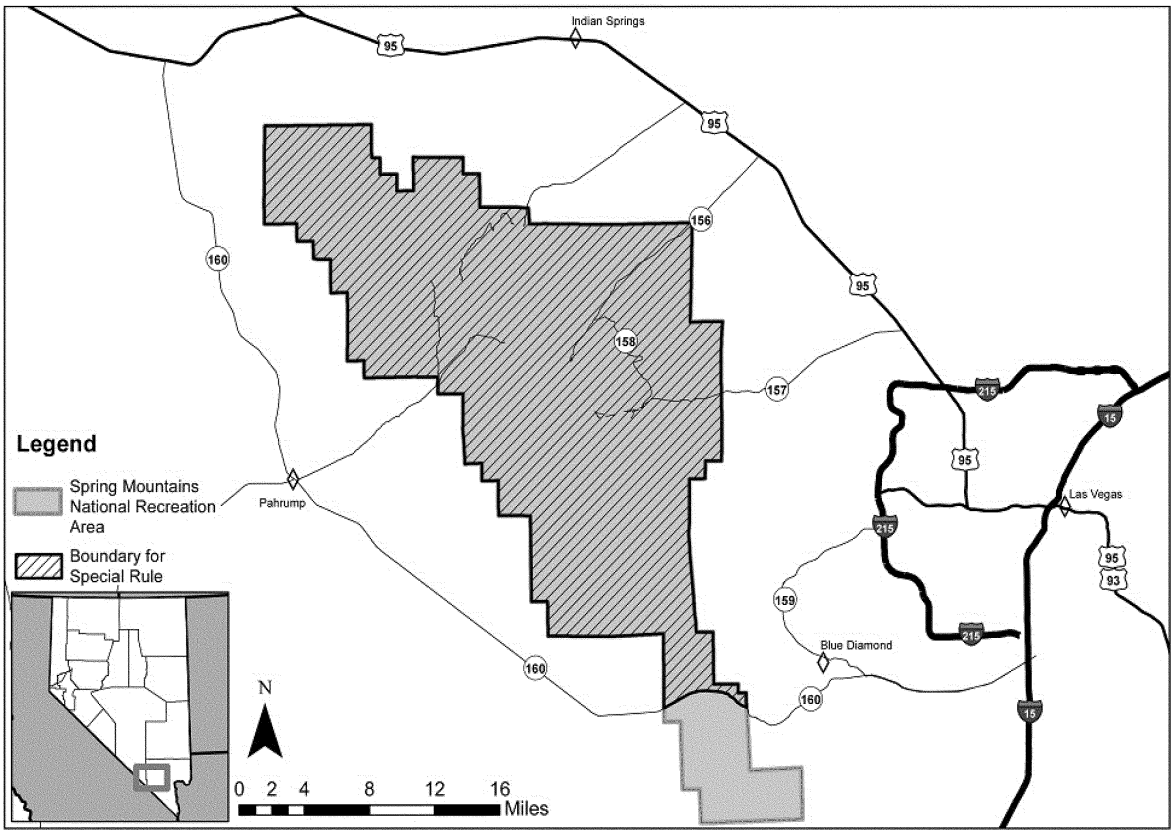
species; and (c) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.'' Listing a species as an endangered or threatened species under the similarity of appearance provisions of the Act extends the take prohibitions of section 9 of the Act to cover the species. A designation of an endangered or threatened species due to similarity of appearance under section 4(e) of the Act, however, does not extend other protections of the Act, such as consultation requirements for Federal agencies under section 7 and the recovery planning provisions under section 4(f), that apply to species that are listed as an endangered or threatened species under section 4(a). All applicable prohibitions and exceptions for species listed under section 4(e) of the Act due to similarity of appearance to a threatened or endangered species will be set forth in a special rule under section 4(d) of the Act.

There are only slight morphological differences between the Mt. Charleston blue and the lupine blue, Reakirt's blue, Spring Mountains icarioides blue, and the two Spring Mountains dark blue butterflies, making it difficult to differentiate between the species, especially due to their small size. This poses a problem for Federal and State law enforcement agents trying to stem unauthorized collection of the Mt. Charleston blue. It is quite possible that collectors authorized to collect similar species may inadvertently (or purposefully) collect the Mt. Charleston blue butterfly, thinking it to be the lupine blue, Reakirt's blue, Spring Mountains icarioides blue, or one of the two Spring Mountains dark blue butterflies, which also occur in the same geographical area and habitat type and have overlapping flight periods. The listing of these similar blue butterflies as threatened species due to similarity of appearance eliminates the ability of amateur butterfly enthusiasts and private and commercial collectors to purposefully or accidentally misrepresent the Mt. Charleston blue as one of these other species.

The listing will facilitate Federal and State law enforcement agents' efforts to curtail unauthorized possession, collection, and trade in the Mt. Charleston blue. At this time, the five similar butterflies are not protected by the State. Extending the prohibition of collection to the five similar butterflies through this listing of these species due to similarity of appearance under section 4(e) of the Act and providing applicable prohibitions and exceptions in a special rule under section 4(d) of the Act will provide greater protection to the Mt. Charleston blue. For these reasons, we are proposing to list the lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and the two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*) as threatened species due to similarity of appearance to the Mt. Charleston blue, pursuant to section 4(e) of the Act on private and public lands within the District Boundary for the Spring Mountains National Recreation Area of the Humboldt-Toiyabe National Forest and north of Nevada State Highway 160 (commonly referred to as the Spring Mountains and Mt. Charleston) (see Figure 1).

Figure 1. Map of the area where the proposed special rule for the Mt. Charleston blue butterfly applies to the five similarity of appearance butterflies.

Map of Where a Special Rule Under Section 4(d) of the Act Applies to Five Similarity-of-Appearance Butterflies



Special Rule Under Section 4(d) of the Act

Whenever a species is listed as a threatened species under the Act, the Secretary may specify regulations that he deems necessary and advisable to provide for the conservation of that species under the authorization of section 4(d) of the Act. These rules, commonly referred to as ''special rules,'' are found in part 17 of title 50 of the Code of Federal Regulations (CFR) in sections 17.40–17.48. This special rule to be promulgated under the designation 50 CFR 17.47, will establish prohibitions on collection of the lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*), or their immature stages, where their ranges overlap with the Mt. Charleston blue butterfly, in order to protect the Mt. Charleston blue butterfly from collection, possession, and trade. In this context, collection is defined as any activity where lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and the two Spring Mountains dark blue butterflies or their immature stages are, or are attempted to be, collected.

Capture of the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and the two Spring Mountains dark blue butterflies, or their immature stages, is not prohibited if it is accidental, such as during research, provided the animal is released immediately upon discovery at the point of capture. Scientific activities involving collection or propagation of these similarity-of-appearance butterflies are not prohibited provided there is prior written authorization from the Service. All otherwise legal activities involving the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and the two Spring Mountains dark blue butterflies that are conducted in accordance with applicable State, Federal, Tribal, and local laws and regulations are not considered to be take under this proposed rule.

Effects of These Rules

Listing the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and the two Spring Mountains dark blue butterflies as threatened species under the ''similarity of appearance'' provisions of the Act, and the promulgation of a special rule under section 4(d) of the Act, extend take prohibitions to these species and their immature stages. Capture of these species, including their immature stages, is not prohibited if it is accidental, such as during research, provided the animal is released immediately upon discovery, at the point of capture.

There are over 100 species and subspecies of butterflies within the 10 genera, occurring domestically and internationally, that could be confused with the Mt. Charleston blue butterfly, or the 4 similarity of appearance butterflies. We are aware that legal trade in some of these other blue butterflies exists. To avoid confusion and delays in legal trade, we strongly recommend maintaining the appropriate documentation and declarations with legal specimens at all times, especially when importing them into the United States. Legal trade of other species that may be confused with the Mt. Charleston blue butterfly or the five similarity of appearance butterflies should also comply with the import/export transfer regulations under 50 CFR 14, where applicable.

All otherwise legal activities that may involve what we would normally define as incidental take (take that results from, but is not the purpose of, carrying out an otherwise lawful activity) of these similar butterflies, and which are conducted in accordance with applicable State, Federal, Tribal, and local laws and regulations, will not be considered take under this regulation. For example, this special 4(d) rule exempts legal application of pesticides, grounds maintenance, recreational facilities maintenance, vehicle use, vegetation management, exotic plant removal, and burning. These actions will not be considered as violations of section 9 of the Act if they result in incidental take of any of the similarity of appearance butterflies. We think that not applying take prohibitions for those otherwise legal activities to these five similar butterflies (lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and the two Spring Mountains dark blue butterflies) will not pose a threat to the Mt. Charleston blue because: (1) Activities such as grounds maintenance and vegetation control in developed or commercial areas are not likely to affect the Mt. Charleston blue, and (2) the primary threat to the Mt. Charleston blue comes from collection and commercial trade. Listing the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and the two Spring Mountains dark blue butterflies under the similarity of appearance provision of the Act, coupled with this special 4(d) rule, will help minimize enforcement problems related to collection, and enhance conservation of the Mt. Charleston blue butterfly.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing decision is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific proposed listing, prudency determination, and similarity of appearance proposal.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **ADDRESSES** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Persons needing reasonable accommodation to attend and participate in a public hearing should contact the Nevada Fish and Wildlife Office at 775–861–6300, as soon as possible. To allow sufficient time to process requests, please call no later than 1 week before the hearing date. Information regarding this proposed rule is available in alternative formats upon request.

Nonsubstantive Administrative Action

Included in this proposed rule is text to correct errors in a previously issued rule. When we published the final rule to list the Miami blue butterfly (*Cyclargus thomasi bethunebakeri*) as endangered and to list three additional butterflies as threatened by similarity of appearance (77 FR 20948; April 6, 2012), the last column in the table at 50 CFR 17.11(h) was inadvertently omitted

from the published rule. This column indicates where the public may locate a special rule pertaining to the three species that were listed as threatened by similarity of appearance (cassius blue butterfly, ceraunus blue butterfly, and nickerbean blue butterfly) in title 50 of the Code of Federal Regulations. Therefore, we are providing that information in this proposed rule. We are also proposing a revision to paragraph (a) of that special rule, which is found in 50 CFR 17.47, to make the format of that special rule consistent with this proposed special rule, which will be located immediately following, at 50 CFR 17.47(b). These changes are administrative and nonsubstantive.

Required Determinations

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.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as endangered or threatened under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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 in connection with designating critical habitat under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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 Mt. Charleston blue butterfly at the time of listing. Therefore, this rulemaking, if finalized, will not affect tribal lands.

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 Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Nevada Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h), the List of Endangered and Threatened Wildlife, by:

a. Revising the entries for ''Butterfly, cassius blue'', ''Butterfly, ceraunus blue'', ''Butterfly, Miami blue'', and Butterfly, nickerbean blue''; and

b. Adding new entries for ''Butterfly, lupine blue'', ''Butterfly, Mt. Charleston blue'', ''Butterfly, Reakirt's blue'', ''Butterfly, Spring Mountains dark blue'', ''Butterfly, Spring Mountains dark blue'', and ''Butterfly, Spring Mountains icarioides blue'', in alphabetical order under Insects, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
INSECTS							
*	*	*	*	*	*		*
Butterfly, cassius blue.	*Leptotes cassius theonus.*	U.S.A. (FL), Bahamas, Greater Antilles, Cayman Islands.	NA	T (S/A)	801	NA	17.47(a)
Butterfly, ceraunus blue.	*Hemiargus ceraunus antibubastus.*	U.S.A. (FL), Bahamas.	NA	T(S/A)	801	NA	17.47(a)
*	*	*	*	*	*		*
Butterfly, lupine blue	*Plebejus lupini texanus.*	U.S.A. (AZ, CA, CO, NE, NM, NV, TX, UT), Mexico.	NA	T (S/A)		NA	17.47(b)
*	*	*	*	*	*		*
Butterfly, Miami blue	*Cyclargus thomasi bethunebakeri.*	U.S.A. (FL), Bahamas.	NA	E	801	NA	NA
*	*	*	*	*	*		*
Butterfly, Mt. Charleston blue.	*Plebejus shasta charlestonensis.*	U.S.A. (NV), Spring Mountains.	NA	E		NA	NA
*	*	*	*	*	*		*
Butterfly, nickerbean blue.	*Cyclargus ammon* ..	U.S.A. (FL), Bahamas, Cuba.	NA	T(S/A)	801	NA	17.47(a)
*	*	*	*	*	*		*
Butterfly, Reakirt's blue.	*Echinargus isola*	U.S.A. (AR, AZ, CA, CO, IA, IL, IN, KS, LA, MI, MN, MO, MS, ND, NE, NM, NV, OH, OK, SD, TN, TX, UT, WA, WI, WY), Mexico.	NA	T(S/A)		NA	17.47(b)
*	*	*	*	*	*		*
Butterfly, Spring Mountains dark blue.	*Euphilotes ancilla cryptica.*	U.S.A. (NV), Spring Mountains.	NA	T(S/A)		NA	17.47(b)
Butterfly, Spring Mountains dark blue.	*Euphilotes ancilla purpura.*	U.S.A. (NV), Spring Mountains.	NA	T(S/A)		NA	17.47(b)
Butterfly, Spring Mountains icarioides blue.	*Plebejus icarioides austinorum.*	U.S.A. (NV), Spring Mountains.	NA	T(S/A)		NA	17.47(b)
*	*	*	*	*	*		*

3. Amend § 17.47 by revising the introductory text or paragraph (a) and paragraph (a)(4) and adding paragraph (b) to read as follows:

§ 17.47 Special rules–insects.

(a) Cassius blue butterfly *(Leptotes cassius theonus),* Ceraunus blue butterfly *(Hemiargus ceraunus antibubastus),* and Nickerbean blue butterfly *(Cyclargus ammon).* The provisions of this special rule apply to these species only when found in coastal counties of Florida south of Interstate 4 and extending to the boundaries of the State at the endpoints of Interstate 4 at Tampa and Daytona Beach. Specifically, regulated activities are prohibited in the following counties: Brevard, Broward, Charlotte, Collier, De Soto, Hillsborough, Indian River, Lee, Manatee, Pinellas, Sarasota, St. Lucie, Martin, Miami-Dade, Monroe, Palm Beach, and Volusia.

* * * * *

(4) Collection of the cassius blue butterfly, ceraunus blue butterfly, and nickerbean blue butterfly is prohibited in the areas set forth in paragraph (a).

(b) Lupine blue butterfly (*Plebejus lupini texanus*), Reakirt's blue butterfly (*Echinargus isola*), Spring Mountains icarioides blue butterfly (*Plebejus icarioides austinorum*), and two Spring Mountains dark blue butterflies (*Euphilotes ancilla cryptica* and *E. a. purpura*). The provisions of this special rule apply to these species only when found on private and public lands within the District Boundary for the Spring Mountains National Recreation Area of the Humboldt-Toiyabe National Forest and north of Nevada State Highway 160 (commonly referred to as the Spring Mountains and Mt. Charleston).

(1) The provisions of § 17.31(c) apply to these species (lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and two Spring Mountains dark blue butterflies), regardless of whether in the wild or in captivity, and also apply to the progeny of any such butterfly.

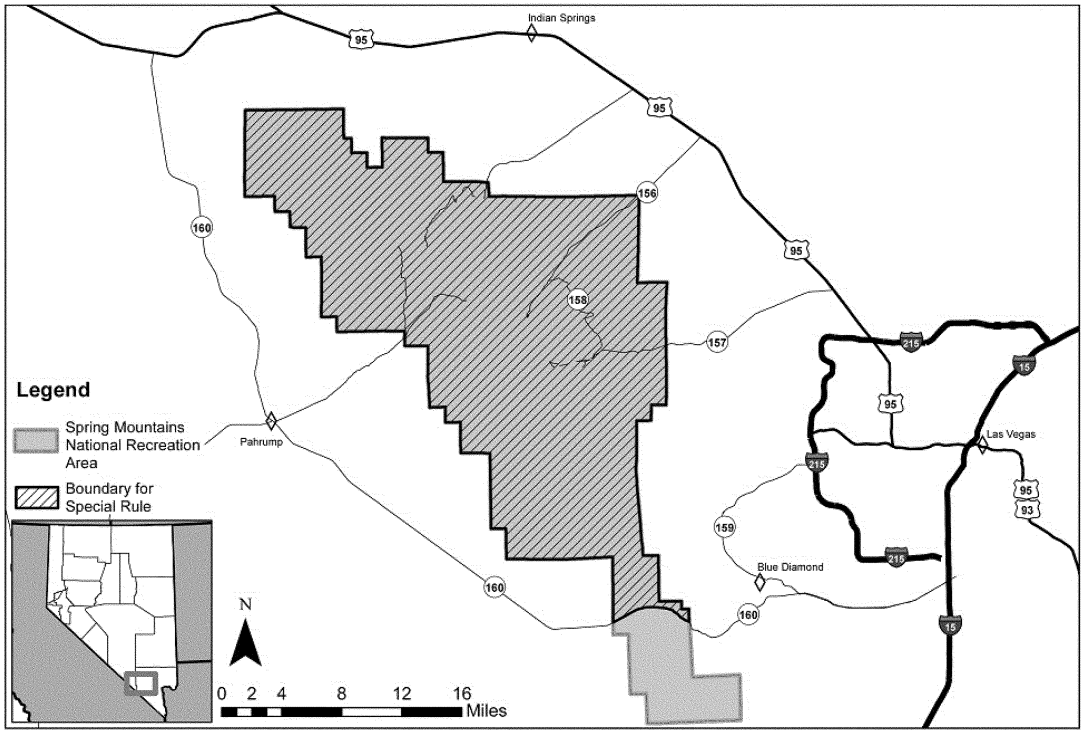
(2) Any violation of State law will also be a violation of the Act.

(3) Incidental take, that is, take that results from, but is not the purpose of, carrying out an otherwise lawful activity, will not apply to the lupine blue butterfly, Reakirt's blue butterfly, Spring Mountains icarioides blue butterfly, and two Spring Mountains dark blue butterflies.

(4) Collection of the lupine blue butterfly, Reakirt's blue butterfly, two Spring Mountains dark blue butterflies, and Spring Mountains icarioides blue butterfly is prohibited in the Spring Mountains of Nevada.

(5) A map showing the area covered by this special rule follows:

Map of Where a Special Rule Under Section 4(d) of the Act Applies to Five Similarity-of-Appearance Butterflies



Dated: September 11, 2012.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–23747 Filed 9–26–12; 8:45 am]

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H.R. 6336/P.L. 112–174
To direct the Joint Committee on the Library to accept a statue depicting Frederick Douglass from the District of Columbia and to provide for the permanent display of the statue in Emancipation Hall of the United States Capitol. (Sept. 20, 2012; 126 Stat. 1311)

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