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**WHEN:** Tuesday, March 22, 2011  
9 a.m.-12:30 p.m.

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

**RESERVATIONS:** (202) 741-6008



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Federal Register

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Tuesday, March 15, 2011

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

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

## DEPARTMENT OF THE TREASURY

### 19 CFR Part 12

[CBP Dec. 11–06]

RIN 1515–AD73

### Extension of Import Restrictions Imposed on Certain Archaeological and Ethnological Materials From Colombia

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

**ACTION:** Final rule.

**SUMMARY:** This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain archaeological and ethnological materials from Colombia. The restrictions, which were originally imposed by CBP Decision (CBP Dec.) 06–09, are due to expire on March 15, 2011. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has determined that factors continue to warrant the imposition of import restrictions. Accordingly, these import restrictions will remain in effect for an additional 5 years, and the CBP regulations are being amended to reflect this extension through March 15, 2016. These restrictions are being extended pursuant to determinations of the United States Department of State made under the terms of the Convention on Cultural Property Implementation Act that implemented the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

Ownership of Cultural Property. CBP Dec. 06–09 contains the Designated List of archaeological and ethnological materials of Colombia to which the restrictions apply.

**DATES:** *Effective Date:* March 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** For legal aspects, Charles Steuart, Chief, Intellectual Property Rights and Restricted Merchandise Branch, Regulations and Rulings, Office of International Trade, (202) 325–0020. For operational aspects, Michael Craig, Chief, Interagency Requirements Branch, Trade Policy and Programs, Office of International Trade, (202) 863–6558.

#### SUPPLEMENTARY INFORMATION:

##### Background

Pursuant to the provisions of the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention, implemented by the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*), the United States entered into a bilateral agreement with Colombia on March 15, 2006, concerning the imposition of import restrictions on certain archeological and ethnological materials from Colombia. On March 17, 2006, CBP published CBP Dec. 06–09 in the **Federal Register** (71 FR 13757), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions and included a list designating the types of articles covered by the restrictions.

Import restrictions listed in 19 CFR 12.104g(a) are “effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period can be extended for additional periods not to exceed five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists” (19 CFR 12.104g(a)). On July 22, 2010, the Department of State received a request by the Government of Colombia to extend the Agreement. Subsequently, after the Department of State proposed to extend the Agreement and reviewed the findings and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that the cultural heritage of Colombia

continues to be in jeopardy from pillage of archaeological and ethnological resources and made the necessary determinations to extend the import restrictions for an additional five years. Diplomatic notes have been exchanged on March 1, 2011, reflecting the extension of those restrictions for an additional five-year period. Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect this extension of the import restrictions.

The Designated List of archaeological and ethnological materials from Colombia covered by these import restrictions is set forth in CBP Dec. 06–09. The Designated List and accompanying image database may also be found at the following Internet Web site address: <http://exchanges.state.gov/heritage/culprop/cofact.html>.

The restrictions on the importation of these archaeological and ethnological materials from Colombia are to continue in effect through March 15, 2016. Importation of such material continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

#### Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). In addition, CBP has determined that such notice or public procedure would be impracticable and contrary to the public interest because the action being taken is essential to avoid interruption of the application of the existing import restrictions (5 U.S.C. 553(b)(B)). For the same reasons, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

#### Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

#### Executive Order 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866.

#### Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1).

**List of Subjects in 19 CFR Part 12**

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise.

**Amendment to CBP Regulations**

For the reasons set forth above, part 12 of Title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

**PART 12—SPECIAL CLASSES OF MERCHANDISE**

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

\* \* \* \* \*

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

\* \* \* \* \*

**§ 12.104g [Amended]**

■ 2. In § 12.104g, paragraph (a), the table is amended in the entry for Colombia by adding, after the reference to “CBP Dec. 06–09”, the words “extended by CBP Dec. 11–06”.

**Alan Bersin,**

*Commissioner, U.S. Customs and Border Protection.*

Approved: March 9, 2011.

**Timothy E. Skud,**

*Deputy Assistant Secretary of the Treasury.*

[FR Doc. 2011–5879 Filed 3–14–11; 8:45 am]

**BILLING CODE 9111–14–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Parts 312 and 314**

[Docket No. FDA–2011–N–0130]

**Investigational New Drug Applications and Abbreviated New Drug Applications; Technical Amendment**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Food and Drug Administration (FDA) is amending its investigational new drug application (IND) regulations and abbreviated new drug application regulations to correct inaccurate cross-references to the IND regulations and the Federal Food, Drug, and Cosmetic Act (the FD&C Act). This

action is being taken to ensure accuracy and clarity in the Agency’s regulations.

**DATES:** This rule is effective March 15, 2011.

**FOR FURTHER INFORMATION CONTACT:**

Olivia A. Pritzlaff, Center for Drug Evaluation and Research, Food and Drug Administration, Bldg. 51, Rm. 6308, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–3506.

**SUPPLEMENTARY INFORMATION:** FDA is amending its regulation in 21 CFR 312.83 to correct an inaccurate cross-reference to other sections of the IND regulations. FDA is amending its regulation in 21 CFR 314.94 to correct an inaccurate cross-reference to a section of the FD&C Act.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). FDA has determined that notice and public comment are unnecessary because this amendment to the regulations provides only technical changes to correct inaccurate cross-references to the IND regulations and the FD&C Act.

**List of Subjects***21 CFR Part 312*

Drugs, Exports, Imports, Investigations, Labeling, Medical research, Reporting and recordkeeping requirements, Safety.

*21 CFR Part 314*

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 312 and 314 are amended as follows:

**PART 312—INVESTIGATIONAL NEW DRUG APPLICATION**

■ 1. The authority citation for 21 CFR part 312 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 355, 360bbb, 371; 42 U.S.C. 262.

**§ 312.83 [Amended]**

■ 2. Section 312.83 is amended by removing “312.34 and 312.35” and by adding in its place “312.305 and 312.320”.

**PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG**

■ 3. The authority citation for 21 CFR part 314 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 356a, 356b, 356c, 371, 374, 379e.

**§ 314.94 [Amended]**

■ 4. Section 314.94 is amended in paragraph (a)(8)(iv) by removing “505(j)(4)(D)” and by adding in its place “505(j)(5)(F)”.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–5946 Filed 3–14–11; 8:45 am]

**BILLING CODE 4160–01–P**

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 301**

[TD 9516]

**RIN 1545–BG73**

**Disclosure of Return Information in Connection With Written Contracts Among the IRS, Whistleblowers, and Legal Representatives of Whistleblowers**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations and removal of temporary regulations.

**SUMMARY:** This document contains final regulations relating to the disclosure of return information by an officer or employee of the Treasury Department, to a whistleblower and, if applicable, the legal representative of the whistleblower, to the extent necessary in connection with a written contract among the IRS, the whistleblower and, if applicable, the legal representative of the whistleblower, for services relating to the detection of violations of the internal revenue laws or related statutes. The final regulations will affect officers and employees of the Treasury Department who disclose return information to whistleblowers or their legal representatives in connection with written contracts among the IRS, whistleblowers and, if applicable, their legal representatives, for services relating to the detection of violations of the internal revenue laws or related statutes. The final regulations will also affect any whistleblower or legal representative of a whistleblower who receives return information in connection with a written contract among the IRS, the whistleblower and, if applicable, the legal representative of the whistleblower, for services relating to the detection of violations of the internal revenue laws or related statutes.

**DATES:** *Effective Date:* These final regulations are effective on March 15, 2011.

*Applicability Date:* For dates of applicability, see § 301.6103(n)-2(f).

**FOR FURTHER INFORMATION CONTACT:** Helene R. Newsome, 202-622-7950 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

This document contains final regulations implementing amendments to the Procedure and Administration Regulations (26 CFR part 301) under section 6103(n) relating to the disclosure of return information in connection with written contracts among the IRS, whistleblowers and, if applicable, their legal representatives.

The Tax Relief and Health Care Act of 2006, Public Law 109-432 (120 Stat. 2958), (the Act) was enacted on December 20, 2006. Section 406 of the Act amends section 7623, concerning the payment of awards to whistleblowers, and establishes a Whistleblower Office within the IRS that has responsibility for the administration of a whistleblower program. In connection with analyzing information provided by a whistleblower, or investigating a matter, the IRS may determine that it requires the assistance of the whistleblower, or the legal representative of the whistleblower. The Joint Committee on Taxation (the JCT) has noted that “[t]o the extent the disclosure of returns or return information is required [for the whistleblower or his or her legal representative] to render such assistance, the disclosure must be pursuant to an IRS tax administration contract.” Joint Committee on Taxation, *Technical Explanation of H.R. 6408, The “Tax Relief and Health Care Act of 2006,”* as Introduced in the House on December 7, 2006, at 89 (JCX-50-06), December 7, 2006. The JCT has further noted that “[i]t is expected that such disclosures will be infrequent and will be made only when the assigned task cannot be properly or timely completed without the return information to be disclosed.” *Id.*

Under section 6103(a), returns and return information are confidential unless the Internal Revenue Code authorizes disclosure. Section 6103(n) is the authority by which returns and return information may be disclosed pursuant to a tax administration contract. Section 6103(n) authorizes, pursuant to regulations prescribed by the Secretary, returns and return information to be disclosed to any person, for purposes of tax

administration, to the extent necessary in connection with: (1) The processing, storage, transmission, and reproduction of returns and return information; (2) the programming, maintenance, repair, testing, and procurement of equipment; and (3) the providing of other services.

On March 25, 2008, temporary regulations (TD 9389) under section 6103(n) were published in the **Federal Register** (73 FR 15668) describing the circumstances under which officers and employees of the Treasury Department may disclose return information to whistleblowers and, if applicable, their legal representatives, in connection with written contracts for services relating to the detection of violations of the internal revenue laws or related statutes. A notice of proposed rulemaking (REG-114942-07) cross-referencing the temporary regulations was published in the **Federal Register** for the same day (73 FR 15687).

One written comment responding to the notice of proposed rulemaking was received. No public hearing was requested or held. After consideration of the comment, the regulations are adopted as proposed with only minor technical changes made.

The limitations applicable to section 6103(n) contracts as outlined in these regulations are not a limitation on the use of return information that may be disclosed to a whistleblower or the legal representative of a whistleblower during an award determination administrative proceeding and in an award determination appeal to the U.S. Tax Court.

**Summary of Comment**

The commentator recommended that § 301.6103(n)-2(b)(3) of the proposed regulations be revised to eliminate any requirement that a written contract be in place for a whistleblower to be provided with basic status information about the whistleblower’s claim for award under section 7623. The commentator drew a comparison with whistleblower claims under the False Claims Act and argued that the standard for the IRS to share status information with a whistleblower should not be the same as that required to share information from the actual returns of taxpayers. Unlike other statutory schemes, however, information regarding the status of a whistleblower’s claim with the IRS is “return information” as defined in section 6103(b)(2). Like returns (defined in section 6103(b)(1)), return information is confidential under section 6103(a) and may only be disclosed if authorized by a specific provision of the Code. In order to disclose status information to a

whistleblower, an exception to section 6103 must be applicable. Section 6103(n) provides authority for the IRS to make status information disclosures to a whistleblower. Because disclosures pursuant to section 6103(n) require a written tax administration contract, the final regulations do not adopt the commentator’s recommendation.

The commentator also recommended that § 301.6103(n)-2(d)(3) of the proposed regulations be revised to eliminate the inspection requirement. The commentator asserted that, by contrast, § 301.6103(n)-1, “Disclosure of returns and return information in connection with written contracts or agreements for the acquisition of property or services for tax administration purposes,” does not include such a requirement and argued that the requirement is unnecessary in that the regulations already provide for severe sanctions for any failure to comply with the terms of written contracts for services. In fact, § 301.6103(n)-1(e)(1) does indeed contain an inspection requirement. The final regulations retain the inspection requirement as consistent with the longstanding safeguard procedures that incorporate inspection as an integral part of the contracting process under section 6103(n).

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

**Drafting Information**

The principal author of these regulations is Helene R. Newsome, Office of the Associate Chief Counsel (Procedure & Administration).

**List of Subjects in 26 CFR Part 301**

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

### PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 is amended by adding entries in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Section 301.6103(n)-2 also issued under 26 U.S.C. 6103(n). \* \* \*

Section 301.6103(n)-2 also issued under 26 U.S.C. 6103(q). \* \* \*

■ **Par. 2.** Section 301.6103(n)-2 is added to read as follows:

#### § 301.6103(n)-2 Disclosure of return information in connection with written contracts among the IRS, whistleblowers, and legal representatives of whistleblowers.

(a) *General rule.* (1) Pursuant to the provisions of sections 6103(n) and 7623 of the Internal Revenue Code and subject to the conditions of this section, an officer or employee of the Treasury Department is authorized to disclose return information (as defined in section 6103(b)(2)) to a whistleblower and, if applicable, the legal representative of the whistleblower, to the extent necessary in connection with a written contract among the Internal Revenue Service (IRS), the whistleblower and, if applicable, the legal representative of the whistleblower, for services relating to the detection of violations of the internal revenue laws or related statutes.

(2) The IRS shall have the discretion to determine whether to enter into a written contract pursuant to section 7623 with the whistleblower and, if applicable, the legal representative of the whistleblower, for services described in paragraph (a)(1) of this section.

(b) *Limitations.* (1) Disclosure of return information in connection with a written contract for services described in paragraph (a)(1) of this section shall be made only to the extent the IRS deems it necessary in connection with the reasonable or proper performance of the contract. Disclosures may include, but are not limited to, disclosures to accomplish properly any purpose or activity of the nature described in section 6103(k)(6) and the regulations thereunder.

(2) If the IRS determines that the services of a whistleblower and, if applicable, the legal representative of the whistleblower, as described in paragraph (a)(1) of this section, can be performed reasonably or properly by disclosure of only parts or portions of

return information, then only the parts or portions of the return information shall be disclosed.

(3) Upon written request by a whistleblower, or a legal representative of a whistleblower, with whom the IRS has entered into a written contract for services as described in paragraph (a)(1) of this section, the Director of the Whistleblower Office, or designee of the Director, may inform the whistleblower and, if applicable, the legal representative of the whistleblower, of the status of the whistleblower's claim for award under section 7623, including whether the claim is being evaluated for potential investigative action, or is pending due to an ongoing examination, appeal, collection action, or litigation. The information may be disclosed only if the IRS determines that the disclosure would not seriously impair Federal tax administration.

(4) Return information disclosed to a whistleblower and, if applicable, a legal representative of a whistleblower, under this section, shall not be further disclosed or otherwise used by the whistleblower or a legal representative of a whistleblower, except as expressly authorized in writing by the IRS.

(c) *Penalties.* Any whistleblower, or legal representative of a whistleblower, who receives return information under this section, is subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of the return information.

(d) *Safeguards.* (1) Any whistleblower, or the legal representative of a whistleblower, who receives return information under this section, shall comply with all applicable conditions and requirements as the IRS may prescribe from time to time for the purposes of protecting the confidentiality of the return information and preventing any disclosure or inspection of the return information in a manner not authorized by this section (prescribed requirements).

(2) Any written contract for services as described in paragraph (a)(1) of this section shall provide that any whistleblower and, if applicable, the legal representative of a whistleblower, who has access to return information under this section, shall comply with the prescribed requirements.

(3) Any whistleblower, or the legal representative of a whistleblower, who may receive return information under this section, shall agree in writing, before any disclosure of return information is made, to permit an inspection of the whistleblower's or the legal representative's premises by the IRS relative to the maintenance of the

return information disclosed under these regulations and, upon completion of services as described in the written contract with the IRS, to dispose of all return information by returning the return information, including any and all copies or notes made, to the IRS, or to the extent that it cannot be returned, by destroying the information in a manner consistent with prescribed requirements.

(4) If the IRS determines that any whistleblower, or the legal representative of a whistleblower, who has access to return information under this section, has failed to, or does not, satisfy the prescribed requirements, the IRS, using the procedures described in the regulations under section 6103(p)(7), may take any action it deems necessary to ensure that the prescribed requirements are or will be satisfied, including—

(i) Suspension of further disclosures of return information by the IRS to the whistleblower and, if applicable, the legal representative of the whistleblower, until the IRS determines that the conditions and requirements have been or will be satisfied; and

(ii) Suspension or termination of any duty or obligation arising under the contract with the IRS.

(e) *Definitions.* For purposes of this section—

(1) The term *Treasury Department* includes the IRS and the Office of the Chief Counsel for the IRS.

(2) The term *whistleblower* means an individual who provides information to the IRS regarding violations of the tax laws or related statutes and submits a claim for an award under section 7623 with respect to the information.

(3) The term *legal representative* means any individual who is a member in good standing in the bar of the highest court of any state, possession, territory, commonwealth, or the District of Columbia, and who has a written power of attorney executed by the whistleblower.

(f) *Effective/applicability date.* This section is applicable on March 15, 2011.

#### § 301.6103(n)-2T [Removed]

■ **Par. 3.** Section 301.6103(n)-2T is removed.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: March 9, 2011.

**Michael Mundaca,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2011-6111 Filed 3-14-11; 8:45 am]

BILLING CODE 4830-01-P

**PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Parts 4022 and 4044**

**Allocation of Assets in Single-Employer Plans; Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans to prescribe interest assumptions under the benefit payments regulation for valuation dates in April 2011 and interest assumptions under the asset allocation regulation for valuation dates in the second quarter of 2011. Interest assumptions are also published on PBGC's Web site (<http://www.pbgc.gov>).

**DATES:** Effective April 1, 2011.

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202-326-4024. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

**SUPPLEMENTARY INFORMATION:** PBGC's regulations on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) and Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974.

The interest assumptions in Appendix B to Part 4044 are used to value benefits

for allocation purposes under ERISA section 4044. PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for April 2011 and updates the asset allocation interest assumptions for the second quarter (April through June) of 2011.

The second-quarter 2011 interest assumptions under the allocation regulation will be 3.96 percent for the first 20 years following the valuation date and 4.32 percent thereafter. In comparison with the interest assumptions in effect for the first quarter of 2011, these interest assumptions represent a decrease of five years in the select period (the period during which the select rate (the initial rate) applies), a decrease of 0.11 percent in the select rate, and an increase of 0.39 percent in the ultimate rate (the final rate).

The April 2011 interest assumptions under the benefit payments regulation will be 2.50 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for March 2011, these interest assumptions are unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public

interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits under plans with valuation dates during April 2011, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

**List of Subjects**

*29 CFR Part 4022*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4044*

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

**PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS**

■ 1. The authority citation for part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 210, as set forth below, is added to the table.

**Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments**

\* \* \* \* \*

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)					
	On or after	Before		$i_1$	$i_2$	$i_3$	$n_1$	$n_2$	
*	*		*	*	*	*	*	*	*
210	4-1-11	5-1-11	2.50	4.00	4.00	4.00	7	8	

■ 3. In appendix C to part 4022, Rate Set 210, as set forth below, is added to the table.

**Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments**

\* \* \* \* \*

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		$i_1$	$i_2$	$i_3$	$n_1$	$n_2$
*	*	*	*	*	*	*	*	*
210	4-1-11	5-1-11	2.50	4.00	4.00	4.00	7	8

**PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS**

■ 4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry for April–June 2011, as set forth below, is added to the table.

**Appendix B to Part 4044—Interest Rates Used To Value Benefits**

\* \* \* \* \*

For valuation dates occurring in the months—	The values of $i_t$ are:					
	$i_t$	for $t =$	$i_t$	for $t =$	$i_t$	for $t =$
*	*	*	*	*	*	*
April–June 2011 .....	0.0396	1–20	0.0432	> 20	N/A	N/A

Issued in Washington, DC, on this 10th day of March 2011.

Vincent K. Snowbarger,  
Deputy Director for Operations, Pension Benefit Guaranty Corporation.  
[FR Doc. 2011–6054 Filed 3–14–11; 8:45 am]  
BILLING CODE 7709–01–P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 100**

[Docket No. USCG–2010–1094]

RIN 1625–AA08

**Special Local Regulation for Marine Event; Temporary Change of Dates for Recurring Marine Event in the Fifth Coast Guard District**

AGENCY: Coast Guard, DHS.  
ACTION: Temporary final rule.

**SUMMARY:** The Coast Guard is temporarily changing the enforcement period of special local regulations for a recurring marine event in the Fifth Coast Guard District. These regulations apply to four recurring marine events that conduct a rescue at sea demonstration, an air show, a swimming competition, and power boat races. Special local regulations are necessary to provide for the safety of life on navigable waters during these events. This action is intended to restrict vessel traffic in a portion of the Severn River at Annapolis, MD, the Chester River near Chestertown, MD, and Prospect Bay at Kent Island, MD during the events.

**DATES:** This rule is effective from April 1, 2011 through September 1, 2011.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–1094 and are available online by going to <http://www.regulations.gov>, inserting USCG–2010–1094 in the “Keyword” box, and then clicking “Search.” This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail Mr. Ronald L. Houck, Project Manager, Coast Guard Sector Baltimore Waterways Management Division, telephone 410–576–2674, email [Ronald.L.Houck@uscg.mil](mailto:Ronald.L.Houck@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

On January 11, 2011, we published a notice of proposed rulemaking (NPRM) entitled “Special Local Regulation for Marine Event; Temporary Change of Dates for Recurring Marine Event in the Fifth Coast Guard District” in the **Federal Register** (76 FR 7). We received no comments on the proposed rule. No public meeting was requested, and none was held.

**Basis and Purpose**

Marine events are frequently held on the navigable waters within the boundary of the Fifth Coast Guard District. The on water activities that typically comprise marine events include sailing regattas, power boat races, swim races and holiday parades. For a description of the geographical area of Coast Guard Sector Baltimore—Captain of the Port Zone, please see 33 CFR 3.25.

This regulation temporarily changes the enforcement period of special local regulations for recurring marine events within the Fifth Coast Guard District. This regulation applies to four marine events previously published at 33 CFR 100.501, Table to § 100.501.

The first event is the annual “Safety at Sea Seminar,” sponsored by the U.S. Naval Academy, on the waters of the Severn River at Annapolis, MD. The regulation at 33 CFR 100.501 is effective annually for the Safety at Sea Seminar marine event. The event consists of demonstrations of at sea rescues including surface and air platforms held on and above the waters of the Severn River in Annapolis, MD. Visual distress signal devices will be used and a helicopter with small boats will be operating before a large fleet of spectator crafts. Therefore, to ensure the safety of participants and support vessels, 33 CFR 100.501 would be enforced for the duration of the event. Under provisions of 33 CFR 100.501, from 11 a.m. to 1:30 p.m. on April 2, 2011, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic may be allowed to transit the regulated

area only when the Patrol Commander determines it is safe to do so.

The second event is the annual "Blue Angels Air Show," sponsored by the U.S. Naval Academy, on the waters of the Severn River at Annapolis, MD. The regulation at 33 CFR 100.501 is effective annually for the Blue Angels Air Show marine event. The event consists of one day for arrival and practice and a second day for the Air Show held above the waters of the Severn River, at Annapolis, MD. High performance military aircraft will conduct maneuvers before a large fleet of spectator crafts. Therefore, to ensure the safety of participants and support vessels, 33 CFR 100.501 would be enforced for the duration of the event. Under provisions of 33 CFR 100.501, from 10:30 a.m. to 4 p.m. on May 24, 2011 and from 1:30 p.m. to 4 p.m. on May 25, 2011, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic may be allowed to transit the regulated area only when the Patrol Commander determines it is safe to do so.

The third event is the annual "Maryland Swim for Life," sponsored by the District of Columbia Aquatics Club, on the waters of the Chester River near Chestertown, MD. The regulation at 33 CFR 100.501 is effective annually for the Maryland Swim for Life marine event. The event is an open water swimming competition held on the waters of the Chester River, near Chestertown, MD. Approximately 200 swimmers will start from Rolph's Wharf and swim up-river 2.5 miles then swim down-river returning back to Rolph's Wharf. A large fleet of support vessels accompany the swimmers. Therefore, to ensure the safety of participants and support vessels, 33 CFR 100.501 would be enforced for the duration of the event. Under provisions of 33 CFR 100.501, from 5:30 a.m. to 2:30 p.m. on June 25, 2011, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic may be allowed to transit the regulated area only when the Patrol Commander determines it is safe to do so.

The fourth event is the annual "Thunder on the Narrows," sponsored by the Kent Narrows Racing Association, on the waters of Prospect Bay at Kent Island, MD. The regulation at 33 CFR 100.501 is effective annually for the Thunder on the Narrows marine event. The event consists of two days of power boat racing on the waters of Prospect Bay, at Kent Island, MD. High performance power boats will race on a designated course before a large fleet of

spectator crafts. Therefore, to ensure the safety of participants and support vessels, 33 CFR 100.501 would be enforced for the duration of the event. Under provisions of 33 CFR 100.501, from 9:30 a.m. to 6:30 p.m. on June 25, 2011 and from 9:30 a.m. to 6:30 p.m. on June 26, 2011, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic may be allowed to transit the regulated area only when the Patrol Commander determines it is safe to do so.

#### **Discussion of Comments and Changes**

The Coast Guard received no comments in response to the NPRM. No public meeting was requested and none was held.

#### **Regulatory Analyses**

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

#### *Regulatory Planning and Review*

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this rule prevents traffic from transiting a portion of certain waterways during specified events, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers, so mariners can adjust their plans accordingly. Additionally, this rulemaking does not change the permanent regulated areas that have been published in 33 CFR 100.501, Table to § 100.501. Furthermore, in some cases vessel traffic may be able to transit the regulated area when the Coast Guard Patrol Commander deems it is safe to do so.

#### **Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently

owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the area where the marine event is being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during marine events that have been permitted by the Coast Guard Captain of the Port. The Captain of the Port will ensure that small entities are able to operate in the areas where events are occurring when it is safe to do so. In some cases, vessels will be able to safely transit around the regulated area at various times, and, with the permission of the Patrol Commander, vessels may transit through the regulated area. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

#### **Assistance for Small Entities**

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### **Collection of Information**

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

## Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

## Unfunded Mandates Reform Act

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

## Taking of Private Property

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

## Civil Justice Reform

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

## Protection of Children

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

## Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,

because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## Energy Effects

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

## Technical Standards

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

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

## Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in

complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

## List of Subjects in 33 CFR Part 100

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

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

### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

**Authority:** 33 U.S.C. 1233.

- 2. In § 100.501, suspend lines No. 13, No. 19, No. 21 and No. 23, and add new heading and entries 65, 66, 67, and 68 in the Table to § 100.501 to read as follows:

#### § 100.501–T05–1094 Special Local Regulations; Recurring Marine Event in the Fifth Coast Guard District.

\* \* \* \* \*

Table To § 100.501. All coordinates listed in the Table to § 100.501 reference Datum NAD 1983.

\* \* \* \* \*



Number	Date	Event	Sponsor	Location
<b>Coast Guard Sector Baltimore—COTP Zone</b>				
65 .....	April 2, 2011 .....	Safety at Sea Seminar ..	U.S. Naval Academy .....	All waters of the Severn River from shoreline to shoreline, bounded to the northwest by a line drawn from the south shoreline at latitude 39°00'38.9" N., longitude 076°31'05.2" W. thence to the north shoreline at latitude 39°00'54.7" N., longitude 076°30'44.8" W., this line is approximately 1300 yards northwest of the U.S. 50 fixed highway bridge. The regulated area is bounded to the southeast by a line drawn from the Naval Academy Light at latitude 38°58'39.5" N., longitude 076°28'49" W. thence southeast to a point 700 yards east of Chinks Point, MD, at latitude 38°58'1.9" N., longitude 076°28'1.7" W. thence northeast to Greenbury Point at latitude 38°58'29" N., longitude 076°27'16" W.
66 .....	May 24 and 25, 2011	Blue Angels Air Show ....	U.S. Naval Academy .....	All waters of the Severn River from shoreline to shoreline, bounded to the northwest by a line drawn from the south shoreline at latitude 39°00'38.9" N., longitude 076°31'05.2" W. thence to the north shoreline at latitude 39°00'54.7" N., longitude 076°30'44.8" W., this line is approximately 1300 yards northwest of the U.S. 50 fixed highway bridge. The regulated area is bounded to the southeast by a line drawn from the Naval Academy Light at latitude 38°58'39.5" N., longitude 076°28'49" W. thence southeast to a point 700 yards east of Chinks Point, MD, at latitude 38°58'1.9" N., longitude 076°28'1.7" W. thence northeast to Greenbury Point at latitude 38°58'29" N., longitude 076°27'16" W.
67 .....	June 25, 2011 .....	Maryland Swim for Life ..	District of Columbia Aquatics Club.	The waters of the Chester River from shoreline to shoreline, bounded on the south by a line drawn at latitude 39°10'16" N., near the Chester River Channel Buoy 35 (LLN-26795) and bounded on the north at latitude 39°12'30" N. by the Maryland S.R. 213 Highway Bridge.
68 .....	June 25 and 26, 2011	Thunder on the Narrows	Kent Narrows Racing Association.	All waters of Prospect Bay enclosed by the following points: Latitude 38°57'52.0" N., longitude 076°14'48.0" W., to latitude 38°58'02.0" N., longitude 076°15'05.0" W., to latitude 38°57'38.0" N., longitude 076°15'29.0" W., to latitude 38°57'28.0" N., longitude 076°15'23.0" W., to latitude 38°57'52.0" N., longitude 076°14'48.0" W.

Dated: February 19, 2011.

**Mark P. O'Malley,**

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

[FR Doc. 2011-5894 Filed 3-14-11; 8:45 am]

**BILLING CODE 9110-04-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[Docket No. 110218149-1182-01]

**RIN 0648-BA86**

**Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery; Revision of 2011 Butterfish Specifications**

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

**ACTION:** Temporary rule; request for comments.

**SUMMARY:** NMFS issues this temporary rule pursuant to its authority to issue emergency measures under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This emergency action increases the butterflyfish allowable biological catch (ABC) for the 2011 fishing year from 1,500 mt to 1,811 mt, and applies the increase to the butterflyfish mortality cap in the *Loligo* squid fishery, based on the most recent and best available scientific information.

**DATES:** Effective March 15, 2011, through September 12, 2011. Comments must be received by April 14, 2011.

**ADDRESSES:** The supplemental EA is available by request from: Patricia Kurkul, Regional Administrator,

National Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930–2276, or via the Internet at <http://www.nero.noaa.gov>.

You may submit comments, identified by RIN 0648–BA86, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal e-Rulemaking portal <http://www.regulations.gov>;

- **Fax:** (978) 281–9135, Attn: Aja Peters-Mason;

- **Mail to NMFS, Northeast Regional Office, 55 Great Republic Dr, Gloucester, MA 01930.** Mark the outside of the envelope “Comments on Emergency Rule to Revise the Butterfish Specifications.”

**Instructions:** All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> 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.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Aja Peters-Mason, Fishery Policy Analyst, (978) 281–9195, fax (978) 281–9135.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

This temporary rule implements emergency measures, authorized by section 305(c) of the Magnuson-Stevens Act, to increase the butterfish ABC for the 2011 fishing year (FY) from 1,500 mt to 1,811 mt, and applies the increase to the butterfish mortality cap in the *Loligo* squid fishery immediately. This action revises the butterfish ABC in the Final 2011 Specifications for the MSB Fishery Management Plan (FMP) (76 FR 8306; February 14, 2011).

Butterfish catches have been constrained to low levels since the ABC was reduced to 4,545 mt in 2005, and then to 1,500 mt in 2008. ABC reductions were in response to the results of the 38th Stock Assessment Workshop (SAW 38) in 2004, which determined the butterfish stock was overfished. The Mid-Atlantic Fishery Management Council (Council) developed Amendment 10 to the FMP in response to SAW 38; Amendment 10

enacted a rebuilding program for butterfish, as well as measures to reduce butterfish bycatch in the *Loligo* squid fishery. The most notable bycatch reduction measure in Amendment 10 is the butterfish mortality cap on the *Loligo* squid fishery, which went into effect on January 1, 2011. The cap is 75 percent of the butterfish ABC, and closes the directed *Loligo* squid fishery once it is attained.

The most recent butterfish assessment, SAW 49 (January 2010), determined that the status of the butterfish stock is unknown. Though the assessment was inconclusive, it did verify that long-term declines in the butterfish stock persisted even in the absence of fishing pressure, which suggests that fishing mortality may not be a major factor impacting the stock. The estimates of butterfish fishing mortality and total biomass resulting from SAW 49 were highly uncertain, and the final assessment report stated that it would be inappropriate to compare the previous status determination criteria from SAW 38 with the current assessment estimates of spawning stock biomass and fishing mortality, because measures of population abundance in the current assessment were scaled much higher than those in the previous assessment. In May 2010, the Council’s Scientific and Statistical Committee (SSC) reviewed the SAW 49 results and other available information, including the Northeast Fisheries Science Center’s (NEFSC) Autumn 2009 trawl survey indices for butterfish and, due to uncertainty in the assessment, recommended setting the butterfish ABC at the status quo level of 1,500 mt for FY 2011.

The Council used the SSC’s recommended butterfish ABC as the basis for 2011 specifications, and submitted their recommendations and supporting analysis to NMFS in July 2010. NMFS went on to recommend the 1,500-mt butterfish ABC in the proposed rule for 2011 MSB Specifications in November 2010. During public comment on the proposed specifications, industry members expressed concern that the low butterfish ABC would cause the directed *Loligo* squid fishery to be closed before the fleet was able to access much of the *Loligo* squid quota. Commenters also pointed to recent information from the NEFSC Autumn 2009 and 2010 trawl survey that showed butterfish catches almost twice the average for the last decade (6.41 kg/tow for 2009; 5.59 kg/tow for 2010; average 3.4 kg/tow from 1999–2008). However, based on the SSC’s recommended ABC, which was

adopted by the Council, NMFS implemented the 1,500-mt ABC for butterfish in the final MSB specifications in February 2011.

Because the NEFSC Autumn 2010 trawl survey information was not available during the SSC’s initial deliberations in May 2010, the SSC met on February 7, 2011, to consider whether the new information warranted an adjustment to their previous recommended butterfish ABC for 2011. The SSC reviewed inshore butterfish survey data from the Northeast Area Monitoring and Assessment Program (NEAMAP), as well as landings information for butterfish through 2010. The SSC also reviewed the past justification for the establishment of the 1,500-mt ABC.

The SSC noted the high uncertainty about the scale of the current stock biomass, which made it difficult to assess the risk of the lower range of ABC values for 2011 that were previously considered in its May 2010 deliberations. It stated that, while establishing an ABC based on average landings over a given time period is justifiable in some situations where stock size is uncertain, it would be inappropriate to continue to use this method in the case of butterfish, given the long-term declining trend in stock abundance. However, the SSC went on to recommend that the Council adjust the 2011 butterfish ABC to 1,811 mt, based on a revised method that considers realized landings and discards from 2002–2008, a time period during which butterfish catch history was dominated principally by discards. This is in contrast to the method that was initially used to set the ABC at 1,500 mt in 2008, which relied on an estimated level of discards associated with average landings over a slightly different timeframe. The SSC also noted that butterfish catches in NEFSC Autumn trawl surveys from 2002–2008 appeared relatively stable.

Based on the SSC’s recommendation, the Council requested at its February 2011 meeting that NMFS take an emergency action to adjust the butterfish ABC to 1,811 mt and apply the increase to the mortality cap for the *Loligo* squid fishery. The duration of this action is limited by the Magnuson-Stevens Act to 180 days; however, NMFS will re-evaluate the status of the fishery at the end of 180 days and may extend this action in order to make the catch limits effective for the duration of the FY (through December 31, 2011), consistent with the authority in the Magnuson-Stevens Act to extend emergency actions for up to an additional 186 days.

NMFS policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone.

The new information from the Autumn 2010 survey and the more recent NEAMAP survey results are recently discovered circumstance and represent the best available science. To not take into account the new scientific advice in a timely manner has the potential to present serious management problems in the *Loligo* fishery. The *Loligo* squid fishery is particularly active during the first Trimester of the fishing year (January–April). Swift implementation of the modified ABC, consistent with the new SSC recommendation, is critical to the *Loligo* fleet due to the timing of fleet activity, and the history of interactions between *Loligo* squid and butterflyfish. It is intended to provide the *Loligo* squid fleet additional access to *Loligo* squid quota during the FY. It would also enable the *Loligo* squid fleet to optimize *Loligo* squid harvest with reduced concern that that fishery could be closed due to the butterflyfish mortality cap. Therefore, this emergency action will reduce the likelihood of disruption to the *Loligo* squid fishery that would be caused by the existing butterflyfish cap. Addressing this through Council action, rather than through Secretarial emergency authority, would take most

of the year, and would likely result in implementing measures well after the existing butterflyfish cap could have closed the *Loligo* squid fishery. The benefit of increasing the butterflyfish ABC and applying the increase to the butterflyfish mortality cap through this emergency action will be immediate to the *Loligo* fleet, and therefore outweighs the value of going through the normal rulemaking process.

This emergency action increases the butterflyfish ABC previously implemented for the FY 2011 from 1,500 mt to 1,811 mt. Other specifications for butterflyfish, specifically, initial optimum yield (IOY), domestic annual harvest (DAH), domestic annual processing (DAP), joint venture processing (JVP), total allowable level of foreign fishing (TALFF), and research set-aside (RSA) are unchanged from those set in the final 2011 specifications. Specifications for Atlantic mackerel, *Loligo* squid, and *Illex* squid also remain unchanged.

Amendment 10 specified that the butterflyfish mortality cap is to be set equal to 75 percent of the butterflyfish ABC, with the remaining 25 percent of the butterflyfish ABC allocated to account for butterflyfish catch in other fisheries, but noted that this apportionment may be revised as necessary to accommodate the *Loligo* squid fishery. The additional 311-mt ABC allotment implemented through this action is entirely allocated to the mortality cap. Under the current 2011 specifications, the butterflyfish mortality cap is 1,125 mt (75 percent of 1,500 mt); this emergency action increases the butterflyfish mortality cap to 1,436 mt.

#### Classification

NMFS has determined that this rule is necessary to respond to an emergency situation and is consistent with the Magnuson-Stevens Act and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under section 553(b)(B) of the Administrative Procedure Act that it is impracticable and contrary to the public interest to provide for prior notice and opportunity for the public to comment. As more fully explained above, the reasons justifying promulgation of this

rule on an emergency basis make solicitation of public comment contrary to the public interest. This action provides the benefit of allowing the *Loligo* fleet to optimize its harvest, with less concern that the fishery could be closed due to the butterflyfish mortality cap. This action did not allow for prior public comment because the scientific review process and determination could not have been completed any earlier, due to the inherent time constraints associated with the process and the fact that the information on which this action is based became available very recently.

If this rulemaking were delayed to allow for notice and comment, the current butterflyfish mortality cap could be reached, which would have the effect of shutting down the directed *Loligo* fishery for the remainder of Trimester 1 (January–April). The time necessary to provide for prior notice, opportunity for public comment, and delayed effectiveness for this action could have resulted in closing the *Loligo* fishery due to the low limit of the current butterflyfish mortality cap. In the interest of receiving public input on this action, the revised assessment upon which this action was based is made available to the public, and this action requests public comments on that document and the provisions in this rule.

For the reason above, the Assistant Administrator for Fisheries finds good cause under section 553(d) of the Administrative Procedure Act to waive the 30-day delay in effectiveness.

This emergency rule has been determined to be not significant for purposes of E.O. 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

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

Dated: March 10, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2011-5995 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-22-P**

# Proposed Rules

Federal Register

Vol. 76, No. 50

Tuesday, March 15, 2011

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

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2010–0005]

RIN 0579–AD36

#### Importation of Bromeliad Plants in Growing Media From Belgium, Denmark, and the Netherlands

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the regulations governing the importation of plants and plant products to add Bromeliad plants of the genera *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* from Belgium, Denmark, and the Netherlands to the list of plants that may be imported into the United States in an approved growing medium, subject to specified growing, inspection, and certification requirements. We are taking this action in response to requests from those three countries and after determining that the plants could be imported, under certain conditions, without resulting in the introduction into, or the dissemination within, the United States of a plant pest or noxious weed.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0005> to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2010–0005, Regulatory Analysis and Development,

PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0005.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Mr. William Aley, Senior Import Specialist, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1236; (301) 734–5057.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 7 CFR part 319 prohibit or restrict the importation into the United States of certain plants and plant products to prevent the introduction of plant pests and noxious weeds. The regulations in “Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products,” §§ 319.37 through 319.37–14 (referred to below as the regulations) contain, among other things, prohibitions and restrictions on the importation of plants, plant parts, and seeds for propagation.

Paragraph (a) of § 319.37–8 of the regulations requires, with certain exceptions, that plants offered for importation into the United States be free of sand, soil, earth, and other growing media. This requirement is intended to help prevent the introduction of plant pests that might be present in the growing media; the exceptions to the requirement take into account factors that mitigate that plant pest risk. Those exceptions, which are found in paragraphs (b) through (e) of § 319.37–8, consider either the origin of the plants and growing media (paragraph (b)), the nature of the growing media (paragraphs (c) and (d)), or the use of a combination of growing conditions, approved media,

inspections, and other requirements (paragraph (e)).

Paragraph (e) of § 319.37–8 provides conditions under which certain plants established in growing media may be imported into the United States. In addition to specifying the types of plants that may be imported, § 319.37–8(e) also:

- Specifies the types of growing media that may be used;
- Requires plants to be grown in accordance with written agreements between the Animal and Plant Health Inspection Service (APHIS) and the plant protection service of the country where the plants are grown and between the foreign plant protection service and the grower;
- Requires the plants to be rooted and grown in a greenhouse that meets certain requirements for pest exclusion and that is used only for plants being grown in compliance with § 319.37–8(e);
- Restricts the source of the seeds or parent plants used to produce the plants, and requires grow-out or treatment of parent plants imported into the exporting country from another country;
- Specifies the sources of water that may be used on the plants, the height of the benches on which the plants must be grown, and the conditions under which the plants must be stored and packaged; and
- Requires that the plants be inspected in the greenhouse and found free of evidence of plant pests no more than 30 days prior to the exportation of the plants.

A phytosanitary certificate issued by the plant protection service of the country in which the plants were grown that declares that the above conditions have been met must accompany the plants at the time of importation. These conditions have been used successfully to mitigate the risk of pest introduction associated with the importation into the United States of approved plants established in growing media.

Currently, Bromeliad plants of the genera *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* may only be imported into the United States as bare root plants, in accordance with § 319.37–2. The Governments of Belgium, Denmark, and the Netherlands have requested that importation into the

United States of those plants be allowed under the provisions of § 319.37–8.

The regulations in § 319.37–8(g) provide that requests such as those made by the Governments of Belgium, Denmark, and the Netherlands be evaluated by APHIS using specific pest risk evaluation standards that are based on pest risk analysis guidelines established by the International Plant Protection Convention of the United Nations' Food and Agriculture Organization. Such analyses are conducted to determine the plant pest risks associated with each requested plant article and to determine whether or not APHIS should propose to allow the requested plant article established in growing media to be imported into the United States.

In accordance with § 319.37–8(g), APHIS has conducted the required pest risk analysis. The pest risk analysis can be viewed on the Internet on the Regulations.gov Web site or in our reading room.<sup>1</sup>

In the pest risk analysis, titled "Importation of *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* in Growing Media, into the United States from Belgium, Denmark, and the Netherlands," APHIS determined that there was only one quarantine pest that could potentially follow the import pathway: *Fusarium oxysporum* f. sp. *aechmeae*, which is present in Belgium. This organism was determined to have a low pest risk potential. The pest risk analysis therefore concluded that the safeguards in § 319.37–8(e) would allow the safe importation of *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* into the United States from Belgium, Denmark, and the Netherlands.

Under section 412(a) of the Plant Protection Act, the Secretary of Agriculture may prohibit or restrict the importation and entry of any plant or plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

The Secretary has determined that it is not necessary to prohibit the importation from Belgium, Denmark, and the Netherlands of *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea*,

provided that the plants are established in an approved growing medium and meet all other applicable conditions of § 319.37–8(e). This determination is based on the findings of the pest risk analysis and the Secretary's judgment that the application of the measures required under § 319.37–8(e) will prevent the introduction or dissemination of plant pests into the United States.

Accordingly, we are proposing to amend the regulations in § 319.37–8(e) by adding *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* from Belgium, Denmark, and the Netherlands to the list of plants established in an approved growing medium that may be imported into the United States. The plants would have to be produced, handled, and imported in accordance with the requirements of § 319.37–8(e) and be accompanied at the time of importation by a phytosanitary certificate issued by the plant protection service of the country in which the plants were grown that declares that those requirements have been met.

#### Miscellaneous

In "Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products," the footnotes are out of sequence. Currently, there is no footnote 7, and there are two footnotes 11. To correct these errors, we would redesignate some footnotes and revise one of them. Current footnotes 8 and 9 would be redesignated as 7 and 8, respectively. In § 319.37–8(e), current footnote 10, which indicates that Bromeliads imported into Hawaii are subject to postentry quarantine in accordance with § 319.37–7, would be redesignated as footnote 9. As Bromeliads, *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* imported into Hawaii from Belgium, Denmark, or the Netherlands would be subject to the same postentry quarantine requirement. Our proposed new entry to the list in § 319.37–8(e) would therefore include a new footnote 10 that would refer the reader back to newly redesignated footnote 9. Current footnote 11 in § 319.37–8(e) also refers the reader back to the footnote pertaining to postentry quarantine. We would revise footnote 11 to refer the reader to newly redesignated footnote 9, rather than to footnote 10, as it currently does. Finally, a footnote in § 319.37–13(a), now also designated, incorrectly, as footnote 11, would be redesignated as footnote 12.

#### Executive Order 12866 and Regulatory Flexibility Act

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

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is summarized below, regarding the economic effects of this proposed rule on small entities. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

Based on the information we have, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

This proposed rule would amend the regulations governing the importation of plants and plant products by adding *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* from Belgium, Denmark, and the Netherlands to the list of plants established in an approved growing medium that may be imported into the United States, subject to certain conditions.

APHIS does not expect the proposed rule to have a significant economic impact on a substantial number of small entities, as there are believed to be relatively few U.S. producers of Bromeliad plants, the entities who stand to be affected most by the rule. The initial regulatory flexibility analysis describes the proposed rule's expected small-entity impact and specifically seeks public comment on that expected impact, as only limited data were available for analysis. Most U.S. growers of Bromeliad plants are likely to be small entities under the Small Business Administration's standards.

#### Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with

<sup>1</sup> Instructions on accessing Regulations.gov and information on the location and hours of the reading room may be found at the beginning of this document under **ADDRESSES**. You may also request paper copies of the risk analysis by calling or writing the person listed under **FOR FURTHER INFORMATION CONTACT**.

this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

### National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the importation of plants of the genera *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia* and *Vriesea*, of the family Bromeliaceae, from Belgium, Denmark, and the Netherlands, we have prepared an environmental assessment. The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Regulations.gov Web site or in our reading room. (A link to Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

### Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

### PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

#### § 319.37–6 [Amended]

2. In § 319.37–6, footnote 8 is redesignated as footnote 7

#### § 319.37–7 [Amended]

3. In § 319.37–7, footnote 9 is redesignated as footnote 8.

#### § 319.37–13 [Amended]

4. In § 319.37–13, footnote 11 is redesignated as footnote 12.

5. In § 319.37–8, paragraph (e) introductory text, the list is amended as follows:

a. By redesignating footnote 10 as footnote 9.

b. By adding a new entry, in alphabetical order, to read as set forth below.

c. By revising footnote 11 to read as set forth below.

#### § 319.37–8 Growing media.

\* \* \* \* \*

(e) \* \* \*  
Bromeliad plants of the genera *Aechmea*, *Cryptanthus*, *Guzmania*, *Hohenbergia*, *Neoregelia*, *Tillandsia*, and *Vriesea* from Belgium, Denmark, and the Netherlands<sup>10</sup>

\* \* \* \* \*

*Nidularium*<sup>11</sup>

\* \* \* \* \*

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–5965 Filed 3–14–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2010–0020]

RIN 0579–AD33

### Importation of Tomatoes With Stems From the Republic of Korea Into the United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the fruits and vegetables regulations to allow, under certain conditions, the importation into the United States of commercial consignments of tomatoes with stems from the Republic of Korea. The conditions for the importation of tomatoes with stems from the Republic of Korea include requirements for pest exclusion at the production site, fruit fly

<sup>10</sup> See footnote 9.

<sup>11</sup> See footnote 9.

trapping inside and outside the production site, and pest-excluding packinghouse procedures. The tomatoes would also be required to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the Republic of Korea with an additional declaration confirming that the tomatoes had been produced in accordance with the proposed requirements. This action would allow for the importation of tomatoes with stems from the Republic of Korea while continuing to provide protection against the introduction of injurious plant pests into the United States.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0020> to submit or view comments and to view supporting and related materials available electronically.

- **Postal Mail/Commercial Delivery:** Please send one copy of your comment to Docket No. APHIS–2010–0020, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0020.

**Reading Room:** You may read any comments that we receive on this docket in our reading room. The reading room is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

**Other Information:** Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Phillip B. Grove, Regulatory Coordination Specialist, Regulatory Coordination and Compliance, PPD, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737; (301) 734–6280.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in “Subpart—Fruits and Vegetables” (7 CFR 319.56–1 through 319.56–50, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into

the United States from certain parts of the world to prevent the introduction and dissemination of plant pests.

The national plant protection organization (NPPO) of the Republic of Korea (South Korea) has requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow fresh tomatoes with stems (*Solanum lycopersicum* L.) (synonym: *Lycopersicon esculentum* P. Mill.) to be imported into the United States. As part of our evaluation of South Korea's request, we prepared a pest risk assessment (PRA) and a risk management document (RMD). Copies of the PRA and RMD may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for a link to Regulations.gov and information on the location and hours of the reading room).

The PRA, titled "Importation of Fresh Tomato Fruit with Stems (*Solanum lycopersicum* L.) (Synonym: *Lycopersicon esculentum* P. Mill.) from the Republic of Korea into the United States" (July 2010), evaluates the risks associated with the importation of fresh tomatoes with stems into the United States from South Korea.

The PRA and supporting documents identified eight pests of quarantine significance present in South Korea that could be introduced into the United States through the importation of fresh tomatoes with stems. These include one fruit fly (*Bactrocera depressa*); four moths (*Helicoverpa armigera*, *Helicoverpa assulta*, *Mamestra brassicae*, and *Ostrinia furnacalis*); two thrips (*Scirtothrips dorsalis* and *Thrips palmi*); and a pathogen (*Ralstonia solanacearum* race 3 biovar 2).

Although *R. solanacearum* race 3 biovar 2 was evaluated in the PRA as a pest of quarantine significance, we believe there is a low likelihood of the pathogen becoming introduced into the United States through the importation of fresh tomatoes with stems from South Korea. Currently, APHIS permits the importation of tomatoes and peppers for consumption from countries where *R. solanacearum* race 3 biovar 2 is known to occur. To date, no known introductions of *R. solanacearum* race 3 biovar 2 have occurred as a result of these importations. This supports the conclusion that even if *R. solanacearum* race 3 biovar 2 entered with fruit, there is a low likelihood of establishment. Therefore, we are proposing to allow the entry of fresh tomatoes with stems from South Korea into the United States subject to a port of entry inspection for *R. solanacearum* race 3 biovar 2.

APHIS has determined that measures beyond standard port-of-arrival inspections are required to mitigate the risks posed by the plant pests other than *R. solanacearum* race 3 biovar 2. Therefore, we are proposing to allow the importation of fresh tomatoes with stems from South Korea into the United States only if the tomatoes are produced under a systems approach. The systems approach would require that the tomatoes be grown in registered pest-exclusionary structures, would require trapping and monitoring inside and outside the pest-exclusionary structures for *B. depressa*, and would require packinghouse procedures designed to exclude the quarantine pests. Consignments of tomatoes with stems from South Korea would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the tomatoes were grown in approved pest-exclusionary structures and were inspected and found free from quarantine pests of concern to the United States.

#### Registered Pest-Exclusionary Structures

The tomatoes would have to be grown in pest-exclusionary structures that are registered with the NPPO of South Korea. The NPPO of South Korea and APHIS would have to jointly approve the pest-exclusionary structures. The pest-exclusionary structures would have to be equipped with double self-closing doors to prevent inadvertent introduction of pests into the pest-exclusionary structures. In addition, any vents or openings in the pest-exclusionary structures (other than the double self-closing doors) would have to be covered with screening 1.6 mm or smaller in order to prevent the entry of pests into the pest-exclusionary structure. The 1.6 mm maximum screening size is adequate to exclude most insect pests of quarantine significance named earlier in this docket. Although the thrips species are small enough to pass through the screening, they are at least partially discouraged by the physical barrier of the 1.6 mm mesh and the resultant reduced velocity of wind currents upon which they are borne. In addition, because thrips are external feeders, they would most likely be detected during inspection of the tomato fruit before shipment.

We would require that the pest-exclusionary structures be inspected monthly throughout the growing season (the months of March through November) by the NPPO of South Korea or its approved designee to ensure that phytosanitary and trapping procedures

are employed to exclude plant pests and to verify that the screening is intact.

#### Trapping

Trapping for *B. depressa* would be required both inside and outside the pest-exclusionary structures. Trapping would have to begin at least 2 months prior to the start of harvest and continue for the duration of the harvest. Both inside and outside traps would have to be serviced once per week.

APHIS-approved traps, with an APHIS-approved protein bait, would have to be placed inside the pest-exclusionary structures at a density of at least two traps per pest-exclusionary structure as well as within a 500-meter-wide buffer area around the registered pest-exclusionary structure at a density of one trap per 10 hectares. During the growing season at least one trap would have to be in the buffer area near each pest-exclusionary structure.

If a single *B. depressa* is found in a trap inside a pest-exclusionary structure, the NPPO of South Korea would have to immediately prohibit that pest-exclusionary structure from exporting tomatoes to the United States and notify APHIS of the action. The prohibition would remain in effect until the NPPO of South Korea and APHIS agree that the risk has been mitigated. If three *B. depressa* are found inside the buffer zone within 2 kilometers of each other within a 30-day period, the NPPO of South Korea would have to immediately prohibit all registered pest-exclusionary structures within 2 kilometers of the finds from exporting tomatoes to the United States and notify APHIS of the action. The prohibition would remain in effect until the NPPO of South Korea and APHIS agree that the risk has been mitigated.

The manager of the pest-exclusionary structure would have to maintain records of trap placement, trap servicing, and fruit fly captures for at least 1 year and must report on the trapping program and provide copies of trapping records to the NPPO of South Korea each month. These trapping records would have to be made available to APHIS for review upon request.

#### Packinghouse Procedures

The tomatoes would have to be packed within 24 hours of harvest in a pest-exclusionary packinghouse. While packing the tomatoes for export to the United States, the packinghouse would only be allowed to accept tomatoes from registered pest-exclusionary structures. A random sample of fruit per lot, as determined by the NPPO of South Korea and agreed to by APHIS, would have to

be inspected for external pests and the fruit cut to reveal internal pests. Each sample would have to be of a size sufficient to detect pest infestations. Inspection of cut fruit is effective at detecting fruit flies, such as *B. depressa*. Any damaged, diseased, or infested fruit would have to be removed and separated from the commodity destined for export to the United States. The tomatoes would have to be safeguarded by an insect-proof mesh, screen, or plastic tarpaulin while in transit from the production site to the packinghouse and while awaiting packing.

The tomatoes would have to be packed for shipment to the United States in insect-proof cartons or containers, or covered with insect-proof screen or plastic tarpaulin. These safeguards would have to remain intact until the arrival of the tomatoes in the United States or the consignment would not be allowed to enter the United States.

#### Commercial Consignments

Only commercial consignments of tomatoes with stems from South Korea would be allowed to be imported into the United States. Produce grown commercially is less likely to be infested with plant pests than noncommercial consignments. Noncommercial consignments are more prone to infestations because the commodity is often ripe to overripe, could be of a variety with unknown susceptibility to pests, and is often grown with little or no pest control. Commercial consignments, as defined in § 319.56–2, are consignments that an inspector identifies as having been imported for sale and distribution. Such identification is based on a variety of indicators, including, but not limited to: Quantity of produce, type of packing, identification of grower or packinghouse on the packaging, and documents consigning the fruits or vegetables to a wholesaler or retailer.

#### Phytosanitary Certificate

To certify that the tomatoes have been produced in accordance with the mitigations described in this document, we would require that each consignment of tomatoes be accompanied by a phytosanitary certificate of inspection issued by the NPPO of South Korea bearing an additional declaration that reads “Tomatoes in this consignment were grown in pest-exclusionary structures in accordance with 7 CFR 319.56–51 and were inspected and found free of *Bactrocera depressa*, *Helicoverpa armigera*, *Helicoverpa assulta*,

*Mamestra brassicae*, *Ostrinia furnacalis*, *Scirtothrips dorsalis*, and *Thrips palmi*.”

These proposed provisions governing the importation of fresh tomatoes with stems from South Korea would be added to the regulations as a new § 319.56–51.

#### Executive Order 12866 and Regulatory Flexibility Act

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

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (*see ADDRESSES* above for instructions for accessing Regulations.gov).

South Korea expects to export one 40-foot shipping container of fresh tomatoes with stems per year to the United States. A shipping container can hold about 25 metric tons (MT) of tomatoes with stems. In 2009, the United States produced 1.47 million MT of tomatoes, U.S. imports reached 1.19 million MT, and U.S. exports were 0.17 million MT. Thus, the total U.S. supply of tomatoes for this period was approximately 2.49 million MT (production plus imports minus exports). This quantity greatly dwarfs the relatively small amount that is expected to be imported from South Korea. Therefore, while the majority of domestic tomato farms are small, the impact of the proposed tomato imports from South Korea would be negligible.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12988

This proposed rule would allow fresh tomatoes with stems to be imported into the United States from South Korea. If this proposed rule is adopted, State and local laws and regulations regarding fresh tomatoes with stems imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is

adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2010–0020. Please send a copy of your comments to: (1) Docket No. APHIS–2010–0020, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

We are proposing to amend the fruits and vegetables regulations to allow, under certain conditions, the importation into the United States of commercial shipments of tomatoes with stems from the Republic of Korea. The conditions for the importation of tomatoes with stems from the Republic of Korea include requirements for pest exclusion at the production site, fruit fly trapping inside and outside the production site, and pest-excluding packinghouse procedures. The tomatoes would also be required to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the Republic of Korea with an additional declaration confirming that the tomatoes had been produced in accordance with the proposed requirements. This action would allow for the importation of tomatoes with stems from the Republic of Korea while continuing to provide protection against the introduction of injurious plant pests into the United States.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency’s



functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, 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 information collection on those who are to respond (such as 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).

*Estimate of burden:* Public reporting burden for this collection of information is estimated to average 2 hours per response.

*Respondents:* Foreign officials.

*Estimated annual number of respondents:* 2.

*Estimated annual number of responses per respondent:* 1.5.

*Estimated annual number of responses:* 3.

*Estimated total annual burden on respondents:* 6 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

### E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

### PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701-7772, and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. A new § 319.56-51 is added to read as follows:

#### § 319.56-51 Tomatoes with stems from the Republic of Korea.

Fresh tomatoes with stems (*Solanum lycopersicum* L.) (Synonym: *Lycopersicon esculentum* P. Mill.) may be imported into the United States from the Republic of Korea only under the conditions described in this section.

These conditions are designed to prevent the introduction of the following quarantine pests: *Bactrocera depressa*, *Heliocoverpa armigera*, *Heliocoverpa assulta*, *Mamestra brassicae*, *Ostrinia furnacalis*, *Scirtothrips dorsalis*, and *Thrips palmi*.

(a) *Registered pest-exclusionary structures.* The tomatoes must be grown in pest-exclusionary structures that are registered with the national plant protection organization (NPPO) of the Republic of Korea and approved by the NPPO of the Republic of Korea and APHIS.

(1) The pest-exclusionary structures must be equipped with double self-closing doors.

(2) Any vents or openings in the pest-exclusionary structures (other than the double self-closing doors) must be covered with 1.6 mm or smaller screening in order to prevent the entry of pests into the pest-exclusionary structures.

(3) The pest-exclusionary structures must be inspected monthly throughout the growing season (March through November) by the NPPO of the Republic of Korea or its approved designee to ensure that phytosanitary procedures are employed to exclude plant pests and diseases and to verify that the screening is intact.

(b) *Trapping for Bactrocera depressa.* Trapping for *B. depressa* is required both inside and outside the pest-exclusionary structures. Trapping must begin at least 2 months prior to the start of harvest and continue until the end of harvest.

(1) *Inside the pest-exclusionary structures.* APHIS-approved traps with an APHIS-approved protein bait must be placed inside the pest-exclusionary structures at a density of at least two traps per pest-exclusionary structure. The traps must be serviced at least once per week. If a single *B. depressa* is captured in a trap inside a pest-exclusionary structure, the NPPO of the Republic of Korea will immediately prohibit that pest-exclusionary structure from exporting tomatoes to the United States and notify APHIS of the action.

The prohibition will remain in effect until the NPPO of the Republic of Korea and APHIS agree that the risk has been mitigated.

(2) *Outside the pest-exclusionary structures.* APHIS-approved traps with an approved protein bait must be placed in a 500-meter-wide buffer area around the registered pest-exclusionary structure at a density of one trap per 10 hectares. During the months of March through November, at least one trap must be placed in the buffer area near each pest-exclusionary structure. The traps must be serviced at least once per week. If three *B. depressa* are found inside the buffer zone within 2 kilometers of each other within a 30-day period, the NPPO of the Republic of Korea will immediately prohibit all registered pest-exclusionary structures within 2 kilometers of the finds from exporting tomatoes to the United States and notify APHIS of the action. The prohibition will remain in effect until the NPPO of the Republic of Korea and APHIS agree that the risk has been mitigated.

(3) Records of trap placement, trap servicing, and fruit fly captures for each pest-exclusionary structure must be kept for at least 1 year and trapping records provided to the NPPO of the Republic of Korea each month. The NPPO of the Republic of Korea must make the records available to APHIS for review upon request.

(c) *Packinghouse procedures.* The tomatoes must be packed within 24 hours of harvest in a pest-exclusionary packinghouse. During the time the packinghouse is in use for exporting tomatoes to the United States, the packinghouse may only accept tomatoes from registered pest-exclusionary structures. A random sample of fruit per lot, as determined by the NPPO of the Republic of Korea and agreed to by APHIS, must be inspected for external pests and the fruit must be cut to reveal internal pests. Each sample must be of sufficient size in order to detect pest infestations. Any damaged, diseased, or infested fruit should be removed and separated from the commodity destined for export. The tomatoes must be safeguarded by an insect-proof mesh, screen, or plastic tarpaulin while in transit from the production site to the packinghouse and while awaiting packing. The tomatoes must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit to the United States. These safeguards must remain intact until the arrival of the tomatoes in the United States or the consignment will not be allowed to enter the United States.

(d) *Commercial consignments.* Tomatoes with stems from the Republic of Korea may be imported in commercial consignments only.

(e) *Phytosanitary certificate.* Each consignment of tomatoes must be accompanied by a phytosanitary certificate of inspection issued by the NPPO of the Republic of Korea bearing the following additional declaration: "Tomatoes in this consignment were grown in pest-exclusionary structures in accordance with 7 CFR 319.56–51 and were inspected and found free from *Bactrocera depressa*, *Heliocoverpa armigera*, *Heliocoverpa assulta*, *Mamestra brassicae*, *Ostrinia furnacalis*, *Scirtothrips dorsalis*, and *Thrips palmi*."

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–5963 Filed 3–14–11; 8:45 am]

BILLING CODE 3410–34–P

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 202

[Regulation B; Docket No. R–1408]

RIN No. 7100–AD67

### Equal Credit Opportunity

**AGENCY:** Board of Governors of the Federal Reserve System (Board).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Section 701 of the Equal Credit Opportunity Act (ECOA) requires a creditor to notify a credit applicant when it has taken adverse action against the applicant. The ECOA adverse action requirements are implemented in the Board's Regulation B. Section 615(a) of the Fair Credit Reporting Act (FCRA) also requires a person to provide a notice when the person takes an adverse action against a consumer based in whole or in part on information in a consumer report. Certain model notices in Regulation B include the content required by both the ECOA and the FCRA adverse action provisions, so that creditors can use the model notices to comply with the adverse action requirements of both statutes. The Board proposes to amend these model notices in Regulation B to include the disclosure of credit scores and information relating to credit scores if a credit score is used in taking adverse action. These proposed amendments reflect the new content requirements in section 615(a) of the FCRA that were added by section 1100F of the Dodd-

Frank Wall Street Reform and Consumer Protection Act.

**DATES:** Comments must be received on or before April 14, 2011. Comments on the Paperwork Reduction Act analysis set forth in Section III.A. of this **Federal Register** notice must be received on or before May 16, 2011.

**ADDRESSES:** You may submit comments, identified by Docket No. R–1408, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments on the <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.
- *FAX:* 202–452–3819 or 202–452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** *Board:* Mandie K. Aubrey, Senior Attorney, or Catherine Henderson, Attorney, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, or age (provided the applicant has the capacity to contract), because all or part of an applicant's income derives from public assistance, or because an applicant has in good faith exercised any right under

the Consumer Credit Protection Act. The Board's Regulation B (12 CFR part 202) implements the ECOA.

Section 701(d) of the ECOA generally requires a creditor to notify a credit applicant against whom it has taken an adverse action. Under section 701(d)(6) of the ECOA, an adverse action generally means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.

Section 615(a) of the FCRA also requires a person to provide an adverse action notice when the person takes an adverse action based in whole or in part on information in a consumer report. The definition of adverse action in section 603(k) of the FCRA incorporates, for purposes of credit transactions, the definition of adverse action under ECOA. The adverse action provisions in both the ECOA and the FCRA require certain disclosures to be given to consumers.

The ECOA adverse action provisions are implemented in Regulation B. There are no implementing regulations for the adverse action requirements of section 615(a) of the FCRA. However, as explained in comment 202.9(b)(2)–9 of Regulation B, certain model notices in Regulation B include the content required by both the ECOA and the FCRA, so that persons can use the model notices to comply with the adverse action requirements of both statutes.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law. Public Law 111–203, 124 Stat. 1376. Section 1100F of the Dodd-Frank Act amends section 615(a) of the FCRA to require creditors to disclose on FCRA adverse action notices a credit score used in taking any adverse action and information relating to that score. The effective date of these amendments is July 21, 2011.<sup>1</sup>

The Board is proposing to amend those model adverse action notices in Regulation B which incorporate the content requirements of section 615(a) of the FCRA to reflect the new content requirements added by section 1100F of the Dodd-Frank Act. These revisions to the model notices will help facilitate uniform compliance when section 1100F of the Dodd-Frank Act becomes effective. Thus, pursuant to its authority

<sup>1</sup> Section 1100H of the Dodd-Frank Act provides that the amendments in Subtitle H of Title X, which includes Section 1100F, become effective on the "designated transfer date." The Secretary of the Treasury set the designated transfer date as July 21, 2011. 75 FR 57252 (Sept. 20, 2010).

in section 703(a) of the ECOA, the Board is proposing to amend certain adverse action model notices in Regulation B consistent with the requirements of section 1100F of the Dodd-Frank Act.

## II. Section-by-Section Analysis

### *Appendix C to Part 202—Sample Notification Forms*

Under section 701(d) of the ECOA, a creditor must provide to applicants against whom adverse action is taken either: (1) A statement of reasons for taking the adverse action as a matter of course; or (2) a notification of adverse action which discloses the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made by the applicant within sixty days after the written notification. Section 615(a) of the FCRA requires a person to provide in an adverse action notice information regarding the consumer reporting agency that furnished the consumer report used in taking the adverse action. It also requires a person to disclose that a consumer has a right to a free credit report and right to dispute the accuracy or completeness of any information in a consumer report.

Section 1100F of the Dodd-Frank Act amends section 615(a) of the FCRA to require that creditors disclose additional information on FCRA adverse action notices. Specifically, a person must disclose on a FCRA adverse action notice a credit score used in taking any adverse action and information relating to that score, in addition to the information currently required by section 615(a) of the FCRA. The statute generally requires that the FCRA adverse action notice include: (1) A numerical credit score used in making the credit decision; (2) the range of possible scores under the model used; (3) the key factors that adversely affected the credit score of the consumer in the model used; (4) the date on which the credit score was created; and (5) the name of the person or entity that provided the credit score.

As explained in paragraph 2 of Appendix C to part 202, model notices C-1 through C-5 may be used to comply with the adverse action provisions of both the ECOA and the FCRA. The Board proposes to amend model notices C-1 through C-5 to incorporate the additional content requirements prescribed by section 1100F of the Dodd-Frank Act.

Under the proposal, Forms C-1 through C-5 would be revised to include, as applicable, a statement that the creditor obtained the consumer's credit score from a consumer reporting

agency named in the notice and used the score in making the credit decision. The notice would also state that a credit score is a number that reflects the information in the consumer's credit report and that the consumer's credit score can change, depending on how the information in the consumer's credit report changes. The model notices would also provide space for the creditor to include the content required under section 1100F of the Dodd-Frank Act that is specific to the consumer. This content includes: the consumer's credit score, the date the credit score was created, the range of possible credit scores under the model used, and up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of enquiries made with respect to that consumer report is one of the factors).

In addition to the content added to each of Forms C-1 through C-5, Form C-3 would be amended for clarity. Form C-3 is a model notice that can be used by creditors in circumstances where the creditor uses a proprietary credit scoring system to make a credit decision and where the creditor uses information from a consumer reporting agency in this scoring evaluation. As discussed above, section 1100F of the Dodd-Frank Act requires information regarding a credit score that is obtained from a consumer reporting agency to be included on an adverse action notice. The Board believes discussing two different types of credit scoring systems on Form C-3 could be confusing for consumers. Therefore, the Board proposes to amend Form C-3 to clarify the differences between a proprietary score and a credit score that is obtained from a consumer reporting agency. The text would clarify that the consumer's application was processed by a system that assigns a numerical value to the various items of information the creditor considers when evaluating the consumer's application. This numerical value is based upon analyses of repayment histories of the creditor's customers. The proposed form would also add topic headings to help distinguish the different types of scores that were used in making the credit decision. It would also remove the reference to credit scoring in the title of the form.

In some cases, a person who is required to provide an adverse action notice under the FCRA may use a consumer report, but not a credit score, in taking the adverse action. Under section 1100F of the Dodd-Frank Act, a person is not required to disclose a credit score and related information if a credit score is not used in taking the

adverse action. Therefore, the amendments to Forms C-1 through C-5 are only applicable if a credit score is used in taking an adverse action. A person may amend, at its option, Form C-3 to add the additional headings and remove the reference to a credit scoring system, even if the person does not add the heading and information about the consumer's credit score.

The Board notes that section 1100F of the Dodd-Frank Act requires a creditor to provide, if applicable, a consumer's credit score and related information, regardless of whether it provides a statement of specific reasons for taking the adverse action or a disclosure of the applicant's right to a statement of specific reasons for an adverse action. Therefore, a creditor would not comply with the FCRA adverse action provisions by providing the required FCRA disclosures only if a consumer responds to a request for a statement of specific reasons for an adverse action. As a result, proposed Form C-5 reflects the requirement to provide the disclosures required by section 615(a) of the FCRA, including the consumer's credit score and the key factors that adversely affected the credit score, at the time a creditor provides a disclosure of the applicant's right to a statement of specific reasons for an adverse action.

The Board requests comment on whether the proposed revisions to the content of the adverse action model notices are appropriate. The Board also solicits comment on whether additional or different changes to the model notices should be adopted.

The Board also proposes to amend paragraph 2 of Appendix C, which discusses the disclosure requirements of section 615 of the FCRA that are contained in Forms C-1 through C-5. Paragraph 2 explains that Form C-1 contains the disclosures required by sections 615(a) and (b) of the FCRA, and Forms C-2 through C-5 contain only disclosures required by section 615(a) of the FCRA. Paragraph 2 also describes the circumstances under which a creditor must provide the section 615(a) disclosures or the section 615(b) disclosures.

The paragraph states that the combined ECOA-FCRA disclosures in Form C-1 through Form C-5 must state that a creditor obtained information from a consumer reporting agency. Consistent with section 1100F of the Dodd-Frank Act, the paragraph would be revised to state that the combined disclosure must also include, as applicable, a credit score used in taking adverse action along with related information. The paragraph would also be revised to clarify that information

from a consumer reporting agency was considered in the credit decision.

*Supplement I to Part 202—Official Staff Interpretations*

The Board proposes to amend comment 9(b)(2)–9 to reflect the proposed changes to the adverse action model notices. Comment 9(b)(2)–9 addresses the combined ECOA–FCRA adverse action disclosures. The proposed amendment would clarify that the FCRA requires a creditor to disclose, as applicable, a credit score it used in taking adverse action along with related information, including the key factors that adversely affected the consumer’s credit score. It would also eliminate a statement that is redundant.

The proposed amendment to comment 9(b)(2)–9 would also clarify that disclosing the key factors that adversely affected the consumer’s credit score does not satisfy the ECOA requirement to disclose specific reasons for denying or taking other adverse action on an application or extension of credit. The Board recognizes that a key factor(s) that adversely affected the consumer’s credit score may be the same as a specific reason(s) for denying credit or taking other adverse action. However, some specific reasons for taking adverse action may be unrelated to a consumer’s credit score, such as reasons related to the consumer’s income, employment, or residency. Therefore, the Board believes the disclosure of both the key factors that adversely affected the consumer’s credit score and the specific reasons for denying credit or taking other adverse action is necessary to fulfill the separate requirements of the ECOA and the FCRA.

### III. Regulatory Analysis

#### A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the proposed rulemaking under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rulemaking is found in 12 CFR 202. In addition, as permitted by the PRA, the Board also proposes to extend for three years the current recordkeeping and disclosure requirements in connection with Regulation B. The Board may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100–0201.

Section 703(a)(1) of the Equal Credit Opportunity Act (15 U.S.C. 1691b(a)(1)) authorizes the Board to issue regulations to carry out the provisions of the Act. The purpose of the Act is to ensure that credit is made available to all creditworthy customers without discrimination on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), receipt of public assistance income, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act (15 U.S.C. 1600 *et seq.*). This information collection is mandatory.

Regulation B applies to all types of creditors, not just State member banks. However, under the Paperwork Reduction Act, the Board accounts for the burden of the paperwork associated with the regulation only for entities that are supervised by the Board. Appendix A of Regulation B defines these creditors as State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other Federal agencies account for the paperwork burden for the institutions they supervise. Creditors are required to retain records for 12 to 25 months as evidence of compliance.

The current annual burden to comply with the provisions of Regulation B is estimated to be 157,538 hours for the 1,107 institutions<sup>2</sup> supervised by the Board that are deemed to be respondents for the purposes of the PRA.

As discussed above, the Board proposes to amend model notices C–1 through C–5 to incorporate the additional content requirements prescribed by section 1100F of the Dodd-Frank Act. In addition, the Board proposes to amend Form C–3 to clarify the differences between a proprietary score and a credit score that is obtained from a consumer reporting agency.

The Board estimates that the proposed rule would impose a one-time increase in the total annual burden under Regulation B. The 1,107 respondents would take, on average, 16 hours (two business days) to update their systems

<sup>2</sup> The number of Board-supervised respondents was obtained from numbers published in the Board of Governors of the Federal Reserve System 96th Annual Report 2009: 845 State member banks, 204 branches & agencies of foreign banks, three commercial lending companies, and 55 Edge Act or agreement corporations.

to comply with the disclosure requirements addressed in 12 CFR part 202. This one-time revision would increase the burden by 17,712 hours. The Board estimates that, on a continuing basis, the revision to the rule would have a negligible effect on the annual burden. The total annual burden for the Regulation B information collection is estimated to increase from 157,538 to 175,250 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board’s functions; including whether the information has practical utility; (2) the accuracy of the Board’s estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Cynthia Ayouch, Acting Federal Reserve Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0202), Washington, DC 20503.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed regulations cover certain banks, other depository institutions, and non-bank entities that take adverse action against consumers. The Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.<sup>3</sup> The size standard to be considered a small business is: \$175 million or less in assets for banks and other depository institutions; and \$7 million or less in annual revenues for the majority of non-bank entities that are likely to be subject to the proposed regulations. The Board requests public comment in the following areas.

<sup>3</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

### 1. Reasons for the Proposed Rule

Section 1100F of the Dodd-Frank Act amends section 615(a) of the FCRA to require persons to disclose a credit score and information relating to that credit score in adverse action notices when the person uses a credit score in taking adverse action. Specifically, a person must disclose, in addition to the information currently required by section 615(a) of the FCRA: (1) A numerical credit score used in making the credit decision; (2) the range of possible scores under the model used; (3) the key factors that adversely affected the credit score of the consumer in the model used; (4) the date on which the credit score was created; and (5) the name of the person or entity that provided the credit score. The effective date of these amendments is July 21, 2011.

Certain model notices in Regulation B include the content required by both the ECOA and the FCRA adverse action provisions, so that creditors can use the model notices to comply with the adverse action requirements of both statutes. The Board is issuing proposed amendments to the combined ECOA-FCRA adverse action model notices in Regulation B pursuant to its existing authority under section 703(a) of the ECOA to facilitate compliance with the new requirements under section 1100F of the Dodd-Frank Act.

### 2. Statement of Objectives and Legal Basis

The **SUPPLEMENTARY INFORMATION** above contains this information. The legal basis for the proposed regulations is section 703(a) of the ECOA. The proposed regulations are consistent with section 1100F of the Dodd-Frank Act.

### 3. Description of Small Entities to Which the Regulation Applies

The proposed regulations apply to any person that (1) is required to provide an adverse action notice to a consumer; and (2) uses a credit score in making the credit decision requiring an adverse action notice. The total number of small entities likely to be affected by the proposal is unknown because the Board does not have data on the number of small entities that use credit scores in taking adverse action in connection with consumer credit. The adverse action provisions of section 1100F of the Dodd-Frank Act have broad applicability to persons who use credit scores in taking adverse action in connection with the provision of consumer credit.

Based on estimates compiled by the Board, the Federal Deposit Insurance

Corporation, and the Office of Thrift Supervision, there are approximately 9,585 depository institutions that could be considered small entities and that are potentially subject to the proposed rule.<sup>4</sup> The available data are insufficient to estimate the number of non-bank entities that would be subject to the proposed rule and that are small as defined by the SBA. Such entities would include non-bank mortgage lenders, auto finance companies, automobile dealers, other non-bank finance companies, insurance companies, employers, telephone companies, and utility companies.

It also is unknown how many of these small entities that meet the SBA's size standards and are potentially subject to the proposed regulations use credit scores in taking adverse action in connection with the provision of consumer credit. The proposed regulations do not impose any requirements on small entities that do not use credit scores in taking adverse action in connection with consumer credit.

The Board invites comment regarding the number and type of small entities that would be affected by the proposed rule.

### 4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The compliance requirements of the proposed regulations are described in detail in the **SUPPLEMENTARY INFORMATION** above.

The proposed regulations generally require a person that is required to provide an adverse action notice to a consumer and uses a credit score in making the credit decision to provide a credit score and information relating to that credit score in the notice, in addition to the information currently required by section 615(a) of the FCRA. A person is currently required to determine if it takes an adverse action, based in whole or in part on consumer reports, in connection with the provision of consumer credit. If the person does take adverse action based on consumer reports, the person is required to establish procedures for identifying those consumers to whom it must provide adverse action notices.

A person that is required to provide adverse action notices to certain consumers would need to analyze the regulations. The person would need to

<sup>4</sup> The estimate includes 1,504 institutions regulated by the Board, 673 national banks, and 4,167 Federally-chartered credit unions, as determined by the Board. The estimate also includes 2,872 institutions regulated by the FDIC and 369 thrifts regulated by the OTS. See 75 FR 36016, 36020 (Jun. 24, 2010).

determine whether it uses credit scores in taking adverse action against the consumers to whom it must provide adverse action notices. Persons that use credit scores in taking adverse action would need to provide a credit score and information relating to that credit score to those consumers to whom it must provide an adverse action notice, in addition to the information currently required by section 615(a) of the FCRA. Persons would need to design, generate, and provide notices, including a credit score and information relating to that credit score, to the consumers to whom it must provide an adverse action notice.

The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small institutions.

### 5. Identification of Duplicative, Overlapping, or Conflicting Federal Regulations

The Board has not identified any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposed regulations. As discussed in part III above, the proposed amendments to the adverse action rules are consistent with section 1100F of the Dodd-Frank Act. The Board is proposing the rules pursuant to their existing authority under section 703(a) of the ECOA. The proposed amendments to the adverse action model notices have been designed to work in conjunction with the requirements of section 1100F of the Dodd-Frank Act to help facilitate uniform compliance when this section becomes effective. The Board seeks comment regarding any statutes or regulations, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed regulations.

### 6. Discussion of Significant Alternatives

The Board welcomes comments on any significant alternatives consistent with section 703(a) of the ECOA and the provisions of section 1100F of the Dodd-Frank Act that would minimize the impact of the proposed regulations on small entities.

#### *Text of Proposed Revisions*

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ► bold-type arrows ◀ while language that would be deleted is set off with <bold-type angles>.

List of Subjects in 12 CFR Part 202

Aged, Banks, Banking, Civil Rights, Consumer protection, Credit, Discrimination, Federal Reserve System, Marital Status Discrimination, Penalties, Religious Discrimination, Reporting and recordkeeping requirements, Sex Discrimination.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 202 and the Official Staff Commentary, as follows:

PART 202—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

1. The authority citation for part 202 continues to read as follows:

Authority: 15 U.S.C. 1693b.

2. Appendix C to Part 202 is amended by revising paragraph 2 and Forms C-1 through C-5 to read as follows:

Appendix C to Part 202—Sample Notification Forms

\* \* \* \* \*
2. Form C-1 contains the Fair Credit Reporting Act disclosure as required by sections 615(a) and (b) of that act. Forms C-2 through C-5 contain only the section 615(a) disclosure (that a creditor obtained information from a consumer reporting agency that <played a part> was considered in the credit decision and, as applicable, a credit score used in taking adverse action along with related information). A creditor must provide the section 615(a) disclosure when adverse action is taken against a consumer based on information from a consumer reporting agency. A creditor must provide the section 615(b) disclosure when adverse action is taken based on information from an outside source other than a consumer reporting agency. In addition, a creditor must provide the section 615(b) disclosure if the creditor obtained information from an affiliate other than information in a consumer report or other than information concerning the affiliate's own transactions or experiences with the consumer. Creditors may comply with the disclosure requirements for adverse action based on information in a consumer report obtained from an affiliate by providing either the section 615(a) or section 615(b) disclosure.
\* \* \* \* \*

Form C-1—Sample Notice of Action Taken and Statement of Reasons Statement of Credit Denial, Termination or Change

Date:
Applicant's Name:
Applicant's Address:
Description of Account, Transaction, or Requested Credit:

Description of Action Taken:

Part I—Principal Reason(s) for Credit Denial, Termination, or Other Action Taken Concerning Credit

- This section must be completed in all instances.
Credit application incomplete
Insufficient number of credit references provided
Unacceptable type of credit references provided
Unable to verify credit references
Temporary or irregular employment
Unable to verify employment
Length of employment
Income insufficient for amount of credit requested
Excessive obligations in relation to income
Unable to verify income
Length of residence
Temporary residence
Unable to verify residence
No credit file
Limited credit experience
Poor credit performance with us
Delinquent past or present credit obligations with others
Collection action or judgment
Garnishment or attachment
Foreclosure or repossession
Bankruptcy
Number of recent inquiries on credit bureau report
Value or type of collateral not sufficient
Other, specify:

Part II—Disclosure of Use of Information Obtained From an Outside Source

This section should be completed if the credit decision was based in whole or in part on information that has been obtained from an outside source.

Our credit decision was based in whole or in part on information obtained in a report from the consumer reporting agency listed below. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

Name:
Address:
[Toll-free] Telephone number:

[We also obtained your credit score from this consumer reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how the information in your credit report changes.

Your credit score:
Date:
Scores range from a low of
to a high of

Key factors that adversely affected your credit score:

[Number of recent inquiries on credit report]

Our credit decision was based in whole or in part on information obtained from an affiliate or from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, no later than 60 days after you receive this notice, for disclosure of the nature of this information.

If you have any questions regarding this notice, you should contact:

Creditor's name:
Creditor's address:
Creditor's telephone number:

Notice: The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

Form C-2—Sample Notice of Action Taken and Statement of Reasons

Date

Dear Applicant: Thank you for your recent application. Your request for [a loan/a credit card/an increase in your credit limit] was carefully considered, and we regret that we are unable to approve your application at this time, for the following reason(s):

Your Income:
is below our minimum requirement.
is insufficient to sustain payments on the amount of credit requested.
could not be verified.

Your Employment:
is not of sufficient length to qualify.
could not be verified.

Your Credit History:
of making payments on time was not satisfactory.
could not be verified.

Your Application:
lacks a sufficient number of credit references.
lacks acceptable types of credit references.

reveals that current obligations are excessive in relation to income.

Other:

The consumer reporting agency contacted that provided information that influenced our decision in whole or in part was [name, address and [toll-free] telephone number of the reporting agency]. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You have a right under

the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency. Any questions regarding such information should be directed to [consumer reporting agency]. If you have any questions regarding this letter, you should contact us at [creditor's name, address and telephone number].

►[We also obtained your credit score from this consumer reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how the information in your credit report changes.

Your credit score: \_\_\_\_\_

Date: \_\_\_\_\_

Scores range from a low of \_\_\_\_\_ to a high of \_\_\_\_\_

Key factors that adversely affected your credit score:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

[Number of recent inquiries on credit report]◀

Notice: The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

Form C-3—Sample Notice of Action Taken and Statement of Reasons ►[(Credit Scoring)]◀

Date

Dear Applicant: Thank you for your recent application for \_\_\_\_\_. We regret that we are unable to approve your request.

►[Reasons for Denial of Credit]◀

Your application was processed by a ►[◀credit scoring▶]◀ system that assigns a numerical value to the various items of information we consider in evaluating an application. These numerical values are based upon the results of analyses of repayment histories of large numbers of customers.

The information you provided in your application did not score a sufficient number of points for approval of the application. The reasons you did not score well compared with other applicants were:

- Insufficient bank references
- Type of occupation
- Insufficient credit experience

- Number of recent inquiries on credit bureau report

►[Your Right to Get Your Credit Report]◀

In evaluating your application the consumer reporting agency listed below provided us with information that in whole or in part influenced our decision. The consumer reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. It can be obtained by contacting: [name, address, and [toll-free] telephone number of the consumer reporting agency]. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

►[Information about Your Credit Score

We also obtained your credit score from this consumer reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how the information in your credit report changes.

Your credit score: \_\_\_\_\_

Date: \_\_\_\_\_

Scores range from a low of \_\_\_\_\_ to a high of \_\_\_\_\_

Key factors that adversely affected your credit score:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

[Number of recent inquiries on credit report]◀

If you have any questions regarding this letter, you should contact us at

Creditor's Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Sincerely,

Notice: The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (with certain limited exceptions); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

Form C-4—Sample Notice of Action Taken, Statement of Reasons and Counteroffer

Date

Dear Applicant: Thank you for your application for \_\_\_\_\_. We are unable to offer you credit on the terms that you requested for the following reason(s):

\_\_\_\_\_

We can, however, offer you credit on the following terms: \_\_\_\_\_

If this offer is acceptable to you, please notify us within [amount of time] at the following address: \_\_\_\_\_.

Our credit decision on your application was based in whole or in part on information obtained in a report from [name, address and [toll-free] telephone number of the consumer reporting agency]. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

►[We also obtained your credit score from this consumer reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how the information in your credit report changes.

Your credit score: \_\_\_\_\_

Date: \_\_\_\_\_

Scores range from a low of \_\_\_\_\_ to a high of \_\_\_\_\_

Key factors that adversely affected your credit score:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

[Number of recent inquiries on credit report]◀

You should know that the Federal Equal Credit Opportunity Act prohibits creditors, such as ourselves, from discriminating against credit applicants on the basis of their race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract), because they receive income from a public assistance program, or because they may have exercised their rights under the Consumer Credit Protection Act. If you believe there has been discrimination in handling your application you should contact the [name and address of the appropriate Federal enforcement agency listed in appendix A].

Sincerely,

Form C-5—Sample Disclosure of Right to Request Specific Reasons for Credit Denial

Date

Dear Applicant: Thank you for applying to us for \_\_\_\_\_.

After carefully reviewing your application, we are sorry to advise you that we cannot [open an account for you/grant a loan to you/increase your credit limit] at this time. If you would like a statement of specific reasons why your application was denied, please contact [our credit service manager] shown below within 60 days of the date of this

letter. We will provide you with the statement of reasons within 30 days after receiving your request.

Creditor's Name \_\_\_\_\_  
Address \_\_\_\_\_  
Telephone Number \_\_\_\_\_

If we obtained information from a consumer reporting agency as part of our consideration of your application, its name, address, and [toll-free] telephone number is shown below. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. [You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency.] You have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you received is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency. You can find out about the information contained in your file (if one was used) by contacting:

Consumer reporting agency's name \_\_\_\_\_  
Address \_\_\_\_\_  
[Toll-free] Telephone number \_\_\_\_\_

► [We also obtained your credit score from this consumer reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how the information in your credit report changes.

Your credit score: \_\_\_\_\_  
Date: \_\_\_\_\_  
Scores range from a low of \_\_\_\_\_ to a high of \_\_\_\_\_

Key factors that adversely affected your credit score:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Number of recent inquiries on credit report] ◀ \_\_\_\_\_

Sincerely,

Notice: The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

\* \* \* \* \*

3. Supplement I to part 202 is amended by revising paragraph 9(b)(2)–9 to read as follows:

**Supplement I to Part 202—Official Staff Interpretations**

\* \* \* \* \*

*Section 202.9—Notifications*

\* \* \* \* \*

*Paragraph 9(b)(2)*

\* \* \* \* \*

9. *Combined ECOA–FCRA disclosures.* The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or its own files. Disclosing that a credit report was obtained and used in the denial of the application, as the FCRA requires, does not satisfy the ECOA requirement to disclose specific reasons. For example, if the applicant's credit history reveals delinquent credit obligations and the application is denied for that reason, to satisfy § 202.9(b)(2) the creditor must disclose that the application was denied because of the applicant's delinquent credit obligations. ► The FCRA also requires a creditor to disclose, as applicable, a credit score it used in taking adverse action along with related information, including the key factors that adversely affected the consumer's credit score. Disclosing the key factors that adversely affected the consumer's credit score does not satisfy the ECOA requirement to disclose specific reasons for denying or taking other adverse action on an application or extension of credit. ◀ ◀ To satisfy the FCRA requirement, the creditor must also disclose that a credit report was obtained and used in the denial of the application. > Sample forms C–1 through C–5 of Appendix C of the regulation provide for the two disclosures. See also comment 9(a)(2)–1.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, March 1, 2011.

**Jennifer J. Johnson,**  
*Secretary of the Board.*

[FR Doc. 2011–5417 Filed 3–14–11; 8:45 am]

**BILLING CODE 6210–01–P**

**FEDERAL RESERVE SYSTEM**

**12 CFR Part 222**

**[Regulation V; Docket No. R–1407]**

**RIN 7100–AD66**

**FEDERAL TRADE COMMISSION**

**16 CFR Parts 640 and 698**

**RIN R411009**

**Fair Credit Reporting Risk-Based Pricing Regulations**

**AGENCIES:** Board of Governors of the Federal Reserve System (Board) and Federal Trade Commission (Commission).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** On January 15, 2010, the Board and the Commission published

final rules to implement the risk-based pricing provisions in section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), which amends the Fair Credit Reporting Act (FCRA). The final rules generally require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. The Board and the Commission propose to amend their respective risk-based pricing rules to require disclosure of credit scores and information relating to credit scores in risk-based pricing notices if a credit score of the consumer is used in setting the material terms of credit. These proposed amendments reflect the new requirements in section 615(h) of the FCRA that were added by section 1100F of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

**DATES:** Comments must be received on or before April 14, 2011. Comments on the Paperwork Reduction Act analysis set forth in Section III.A. of this **Federal Register** notice must be received on or before May 16, 2011.

**ADDRESSES:** All comments will become a matter of public record.

Comments should be addressed to:  
**Board:** You may submit comments, identified by Docket No. R–1407 and RIN No. RIN 7100–AD66, by any of the following methods:

- **Agency Web Site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments on the <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **E-mail:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.
- **FAX:** 202–452–3819 or 202–452–3102.

• **Mail:** Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–



500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

*Commission:* Comments should refer to "FCRA Risk-Based Pricing Rule Amendments: Project No. R411009," and may be submitted by any of the following methods. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled "Confidential."

- *Web site:* Comments filed in electronic form should be submitted by clicking on the following Web link: <https://ftcpublish.commentworks.com/ftc/riskbasedpricingamendnprm> and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at <https://ftcpublish.commentworks.com/ftc/riskbasedpricingamendnprm>.

- *Federal eRulemaking Portal:* If this notice appears at <http://www.regulations.gov>, you may also file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://www.regulations.gov) forwards to it.

- *Mail or Hand Delivery:* A comment filed in paper form should include "FCRA Risk-Based Pricing Rule Amendments: Project No. R411009," both in the text and on the envelope and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission/ Office of the Secretary, Room H-113 (Annex M), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington, DC area and at the Commission is subject to delay due to heightened security precautions.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

**FOR FURTHER INFORMATION CONTACT:**

*Board:* Mandie K. Aubrey, Senior Attorney; or Catherine Henderson, Attorney, Division of Consumer and Community Affairs, (202) 452-3667 or

(202) 452-2412, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

*Commission:* Manas Mohapatra and Katherine White, Attorneys, Division of Privacy and Identity Protection, Bureau of Consumer Protection, (202) 326-2252, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION 1:**

**I. Background**

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law on December 4, 2003. Public Law 108-159, 117 Stat. 1952. Section 311 of the FACT Act added section 615(h), 15 U.S.C. 1681m(h), to the Fair Credit Reporting Act (FCRA) to address risk-based pricing. Risk-based pricing refers to the practice of setting or adjusting the price and other terms of credit offered or extended to a particular consumer to reflect the risk of nonpayment by that consumer. Information from a consumer report is often used in evaluating the risk posed by the consumer. Creditors that engage in risk-based pricing generally offer more favorable terms to consumers with good credit histories and less favorable terms to consumers with poor credit histories.

Under section 615(h) of the FCRA, a person generally must provide a risk-based pricing notice to a consumer when the person uses a consumer report in connection with an extension of credit and, based in whole or in part on the consumer report, extends credit to the consumer on terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers. The risk-based pricing notice is designed primarily to improve the accuracy of consumer reports by alerting consumers to the existence of negative information in their consumer reports so that consumers can, if they choose, check their consumer reports for accuracy and

<sup>1</sup> The Board is placing the proposed regulations in the part of its regulations that implements the FCRA—12 CFR Part 222. For ease of reference, the discussion in the **SUPPLEMENTARY INFORMATION** section uses the numerical suffix of each of the Board's regulations. The FTC also is placing the proposed regulations and model forms in the part of its regulations implementing the FCRA, specifically 16 CFR part 640. However, the FTC uses different numerical suffixes that equate to the numerical suffixes discussed in the **SUPPLEMENTARY INFORMATION** section as follows: suffix .70 = FTC suffix .1, suffix .71 = FTC suffix .2, suffix .72 = FTC suffix .3, suffix .73 = FTC suffix .4, suffix .74 = FTC suffix .5, and suffix .75 = FTC suffix .6.

correct any inaccurate information. The Board and the Commission (the Agencies) jointly published regulations implementing these risk-based pricing provisions on January 15, 2010 (75 FR 2724) (January 2010 Final Rule). The January 2010 Final Rule has a mandatory compliance date of January 1, 2011.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law. Public Law 111-203, 124 Stat. 1376. Section 1100F of the Dodd-Frank Act amends section 615(h) of the FCRA to require creditors to disclose in risk-based pricing notices a credit score used in making a credit decision and information relating to such credit score. The effective date of these amendments is July 21, 2011.<sup>2</sup>

Title X of the Dodd-Frank Act also establishes a Bureau of Consumer Financial Protection (the Bureau), to which rulewriting authority for certain consumer protection laws will transfer. Section 1088(a)(9) of the Dodd-Frank Act amends section 615(h)(6) to provide that rulewriting authority for section 615(h) will transfer to the Bureau. Pursuant to section 1100H of the Dodd-Frank Act, however, this rulewriting authority does not transfer to the Bureau until July 21, 2011.<sup>3</sup> Thus, rulewriting authority for the risk-based pricing provisions of FCRA, including the amendments prescribed by section 1100F of the Dodd-Frank Act, will not be vested in the Bureau until the date that the section 1100F amendments become effective.

The Agencies believe it is important to have implementing regulations and revised model forms in place by July 21, 2011. This will help ensure that consumers receive consistent disclosures of credit scores and information relating to credit scores and will help facilitate uniform compliance when section 1100F of the Dodd-Frank Act becomes effective.

Accordingly, the Agencies are proposing amendments to the risk-based pricing rules that are consistent with section 1100F of the Dodd-Frank Act pursuant to their existing authority under section 615(h) of the FCRA. Section 615(h) gives the Agencies the

<sup>2</sup> Section 1100H of the Dodd-Frank Act provides that the amendments in Subtitle H of Title X, which includes Section 1100F, become effective on a "designated transfer date." The Secretary of the Treasury set the designated transfer date as July 21, 2011. 75 FR 57252 (Sept. 20, 2010).

<sup>3</sup> Section 1100H of the Dodd-Frank Act provides that the amendments in Subtitle H of Title X, which includes Section 1088, become effective on a "designated transfer date." The Secretary of the Treasury set the designated transfer date as July 21, 2011. 75 FR 57252 (Sept. 20, 2010).

authority to issue rules implementing the risk-based pricing provisions, and requires the Agencies to address in those rules the form, content, timing, and manner of delivery of risk-based pricing notices. In particular, section 615(h)(5) prescribes certain content requirements for the risk-based pricing notices, but provides that the required content elements are the minimum that must be disclosed. Moreover, section 615(h)(6)(B)(iv) provides that the Agencies must provide a model notice that can be used to comply with section 615(h). Therefore, the Agencies have the authority to add content to the risk-based pricing notices that they deem appropriate. The Agencies believe that adding to the requirements for the risk-based pricing notice the content required by section 1100F of the Dodd-Frank Act and providing revised model notices is appropriate to avoid consumer confusion and to ensure timely and consistent compliance with the new content provisions.

## II. Section-by-Section Analysis

### *Section \_\_.73 Content, Form, and Timing of Risk-Based Pricing Notices*

#### Section \_\_.73(a) Content of the notice

Section 615(h) of the FCRA requires a person to include certain information in a risk-based pricing notice. The January 2010 Final Rule implements the general content requirements for risk-based pricing notices in § 222.72(a)(1) and § 640.4(a)(1) (hereafter “general risk-based pricing notice”). The January 2010 Final Rule also sets forth the content requirements for any risk-based pricing notice required to be given as a result of the use of a consumer report in an account review in § 222.72(a)(2) and § 640.4(a)(2) (hereafter “account review notice”).

Pursuant to section 615(h) of the FCRA, the January 2010 Final Rule provides that a general risk-based pricing notice must include a statement that the person sending the notice has set the terms of credit offered, such as the annual percentage rate, based on information from a consumer report, and a statement that those terms may be less favorable than the terms offered to consumers with better credit histories. Similarly, the January 2010 Final Rule provides that the account review notice must include a statement that the person sending the notice has conducted a review of the account based in whole or in part on information from a consumer report, and a statement that as a result of that review the annual percentage rate on the account has been increased. The January 2010 Final Rule also requires a person to provide certain

information about the consumer reporting agency that furnished a consumer report and about the consumer's right to a free consumer report. The January 2010 Final Rule also provides that the general risk-based pricing notice and the account review notice must encourage consumers to verify the accuracy of the information in their consumer reports.

Section 1100F of the Dodd-Frank Act amends section 615(h) of the FCRA to require that creditors disclose additional information in risk-based pricing notices. Specifically, a person must disclose in a risk-based pricing notice a credit score used in making a credit decision and information relating to such credit score, in addition to the information currently required by section 615(h) of the FCRA. Section 1100F of the Dodd-Frank Act requires that a risk-based pricing notice include: (1) A numerical credit score used in making the credit decision; (2) the range of possible scores under the model used; (3) the key factors that adversely affected the credit score of the consumer in the model used; (4) the date on which the credit score was created; and (5) the name of the person or entity that provided the credit score.

Pursuant to section 615(h) of the FCRA, proposed \_\_.73(a)(1) and (a)(2) would amend the content requirements of the general risk-based pricing notice and the account review notice, consistent with section 1100F of the Dodd-Frank Act. Proposed \_\_.73(a)(1)(ix) would require a person to provide the additional content described above in a general risk-based pricing notice if a credit score of the consumer to whom a person grants, extends, or otherwise provides credit is used in setting the material terms of credit. Similarly, proposed \_\_.73(a)(2)(ix) would require a person to provide the additional content described above in an account review notice if a credit score of the consumer whose extension of credit is under review is used in increasing the annual percentage rate.

Section 1100F of the Dodd-Frank Act requires a risk-based pricing notice to include a disclosure of a credit score used by a person in making the credit decision. However, a person who is required to provide a general risk-based pricing notice or account review notice may use a credit report to set the credit terms offered or extended to consumers without using a credit score. In a case where a person does not use a credit score in making the credit decision requiring a risk-based pricing notice or account review notice, the person would not be required to disclose a

credit score and information relating to a credit score in such a notice.

In some cases, a creditor may use the credit score of a guarantor, co-signer, surety, or endorser, but not a credit score of the consumer to whom it extends credit or whose extension of credit is under review. Proposed \_\_.73(a)(1)(ix) and \_\_.73(a)(2)(ix) would only require a person to disclose a credit score and information relating to a credit score when using the credit score of the consumer to whom it grants, extends, or otherwise provides credit or whose extension of credit is under review. As discussed in the January 2010 Final Rule, a person is not required to provide a risk-based pricing notice to a guarantor, co-signer, surety, or endorser.<sup>4</sup> A person may be required, however, to provide a risk-based pricing notice to the consumer to whom it grants, extends, or otherwise provides credit, even if the person only uses the credit report or credit score of the guarantor, co-signer, surety, or endorser.

The Agencies do not believe the credit score of one consumer, such as a guarantor, co-signer, surety, or endorser, should be disclosed to a different consumer who is required to be given a risk-based pricing notice. Therefore, when a person only uses a credit score of a guarantor, co-signer, surety, or endorser to set the terms of credit for the consumer to whom it extends credit or whose extension of credit is under review, the proposal would not require a credit score to be provided in the general risk-based pricing notice or account review notice.

In those situations where a person must provide a credit score and information relating to a credit score to a consumer in a general risk-based pricing notice or an account review notice, §§ \_\_.73(a)(1)(ix)(B)–(F) and \_\_.73(a)(2)(ix)(B)–(F) of the proposed rules would require the following disclosures: (1) the credit score<sup>5</sup> used by the person in making the credit decision; (2) the range of possible credit scores under the model used to generate the credit score; (3) all of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquiries made with respect to the consumer report, the number of key factors shall not exceed five; (4) the date on which the credit score was created; and (5) the name of

<sup>4</sup> See 75 FR at 2731 (Jan. 15, 2010).

<sup>5</sup> “Credit score” is defined in the January 2010 Final Rule in \_\_.71(l) to have the same meaning as section 609(f)(2)(A) of the FCRA, 15 U.S.C. 1681g(f)(2)(A). This is consistent with the definition of “numerical credit score” in section 1100F of the Dodd-Frank Act.

the consumer reporting agency or other person that provided the credit score. In addition, to provide context for the additional content requirements, proposed §§ .73(a)(1)(ix)(A) and .73(a)(2)(ix)(A) also would require a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history.

The Agencies request comment as to whether the proposed additional content for general risk-based pricing notices and account review notices in the proposed rules is appropriate.

Finally, the Agencies note that the January 2010 Final Rule provides exceptions to the requirements to provide general risk-based pricing notices for persons that provide credit score disclosure exception notices to consumers who request credit. See §§ 222.74(d), (e), and (f); §§ 640.5(d), (e), and (f). Nothing in section 1100F of the Dodd-Frank Act or this proposal limits the ability of creditors to provide these exception notices in lieu of the general risk-based pricing notice.

#### Section \_\_\_\_ .73(b) Form of the Notice

The Agencies provide model forms that may be used for compliance with the risk-based pricing requirements in Appendix H of the January 2010 Final Rule. Paragraph (b)(2) of the January 2010 Final Rule clarifies how each of the model forms of the risk-based pricing notices required by §§ \_\_\_\_ .72(a) and (c), and by § \_\_\_\_ .72(d) may be used. Paragraph (b)(2) provides that appropriate use of the model forms contained in Appendices H-1 and H-2 of the Board's rules and Appendices B-1 and B-2 of the Commission's rules are deemed to be in compliance with §§ \_\_\_\_ .72(a) and (c), and § \_\_\_\_ .72(d), respectively. Use of these model forms is optional.

Under the proposal, the Agencies would amend Appendices H and B of the January 2010 Final Rule to add two new model forms in Appendices H-6 and H-7 of the Board's proposed rules and Appendices B-6 and B-7 of the Commission's proposed rules, for situations where a credit score and information relating to such credit score must be disclosed. See *Model Forms*, below. Proposed paragraph (b)(2) would clarify that appropriate use of Model Form H-1 or H-6, or B-1 or B-6, would be deemed to comply with the requirements of the requirements of § \_\_\_\_ .72(a) and (c). It would also clarify that appropriate use of Model Form H-2 or H-7, or B-2 or B-7, would be deemed to comply with the requirements of § \_\_\_\_ .72(d).

#### Section \_\_\_\_ .73(d) Multiple Credit Scores

Some creditors may obtain multiple credit scores from consumer reporting agencies in connection with their underwriting processes. A creditor may use one or more of those scores in setting the material terms of credit. Section 1100F of the Dodd-Frank Act only requires a person to disclose a single credit score that is used by the person in making the credit decision. The Agencies are proposing § \_\_\_\_ .73(d) to address situations where a creditor obtains multiple credit scores from consumer reporting agencies and must provide either a general risk-based pricing notice or an account review notice to a consumer.

Proposed § \_\_\_\_ .73(d)(1) provides that when a person uses one of those credit scores in setting the material terms of credit, for example, by using the low, middle, high, or most recent score, the general risk-based pricing and account review notices would be required to include that credit score and information relating to that credit score as required by proposed §§ \_\_\_\_ .73(a)(1)(ix) and (a)(2)(ix). When a person uses two or more credit scores in setting the material terms of credit, for example, by computing the average of all the credit scores obtained, the notices would be required to include any one of those credit scores and information relating to the credit score as required by proposed §§ \_\_\_\_ .73(a)(1)(ix) and (a)(2)(ix). The notice may, at the person's option, include more than one credit score, along with the information specified in proposed §§ \_\_\_\_ .73(a)(1)(ix) and (a)(2)(ix) for each credit score disclosed.

Proposed § \_\_\_\_ .73(d)(2) provides examples to illustrate the notice requirements for creditors that obtain multiple credit scores from consumer reporting agencies. The first example described in proposed § \_\_\_\_ .73(d)(2)(i) applies when a person that uses consumer reports to set the material terms of credit cards granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. Under the proposed rules, that person must disclose the low score in its notices. The example described in proposed § \_\_\_\_ .73(d)(2)(ii) applies when a person that uses consumer reports to set the material terms of automobile loans granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of

which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. Under the proposal, that person may choose any one of these scores to include in its notices.

#### Section \_\_\_\_ .75 Rules of Construction

##### Section \_\_\_\_ .75(c) Multiple Consumers

The proposed rules would amend § \_\_\_\_ .75(c) to address circumstances where a person must provide multiple consumers, such as co-borrowers, with a risk-based pricing notice in a transaction. The proposed rules retain the rule of construction that clarifies that in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a risk-based pricing notice to each consumer. The proposed rules, however, would amend the rules addressing the provision of a risk-based pricing notice when the consumers have the same address and when the consumers have different addresses to account for situations where a risk-based pricing notice contains a consumer's credit score.

Proposed § \_\_\_\_ .75(c)(1) provides that whether the consumers have the same address or not, the person must provide a separate notice to each consumer if a notice includes a credit score(s). Each separate notice that includes a credit score(s) must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. If the consumers have the same address, and the notice does not include a credit score(s), a person may satisfy the requirements by providing a single notice addressed to both consumers.

The proposed rules would also amend § \_\_\_\_ .75(c)(3)(i) to provide an example to illustrate the notice requirements when a person must provide a risk-based pricing notice that includes credit score information to multiple consumers. Proposed § \_\_\_\_ .75(c)(3)(i) would clarify that, in a situation where two consumers jointly apply for credit with a creditor and the credit decision is based in part on the consumers' credit scores, a separate risk-based pricing notice must be provided to each consumer whether the consumers have the same address or not. Each separate risk-based pricing notice must contain the credit score(s) of the consumer to whom the notice is provided.

#### Model Forms

Appendix H of the Board's rules and Appendix B of the Commission's rules contain five model forms that the Agencies prepared to facilitate

compliance with the rules. Two of the model forms are for risk-based pricing notices, and three of the model forms are for the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form. Model forms H-1 and B-1 are for use in complying with the general risk-based pricing notice requirements in § \_\_\_\_.72. Model forms H-2 and B-2 are for use in complying with the risk-based pricing notices given in connection with account review in § \_\_\_\_.72.

The proposed rules would add two new forms that could be used when a person must disclose credit score information to a consumer. Model forms H-6 and B-6 set forth a risk-based pricing notice with credit score information that could be used to comply with the general risk-based pricing requirements if the additional content requirements of § \_\_\_\_.73(a)(1)(ix) apply. Model forms H-7 and B-7 set forth an account review risk-based pricing notice with credit score information that could be used to comply with the account review notice requirements if the additional content requirements of § \_\_\_\_.73(a)(2)(ix) apply.

The Agencies request comment on the design and content of these model forms. The Agencies specifically solicit comment on the ordering of the content in Model Forms H-6 and H-7, and B-6 and B-7, and whether the credit score and information relating to a credit score should be presented prior to the information on credit reports.

Model forms H-1 and H-2, and B-1 and B-2 would be retained. The general risk-based pricing and account review notices could continue to be used to comply with § \_\_\_\_.72 when the additional content requirements discussed in §§ \_\_\_\_.73(a)(1)(ix) and (a)(2)(ix) do not apply. As with the other model forms, use of the model forms H-6 or H-7, or B-6 or B-7, by creditors would be optional. If a creditor appropriately uses Model Form H-6 or H-7, or B-6 or B-7, or modifies a form in accordance with the rules or the instructions to the appendix, that creditor would be deemed to be acting in compliance with the general risk-based pricing notice or account review requirement when the content provisions of §§ \_\_\_\_.73(a)(1)(ix) or (a)(2)(ix) apply.

Finally, the proposal would amend instructions 1. and 2. to Appendices H and B to reflect the addition of H-6 and H-7, and B-6 and B-7.

### III. Regulatory Analysis

#### A. Paperwork Reduction Act

##### 1. Request for Comment on Proposed Information Collection

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3512; 5 CFR part 1320, Appendix A.1), the Board and the Commission may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

In accordance with the PRA, the Board has reviewed the proposed rule under the authority delegated by OMB. The proposed rule contains requirements subject to the PRA. The collections of information that would be required by this proposed rule are found in 12 CFR 222.73(a)(1) and (a)(2). The Board's OMB control number is 7100-0308.<sup>6</sup>

The information collection requirements contained in this joint notice of proposed rulemaking will be submitted by the Commission to OMB for review and approval under the PRA.<sup>7</sup> The requirements are found in 16 CFR 640.4(a)(1) and (a)(2).

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the Agencies' 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;

(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; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record.

<sup>6</sup> The information collections (ICs) in this rule will be incorporated with the Board's Recordkeeping and Disclosure Requirements Associated with Regulation V (OMB No. 7100-0308). The burden estimates provided in this rule pertain only to the ICs associated with this proposed rulemaking. The current OMB inventory for Regulation V is available at: <http://www.reginfo.gov/public/do/PRAmain>.

<sup>7</sup> Current PRA clearance for the existing Fair Credit Reporting Risk-Based Pricing Regulations, under OMB control number 3084-0145, expires January 31, 2013.

Comments should be addressed to: Board: You may submit comments, identified by Docket No. R-1407 and RIN No. RIN 7100-AD66, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments on the <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

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

- *E-mail:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.

- *FAX:* 202-452-3819 or 202-452-3102.

- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

*Commission:* Comments should refer to "FCRA Risk-Based Pricing Rule Amendments: Project No. R411009," and may be submitted by any of the following methods. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled "Confidential."<sup>8</sup>

- *Web site:* Comments filed in electronic form should be submitted by clicking on the following Web link: <https://ftcpublic.commentworks.com/ftc/riskbasedpricingamendnprm> and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at <https://ftcpublic.commentworks.com/ftc/riskbasedpricingamendnprm>.

- *Federal eRulemaking Portal:* If this notice appears at <http://>

<sup>8</sup> FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

[www.regulations.gov](http://www.regulations.gov), you may also file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://regulations.gov) forwards to it.

- *Mail or Hand Delivery:* A comment filed in paper form should include “FCRA Risk-Based Pricing Rule Amendments: Project No. R411009,” both in the text and on the envelope and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission/ Office of the Secretary, Room H-113 (Annex M), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington, DC area and at the Commission is subject to delay due to heightened security precautions.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the Commission’s Web site, to the extent practicable, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the Commission’s Web site. More information, including routine uses permitted by the Privacy Act, may be found in the Commission’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

## 2. Proposed Information Collection

*Title of Information Collection:* Fair Credit Reporting Risk-Based Pricing Notice Amendments.

*Frequency of Response:* On occasion.

*Affected Public:* Any person that is required to provide a risk-based pricing notice and uses a credit score in making

the credit decision requiring a risk-based pricing notice.

*Board:* For purposes of the PRA, the Board is estimating the burden for entities regulated by the Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, and the U.S. Department of Housing and Urban Development (collectively, the “Federal financial regulatory agencies”). Such entities may include, among others, State member banks, national banks, insured nonmember banks, savings associations, Federally-chartered credit unions, and other mortgage lending institutions.

*Commission:* For purposes of the PRA, the Commission is estimating the burden for entities that extend credit to consumers for personal, household, or family purposes, and are subject to administrative enforcement by the FTC pursuant to section 621(a)(1) of the FCRA (15 U.S.C. 1681s(a)(1)). These businesses include, among others, non-bank mortgage lenders, consumer lenders, utilities, State-chartered credit unions, and automobile dealers and retailers that directly extend credit to consumers for personal, non-business uses.

*Abstract:* As discussed above, §§ \_\_.73(a)(1)(ix)(B)–(F) and \_\_.73(a)(2)(ix)(B)–(F) of the proposed rules would require the following disclosures: (1) the credit score<sup>9</sup> used by the person in making the credit decision; (2) the range of possible credit scores under the model used to generate the credit score; (3) all of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquiries made with respect to the consumer report, the number of key factors shall not exceed five; (4) the date on which the credit score was created; and (5) the name of the consumer reporting agency or other person that provided the credit score. In addition, proposed §§ \_\_.73(a)(1)(ix)(A) and \_\_.73(a)(2)(ix)(A) also would require a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer’s credit history.

*Estimated Burden:* To ease creditors’ burden and cost of complying with the notice and disclosure requirements, the Agencies have provided draft model

<sup>9</sup>“Credit score” is defined in the January 2010 Final Rule in \_\_.71(l) to have the same meaning as 15 U.S.C. 1681g(f)(2)(A). This is consistent with the definition of “numerical credit score” in section 1100F of the Dodd-Frank Act.

forms in Appendices H and B of the proposed regulations.

*Board:* The Board believes that since financial institutions are familiar with the existing provisions of section 615(h) of the FCRA, which require risk-based pricing disclosures when a person uses a consumer report in setting the material terms of credit, implementation of the proposed requirements should not be overly burdensome. The proposed requirements would require a person to add information to a disclosure that it is already providing to a consumer.

The Board estimates that there are 18,173 respondents regulated by the Federal financial regulatory agencies potentially affected by the new disclosure requirements. The Board estimates that the 18,173 respondents would take, on average, 16 hours (2 business days) to update their systems and modify model notices to comply with proposed requirements. This one-time annual burden is estimated to be 290,768 hours. The Board believes that, on a continuing basis, the revision to the rule would have a negligible effect on the annual burden.

*Commission:*

*Number of respondents:*

As discussed above, the proposed requirements would require a person that is required to provide a risk-based pricing notice and uses a credit score in making the credit decision requiring a risk-based pricing notice to add information to that disclosure.

Given the broad scope of creditors, it is difficult to determine precisely the number of them that are subject to the Commission’s jurisdiction and that engage in risk-based pricing and use a credit score in making the credit decision requiring a risk-based pricing notice. As a whole, the entities under the Commission’s jurisdiction are so varied that there are no general sources that provide a record of their existence, and they include many small entities for which there is no formal tracking method. Nonetheless, Commission staff estimates that the proposed regulations will affect approximately 199,500 creditors subject to the Commission’s jurisdiction.<sup>10</sup> The Commission invites

<sup>10</sup>This estimate derives in part from an analysis of the figures obtained from the North American Industry Classification System (NAICS) Association’s database of U.S. businesses. See <http://www.naics.com/search.htm>. Commission staff identified categories of entities under its jurisdiction that also directly provide credit to consumers. Those categories include retail, vehicle dealers, consumer lenders, and utilities. The estimate also includes state-chartered credit unions, which are subject to the Commission’s jurisdiction. See 15 U.S.C. 1681s. For the latter category, Commission staff relied on estimates from the

comment and information about the categories and number of creditors subject to its jurisdiction.

*Estimated Hours Burden:* As detailed below, Commission staff estimates that respondents would require, on average, 16 hours (two business days) to update their systems and modify model notices to comply with the proposed requirements. Thus, based on an estimated 199,500 respondents, the one-time burden, annualized for a 3 year PRA clearance, would be 1,064,000 hours  $[(16 \times 199,500) \div 3]$ . The Commission believes that, on a continuing basis, the revision to the rule would have a negligible effect on the annual burden.

*Estimated Cost Burden:* Commission staff derived labor costs by applying appropriate estimated hourly cost figures to the burden hours described above. It is difficult to calculate with precision the labor costs associated with the proposed regulations, as they entail varying compensation levels of clerical, management, and/or technical staff among companies of different sizes. In calculating the cost figures, Commission staff assumes that managerial and/or professional technical personnel will update systems for providing risk-based pricing notices and adapt the written notices as necessary at an hourly rate of \$42.95.<sup>11</sup> Based on the above estimates and assumptions, the estimated one-time labor cost for all categories of FTC covered entities under the proposed regulations, annualized for a 3 year PRA clearance, is \$45,698,800  $[(16 \text{ hours} \times \$42.95) \times 199,500] \div 3$ .

Commission staff does not anticipate that compliance with the proposed amendments will require any new capital or other non-labor expenditures. The proposed amendments provide a simple and concise model notice that creditors may use to comply, and as creditors already are providing risk-based pricing notices to consumers under the FCRA, they already have the necessary resources to generate and distribute these notices. Thus, any capital or non-labor costs associated with compliance would be negligible.

Credit Union National Association for the number of non-federal credit unions. See [http://www.ncua.gov/news/quick\\_facts/Facts2007.pdf](http://www.ncua.gov/news/quick_facts/Facts2007.pdf). For purposes of estimating the burden, Commission staff made the conservative assumption that all of the included entities engage in risk-based pricing and use a credit score in making the credit decision requiring a risk-based pricing notice.

<sup>11</sup> This cost is derived from the median hourly wage for management occupations found in the May 2009 National Occupational Employment and Wage Estimates of the Bureau of Labor Statistics, Table 1.

### B. Regulatory Flexibility Act

*Board:* The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed regulations cover certain banks, other depository institutions, and non-bank entities that extend credit to consumers. The Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.<sup>12</sup> The size standard to be considered a small business is: \$175 million or less in assets for banks and other depository institutions; and \$7 million or less in annual revenues for the majority of non-bank entities that are likely to be subject to the proposed regulations. The Board requests public comment in the following areas.

#### 1. Reasons for the Proposed Rule

Section 1100F of the Dodd-Frank Act amends section 615(h) of the FCRA to require persons to disclose a credit score and information relating to that credit score in risk-based pricing notices when the person uses a credit score in setting the material terms of credit. Specifically, a person must disclose, in addition to the information currently required by the January 2010 Final Rule: (1) A numerical credit score used in making the credit decision; (2) the range of possible scores under the model used; (3) the key factors that adversely affected the credit score of the consumer in the model used; (4) the date on which the credit score was created; and (5) the name of the person or entity that provided the credit score. The effective date of these amendments is July 21, 2011.

The Agencies are issuing proposed amendments to the risk-based pricing rules pursuant to their existing authority under section 615(h) of the FCRA to facilitate compliance with the new requirements under section 1100F of the Dodd-Frank Act.

#### 2. Statement of Objectives and Legal Basis

The SUPPLEMENTARY INFORMATION above contains this information. The legal basis for the proposed regulations is section 615(h) of the FCRA. The

<sup>12</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

proposed regulations are consistent with section 1100F of the Dodd-Frank Act.

#### 3. Description of Small Entities To Which the Regulation Applies

The proposed regulations apply to any person that (1) is required to provide a risk-based pricing notice to a consumer; and (2) uses a credit score in making the credit decision requiring a risk-based pricing notice. The total number of small entities likely to be affected by the proposal is unknown because the Agencies do not have data on the number of small entities that use credit scores for risk-based pricing in connection with consumer credit. The risk-based pricing provisions of section 1100F of the Dodd-Frank Act have broad applicability to persons who use credit scores for risk-based pricing in connection with the provision of consumer credit.

Based on estimates compiled by the Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision, there are approximately 9,585 depository institutions that could be considered small entities and that are potentially subject to the proposed rule.<sup>13</sup> The available data are insufficient to estimate the number of non-bank entities that would be subject to the proposed rule and that are small as defined by the SBA. Such entities would include non-bank mortgage lenders, auto finance companies, automobile dealers, other non-bank finance companies, telephone companies, and utility companies.

It also is unknown how many of these small entities that meet the SBA's size standards and are potentially subject to the proposed regulations use credit scores for risk-based pricing in connection with the provision of consumer credit. The proposed regulations do not impose any requirements on small entities that do not use credit scores for risk-based pricing in connection with consumer credit.

The Board invites comment regarding the number and type of small entities that would be affected by the proposed rule.

#### 4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The compliance requirements of the proposed regulations are described in

<sup>13</sup> The estimate includes 1,504 institutions regulated by the Board, 673 national banks, and 4,167 federally-chartered credit unions, as determined by the Board. The estimate also includes 2,872 institutions regulated by the FDIC and 369 thrifts regulated by the OTS. See 75 FR 36016, 36020 (Jun. 24, 2010).

detail in the **SUPPLEMENTARY INFORMATION** above.

The proposed regulations generally require a person that is required to provide a risk-based pricing notice to a consumer and uses a credit score in making the credit decision to provide a credit score and information relating to that credit score in the notice, in addition to the information currently required by the January 2010 Final Rule. Pursuant to the January 2010 Final Rule, a person is currently required to determine if it engages in risk-based pricing, based in whole or in part on consumer reports, in connection with the provision of consumer credit. If the person does engage in risk-based pricing based on consumer reports, the person generally is required to establish procedures for identifying those consumers to whom it must provide risk-based pricing notices.

A person that is required to provide risk-based pricing notices to certain consumers would need to analyze the regulations. The person would need to determine whether it used credit scores for risk-based pricing of the consumers to whom it must provide risk-based pricing notices. Persons that use credit scores for risk-based pricing would need to provide a credit score and information relating to that credit score to those consumers to whom it must provide a risk-based pricing notice, in addition to the information currently required by the January 2010 Final Rule. Persons would need to design, generate, and provide notices, including a credit score and information relating to that credit score, to the consumers to whom it must provide a risk-based pricing notice.

The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small institutions.

#### 5. Identification of Duplicative, Overlapping, or Conflicting Federal Regulations

The Board has not identified any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposed regulations. As discussed in Part III above, the proposed amendments to the risk-based pricing rules are consistent with section 1100F of the Dodd-Frank Act. The Agencies are proposing the rules pursuant to their existing authority under section 615(h) of the FCRA. The proposed amendments to the risk-based pricing rules have been designed to work in conjunction with the requirements of section 1100F of the Dodd-Frank Act to help facilitate

uniform compliance when this section becomes effective. The Board seeks comment regarding any statutes or regulations, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed regulations.

#### 6. Discussion of Significant Alternatives

The Board welcomes comments on any significant alternatives consistent with section 615(h) of the FCRA, including the provisions of section 1100F of the Dodd-Frank Act, that would minimize the impact of the proposed regulations on small entities.

*Commission:* The RFA, 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603–605. The SBA establishes size standards that define which entities are small businesses for purposes of the RFA.<sup>14</sup> The size standard to be considered a small business is: \$175 million or less in assets for banks and other depository institutions; and \$7 million or less in annual revenues for the majority of non-bank entities that are likely to be subject to the proposed regulations. The Commission does not believe that the proposed regulations will have a significant economic impact on a substantial number of small business entities. The Commission recognizes that the proposed regulations will affect some small business entities; however we do not expect that a substantial number of small businesses will be affected or that the regulations will have a significant economic impact on them. Nonetheless, the Commission has prepared the following IRFA. The Commission requests public comment in the following areas.

##### 1. Reasons for the Proposed Rule

Section 1100F of the Dodd-Frank Act amends section 615(h) of the FCRA to require persons to disclose a credit score and information relating to that credit score in risk-based pricing notices when the person uses a credit score in setting the material terms of credit. Specifically, a person must disclose, in addition to the information currently required by the January 2010 Final Rule: (1) A numerical credit score used in making the credit decision; (2) the range of possible scores under the model used;

(3) the key factors that adversely affected the credit score of the consumer in the model used; (4) the date on which the credit score was created; and (5) the name of the person or entity that provided the credit score. The effective date of these amendments is July 21, 2011.

The Agencies are issuing proposed amendments to the risk-based pricing rules pursuant to their existing authority under section 615(h) of the FCRA to facilitate compliance with the new requirements under section 1100F of the Dodd-Frank Act.

##### 2. Statement of Objectives and Legal Basis

The **SUPPLEMENTARY INFORMATION** above contains this information. The legal basis for the proposed regulations is section 615(h) of the FCRA. The proposed regulations are consistent with section 1100F of the Dodd-Frank Act.

##### 3. Description of Small Entities to Which the Regulation Applies

The proposed regulations apply to any person that (1) is required to provide a risk-based pricing notice to a consumer; and (2) uses a credit score in making the credit decision requiring a risk-based pricing notice. The total number of small entities likely to be affected by the proposal is unknown because the Agencies do not have data on the number of small entities that use credit scores for risk-based pricing in connection with consumer credit. The risk-based pricing provisions of section 1100F of the Dodd-Frank Act have broad applicability to persons who use credit scores for risk-based pricing in connection with the provision of consumer credit.

The available data is not sufficient for the Commission to realistically estimate the number of small entities, as defined by the U.S. Small Business Administration (SBA), that the Commission regulates and that would be subject to the proposed rule.<sup>15</sup> The entities under the Commission's jurisdiction are so varied that there is no way to identify them in general and, therefore, no way to know how many of

<sup>14</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at [http://www.sba.gov/sites/default/files/Current\\_Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Current_Size_Standards_Table.pdf).

<sup>15</sup> Under the SBA's size standards, many creditors, including the majority of non-bank entities that are likely to be subject to the proposed regulations and are subject to the Commission's jurisdiction, are considered small if their average annual receipts do not exceed \$7 million. Auto dealers have a higher size standard of \$29 million in average annual receipts for new car dealers and \$23 million in average annual receipts for used car dealers. A list of the SBA's size standards for all industries can be found in the SBA's Table of Small Business Size Standards Matched to North American Industry Classification Codes, which is available at [http://www.sba.gov/sites/default/files/Current\\_Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Current_Size_Standards_Table.pdf).

them qualify as small businesses. Generally, the entities under the Commission's jurisdiction that also are covered by section 1100F of the Dodd-Frank Act include State-chartered credit unions, non-bank mortgage lenders, auto dealers, and utility companies. The proposed regulations do not impose any requirements on small entities that do not use credit scores for risk-based pricing in connection with consumer credit.

The Commission invites comment regarding the number of and type of small entities that would be affected by the proposed rule.

#### 4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The compliance requirements of the proposed regulations are described in detail in the **SUPPLEMENTARY INFORMATION** above.

The proposed regulations generally require a person that is required to provide a risk-based pricing notice to a consumer and uses a credit score in making the credit decision to provide a credit score and information relating to that credit score in the notice, in addition to the information currently required by the January 2010 Final Rule. Pursuant to the January 2010 Final Rule, a person is currently required to determine if it engages in risk-based pricing, based in whole or in part on consumer reports, in connection with the provision of consumer credit. If the person does engage in risk-based pricing based on consumer reports, the person generally is required to establish procedures for identifying those consumers to whom it must provide risk-based pricing notices.

A person that is required to provide risk-based pricing notices to certain consumers would need to analyze the regulations. The person would need to determine whether it used credit scores for risk-based pricing of the consumers to whom it must provide risk-based pricing notices. Persons that use credit scores for risk-based pricing would need to provide a credit score and information relating to that credit score to those consumers to whom it must provide risk-based pricing notice, in addition to the information currently required by the January 2010 Final Rule. Persons would need to employ the professional skills necessary to design, generate, and provide notices including a credit score and information relating to that credit score to the consumers to whom it must provide risk-based pricing notice.

The Commission seeks information and comment on any costs, compliance requirements, or changes in operating

procedures arising from the application of the proposed rule to small institutions.

#### 5. Identification of Duplicative, Overlapping, or Conflicting Federal Regulations

The Commission has not identified any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposed regulations. As discussed in Part III above, the proposed amendments to the risk-based pricing rules are consistent with section 1100F of the Dodd-Frank Act. The Agencies are proposing the rules pursuant to their existing authority under section 615(h) of the FCRA. The proposed amendments to the risk-based pricing rules have been designed to work in conjunction with the requirements of section 1100F of the Dodd-Frank Act to help facilitate uniform compliance when this section becomes effective. The Commission seeks comment regarding any statutes or regulations, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed regulations.

#### 6. Discussion of Significant Alternatives

The compliance requirements of the proposed regulations are described in detail in the **SUPPLEMENTARY INFORMATION** above.

The proposed regulations generally require a person that is required to provide a risk-based pricing notice to a consumer and uses a credit score in making the credit decision to provide a credit score and information relating to that credit score in the notice, in addition to the information currently required by the January 2010 Final Rule. Alternatively, a business may comply with the January 2010 Final Rule by providing consumers with a credit score disclosure notice. By providing a range of options, the Agencies have sought to help businesses of all sizes reduce the burden or inconvenience of complying with the proposed regulations.

Similarly, the proposed regulations provide a model notice to facilitate compliance. By using the model notice, creditors qualify for safe harbor. Creditors are not required to use the model notice, however. If they provide a notice that clearly and conspicuously conveys the required information, these creditors would comply with the requirements of the rule, though they would not receive the benefit of the safe harbor. Having this option provides creditors of all sizes with flexibility in how to comply with the proposed regulations.

Notwithstanding the Agencies' efforts to consider the impact of the proposed

regulations on small entities, the Commission welcomes comments on any significant alternatives consistent with section 615(h) of the FCRA, including the provisions of section 1100F of the Dodd-Frank Act, that would minimize the impact of the proposed regulations on small entities.

### Board of Governors of the Federal Reserve System

#### Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ► bold-type arrows ◀ while language that would be deleted is set off with [bold-type brackets].

#### List of Subjects in 12 CFR Part 222

Banks, Banking, Consumer protection, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

#### Authority and Issuance

For the reasons set forth in the joint preamble, the Board proposes to amend chapter II of title 12 of the Code of Federal Regulations by amending 12 CFR part 222, as follows:

### PART 222—FAIR CREDIT REPORTING (REGULATION V)

1. The authority citation for part 222 continues to read as follows:

**Authority:** 15 U.S.C. 1681b, 1681c, 1681m and 1681s; Secs. 3, 214, and 216, Pub. L. 108–159, 117 Stat. 1952.

2. Section 222.73 is amended as follows:

A. Paragraphs (a)(1)(vii) and (viii) are revised.

B. Paragraph (a)(1)(ix) is added.

C. Paragraphs (a)(2)(vii) and (viii) are revised.

D. Paragraph (a)(2)(ix) is added.

E. Paragraph (b)(2) is revised.

F. Paragraph (d) is added.

#### § 222.73 Content, form, and timing of risk-based pricing notices.

(a) \* \* \*

(1) \* \* \*

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; [and]

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports[.]►; and ◀



►(ix) If a credit score of the consumer to whom a person grants, extends, or otherwise provides credit is used in setting the material terms of credit:

(A) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(B) The credit score used by the person in making the credit decision;

(C) The range of possible credit scores under the model used to generate the credit score;

(D) All of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquires made with respect to the consumer report, the number of key factors shall not exceed five;

(E) The date on which the credit score was created; and

(F) The name of the consumer reporting agency or other person that provided the credit score.◀

(2) \* \* \*

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; [and]

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports[.]►; and◀

►(ix) If a credit score of the consumer whose extension of credit is under review is used in increasing the annual percentage rate:

(A) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(B) The credit score used by the person in making the credit decision;

(C) The range of possible credit scores under the model used to generate the credit score;

(D) All of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquires made with respect to the consumer report, the number of key factors shall not exceed five;

(E) The date on which the credit score was created; and

(F) The name of the consumer reporting agency or other person that provided the credit score.◀

\* \* \* \* \*

(b) \* \* \*

(2) *Model forms.* [A m]►M◀odel form►s◀ of the risk-based pricing notice required by Sec. 222.72(a) and (c) [is]►are◀ contained in Appendi[x]►ces◀ H-1 ►and H-6◀ of this part. Appropriate use of Model Form H-1 ►or H-6◀ is deemed to comply with the requirements of Sec. 222.72(a) and (c). [A m]►M◀odel form►s◀ of the risk-based pricing notice required by Sec. 222.72(d) [is]►are◀ contained in Appendi[x]►ces◀ H-2 ►and H-7◀ of this part. Appropriate use of Model Form H-2 ►or H-7◀ is deemed to comply with the requirements of Sec. 222.72(d). Use of the model forms is optional.

\* \* \* \* \*

►(d) *Multiple credit scores—(1) In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit, for example, by using the low, middle, high, or most recent score, the notices described in paragraphs (a)(1) and (2) of this section must include that credit score and information relating to that credit score required by paragraphs (a)(1)(ix) and (a)(2)(ix). When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit, for example, by computing the average of all the credit scores obtained, the notices described in paragraphs (a)(1) and (2) of this section must include one of those credit scores and information relating to credit scores required by paragraphs (a)(1)(ix) and (a)(2)(ix). The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraphs (a)(1)(ix) and (a)(2)(ix) of this section for each credit score disclosed.

(2) *Examples.* (i) A person that uses consumer reports to set the material terms of credit cards granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That person must disclose the low score in the notices described in paragraphs (a)(1) and (2) of this section.

(ii) A person that uses consumer reports to set the material terms of automobile loans granted, extended, or provided to consumers regularly

requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That person may choose one of these scores to include in the notices described in paragraph (a)(1) and (2) of this section.◀

3. Section 222.75 is amended by revising paragraphs (c)(1) and (c)(3)(i) to read as follows:

**§ 222.75 Rules of construction.**

\* \* \* \* \*

(c) *Multiple consumers—(1) Risk-based pricing notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer to satisfy the requirements of § 222.72(a) or (c). [If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.]

►Whether the consumers have the same address or not, the person must provide a separate notice to each consumer if a notice includes a credit score(s). Each separate notice that includes a credit score(s) must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. If the consumers have the same address, and the notice does not include a credit score(s), a person may satisfy the requirements by providing a single notice addressed to both consumers.◀

\* \* \* \* \*

(3) *Examples.* (i) Two consumers jointly apply for credit with a creditor. The creditor obtains credit scores on both consumers. ►Based in part on the credit scores, t◀[T]he creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. [The two consumers reside at different addresses.]The creditor provides risk-based pricing notices to satisfy its obligations under this subpart. The creditor must provide a risk-based pricing notice to each consumer [at the address where each consumer resides.]►whether the consumers have the same address or not. Each separate risk-based pricing notice must contain only the credit score(s) of the consumer to whom the notice is provided.◀

\* \* \* \* \*

4. Appendix H is amended by revising paragraphs 1. and 2. and adding Model Forms H-6 and H-7 to read as follows:

**Appendix H to Part 222—Appendix H—Model Forms for Risk-Based Pricing and Credit Score Disclosure Exception Notices**

1. This appendix contains [two]▶four◀ model forms for risk-based pricing notices and three model forms for use in connection with the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form.

2. Model form H-1 is for use in complying with the general risk-based pricing notice

requirements in Sec. 222.72▶if a credit score is not used in setting the material terms of credit◀. Model form H-2 is for risk-based pricing notices given in connection with account review▶if a credit score is not used in increasing the annual percentage rate◀. Model form H-3 is for use in connection with the credit score disclosure exception for loans secured by residential real property. Model form H-4 is for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model form H-5 is for use in connection with the credit score disclosure exception when no credit score is available for a consumer.▶Model form H-6 is for use in complying with the general risk-based pricing notice requirements in Sec. 222.72 if

a credit score is used in setting the material terms of credit. Model form H-7 is for risk-based pricing notices given in connection with account review if a credit score is used in increasing the annual percentage rate.◀ All forms contained in this appendix are models; their use is optional.

\* \* \* \* \*

▶H-6 Model form for risk-based pricing notice with credit score information H-7 Model form for account review risk-based pricing notice with credit score information◀

\* \* \* \* \*

BILLING CODE 6210-01-P

**H-6. Model form for risk-based pricing notice with credit score information**

[Name of Entity Providing the Notice]  
**Your Credit Report[s] and the Price You Pay for Credit**

<b>What is a credit report?</b>	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
<b>How did we use your credit report[s]?</b>	<p>We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment].</p> <p>The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.</p>
<b>What if there are mistakes in your credit report[s]?</b>	<p>You have a right to dispute any inaccurate information in your credit report[s].</p> <p>If you find mistakes on your credit report[s], contact <b>[insert name of CRA(s)]</b>, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s].</p> <p>It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.</p>
<b>How can you obtain a copy of your credit report[s]?</b>	<p>Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact <b>[insert name of CRA(s)]</b>:</p> <p><i>By telephone:</i> Call toll-free: 1-877-xxx-xxxx</p> <p><i>By mail:</i> Mail your written request to: <b>[Insert address]</b></p> <p><i>On the web:</i> Visit <b>[insert web site address]</b></p>
<b>How can you get more information about credit reports?</b>	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at <a href="http://www.federalreserve.gov">www.federalreserve.gov</a> , or the Federal Trade Commission's web site at <a href="http://www.ftc.gov">www.ftc.gov</a> .

**Your Credit Score and Understanding Your Credit Score**

<b>Your credit score</b>	<b>[Insert credit score]</b> Source: <b>[Insert source]</b> Date: <b>[Insert date score was created]</b>
<b>What you should know about credit scores</b>	Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how your credit history changes.
<b>The range of scores</b>	Scores range from a low of <b>[Insert bottom number in the range]</b> to a high of <b>[Insert top number in the range]</b> .
<b>Key factors that adversely affected your credit score</b>	<b>[Insert first factor]</b> <b>[Insert second factor]</b> <b>[Insert third factor]</b> <b>[Insert fourth factor]</b> <b>[Insert fifth factor, if applicable]</b>

**H-7. Model form for account review risk-based pricing notice with credit score information**

[Name of Entity Providing the Notice]  
Your Credit Report[s] and the Pricing of Your Account

<b>What is a credit report?</b>	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
<b>How did we use your credit report[s]?</b>	<p>We have used information from your credit report[s] to review the terms of your account with us.</p> <p>Based on our review of your credit report[s], we have increased the annual percentage rate on your account.</p>
<b>What if there are mistakes in your credit report[s]?</b>	<p>You have a right to dispute any inaccurate information in your credit report[s].</p> <p>If you find mistakes on your credit report[s], contact <b>[insert name of CRA(s)]</b>, which [is/are] [a consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s].</p> <p>It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.</p>
<b>How can you obtain a copy of your credit report[s]?</b>	<p>Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact <b>[insert name of CRA(s)]</b>:</p> <p style="margin-left: 40px;"><i>By telephone:</i>                      Call toll-free: 1-877-xxx-xxxx</p> <p style="margin-left: 40px;"><i>By mail:</i>                                      Mail your written request to: <b>[Insert address]</b></p> <p style="margin-left: 40px;"><i>On the web:</i>                                      Visit <b>[insert web site address]</b></p>
<b>How can you get more information about credit reports?</b>	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at <a href="http://www.federalreserve.gov">www.federalreserve.gov</a> , or the Federal Trade Commission's web site at <a href="http://www.ftc.gov">www.ftc.gov</a> .

**Your Credit Score and Understanding Your Credit Score**

<b>Your credit score</b>	<p>[Insert credit score]</p> <p>Source: [Insert source]                      Date: [Insert date score was created]</p>
<b>What you should know about credit scores</b>	<p>Your credit score is a number that reflects the information in your credit report.</p> <p>Your credit score can change, depending on how your credit history changes.</p>
<b>The range of scores</b>	<p>Scores range from a low of [Insert bottom number in the range] to a high of [Insert top number in the range].</p>
<b>Key factors that adversely affected your credit score</b>	<p>[Insert first factor]                  [Insert second factor]                  [Insert third factor]                  [Insert fourth factor]                  [Insert fifth factor, if applicable]</p>

**Federal Trade Commission**

**List of Subjects**

16 CFR Part 640

Credit, Trade practices.

16 CFR Part 698

Credit, Trade practices.

**Authority and Issuance**

For the reasons discussed in the joint preamble, the Federal Trade Commission proposes to amend chapter I, title 16, Code of Federal Regulations, as follows:

**PART 640—DUTIES OF CREDITORS REGARDING RISK-BASED PRICING**

1. The authority citation for part 640 continues to read as follows:

**Authority:** Pub. L. 108–159, sec. 311; 15 U.S.C. 1681m(h).

2. Section 640.4 is amended as follows:

A. Paragraphs (a)(1)(vii) and (viii) are revised.

B. Paragraph (a)(1)(ix) is added.

C. Paragraphs (a)(2)(vii) and (viii) are revised.

D. Paragraph (a)(2)(ix) is added.

E. Paragraph (b)(2) is revised.

F. Paragraph (d) is added.

**§ 640.4 Content, Form, and Timing of Risk-Based Pricing Notices.**

(a) \* \* \*

(1) \* \* \*

(vii) A statement informing the consumer how to obtain a consumer

report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; [and]

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports[.]▶; and◀

▶(ix) If a credit score of the consumer to whom a person grants, extends, or otherwise provides credit is used in setting the material terms of credit:

(A) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(B) The credit score used by the person in making the credit decision;

(C) The range of possible credit scores under the model used to generate the credit score;

(D) All of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquiries made with respect to the consumer report, the number of key factors shall not exceed five;

(E) The date on which the credit score was created; and

(F) The name of the consumer reporting agency or other person that provided the credit score.◀

(2) \* \* \*

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; [and]

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports[.]▶; and◀

▶(ix) If a credit score of the consumer whose extension of credit is under review is used in increasing the annual percentage rate:

(A) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(B) The credit score used by the person in making the credit decision;

(C) The range of possible credit scores under the model used to generate the credit score;

(D) All of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquiries made with respect to the consumer report, the

number of key factors shall not exceed five;

(E) The date on which the credit score was created; and

(F) The name of the consumer reporting agency or other person that provided the credit score. ◀

\* \* \* \* \*

(b) \* \* \*

(2) Model forms. [A m] ▶ M ◀ model form ▶ s ◀ of the risk-based pricing notice required by Sec. 640.3(a) and (c) [is] ▶ are ◀ contained in Appendi[x] ▶ ces ◀ B-1 ▶ and B-6 ◀ of this part. Appropriate use of Model form B-1 ▶ or B-6 ◀ is deemed to comply with the requirements of Sec. 640.3(a) and (c). [A m] ▶ M ◀ model form ▶ s ◀ of the risk-based pricing notice required by Sec. 640.3(d) [is] ▶ are ◀ contained in Appendi[x] ▶ ces ◀ B-2 ▶ and B-7 ◀ of this part. Appropriate use of Model form B-2 ▶ or B-7 ◀ is deemed to comply with the requirements of Sec. 640.3(d). Use of the model forms is optional.

\* \* \* \* \*

▶ (d) *Multiple credit scores*—(1) *In General*. When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit, for example, by using the low, middle, high, or most recent score, the notices described in paragraphs (a)(1) and (2) of this section must include that credit score and information relating to that credit score required by paragraphs (a)(1)(ix) and (a)(2)(ix). When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit, for example, by computing the average of all the credit scores obtained, the notices described in paragraphs (a)(1) and (2) of this section must include one of those credit scores and information relating to credit scores required by paragraphs (a)(1)(ix) and (a)(2)(ix). The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraphs (a)(1)(ix) and (a)(2)(ix) of this section for each credit score disclosed.

(2) *Examples*. (i) A person that uses consumer reports to set the material terms of credit cards granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That person must disclose the low score in the notices described in paragraphs (a)(1) and (2) of this section.

(ii) A person that uses consumer reports to set the material terms of automobile loans granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That person may choose one of these scores to include in the notices described in paragraph (a)(1) and (2) of this section. ◀

\* \* \* \* \*

3. Section 640.6 is amended by revising paragraphs (c)(1) and (c)(3)(i) to read as follows:

**§ 640.6 Rules of construction.**

\* \* \* \* \*

(c) *Multiple consumers*—(1) *Risk-based pricing notices*. In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer to satisfy the requirements of § 640.3(a) or (c). [If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.] ▶ Whether the consumers have the same address or not, the person must provide a separate notice to each consumer if a notice includes a credit score(s). Each separate notice that includes a credit score(s) must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. If the consumers have the same address, and the notice does not include a credit score(s), a person may satisfy the requirements by providing a single notice addressed to both consumers. ◀

\* \* \* \* \*

(3) *Examples*. (i) Two consumers jointly apply for credit with a creditor. The creditor obtains credit scores on both consumers. ▶ Based in part on the credit scores, t ◀ [T]he creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. [The two consumers reside at different addresses.] The creditor provides risk-based pricing notices to satisfy its obligations under this subpart. The creditor must provide a risk-based pricing notice to each consumer [at the address where each consumer resides.] ▶ whether the consumers have

the same address or not. Each separate risk-based pricing notice must contain only the credit score(s) of the consumer to whom the notice is provided. ◀

\* \* \* \* \*

**PART 698—MODEL FORMS AND DISCLOSURES**

4. The authority citation for part 698 continues to read as follows:

**Authority:** 15 U.S.C. 1681e, 1681g, 1681j, 1681m, 1681s, and 1681s-3; Pub. L. 108-159, sections 211(d), 214(b), and 311; 117 Stat. 1952.

5. In Part 698, Appendix B is amended by revising paragraphs 1. and 2. and adding Model Forms B-6 and B-7 to read as follows:

**Appendix B to Part 698—Appendix B—Model Forms for Risk-Based Pricing and Credit Score Disclosure Exception Notices**

1. This appendix contains [two] ▶ four ◀ model forms for risk-based pricing notices and three model forms for use in connection with the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form.

2. Model form B-1 is for use in complying with the general risk-based pricing notice requirements in Sec. 640.3 ▶ if a credit score is not used in setting the material terms of credit ◀. Model form B-2 is for risk-based pricing notices given in connection with account review ▶ if a credit score is not used in increasing the annual percentage rate ◀. Model form B-3 is for use in connection with the credit score disclosure exception for loans secured by residential real property. Model form B-4 is for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model form B-5 is for use in connection with the credit score disclosure exception when no credit score is available for a consumer. ▶ Model form B-6 is for use in complying with the general risk-based pricing notice requirements in Sec. 640.3 if a credit score is used in setting the material terms of credit. Model form B-2 is for risk-based pricing notices given in connection with account review if a credit score is used in increasing the annual percentage rate. ◀ All forms contained in this appendix are models; their use is optional.

\* \* \* \* \*

▶ B-6 Model form for risk-based pricing notice with credit score information

B-7 Model form for account review risk-based pricing notice with credit score information ◀

\* \* \* \* \*

BILLING CODE 6210-01-P

**B-6. Model form for risk-based pricing notice with credit score information**

[Name of Entity Providing the Notice]  
**Your Credit Report[s] and the Price You Pay for Credit**

<b>What is a credit report?</b>	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
<b>How did we use your credit report[s]?</b>	<p>We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment].</p> <p>The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.</p>
<b>What if there are mistakes in your credit report[s]?</b>	<p>You have a right to dispute any inaccurate information in your credit report[s].</p> <p>If you find mistakes on your credit report[s], contact <b>[insert name of CRA(s)]</b>, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s].</p> <p>It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.</p>
<b>How can you obtain a copy of your credit report[s]?</b>	<p>Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact <b>[insert name of CRA(s)]</b>:</p> <p style="margin-left: 40px;"><i>By telephone:</i>                      Call toll-free: 1-877-xxx-xxxx</p> <p style="margin-left: 40px;"><i>By mail:</i>                                      Mail your written request to: <b>[Insert address]</b></p> <p style="margin-left: 40px;"><i>On the web:</i>                                      Visit <b>[insert web site address]</b></p>
<b>How can you get more information about credit reports?</b>	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at <a href="http://www.federalreserve.gov">www.federalreserve.gov</a> , or the Federal Trade Commission's web site at <a href="http://www.ftc.gov">www.ftc.gov</a> .



**Your Credit Score and Understanding Your Credit Score**

<b>Your credit score</b>	<b>[Insert credit score]</b> Source: <b>[Insert source]</b> Date: <b>[Insert date score was created]</b>
<b>What you should know about credit scores</b>	Your credit score is a number that reflects the information in your credit report. Your credit score can change, depending on how your credit history changes.
<b>The range of scores</b>	Scores range from a low of <b>[Insert bottom number in the range]</b> to a high of <b>[Insert top number in the range]</b> .
<b>Key factors that adversely affected your credit score</b>	<b>[Insert first factor]</b> <b>[Insert second factor]</b> <b>[Insert third factor]</b> <b>[Insert fourth factor]</b> <b>[Insert fifth factor, if applicable]</b>

**B-7. Model form for account review risk-based pricing notice with credit score information**

[Name of Entity Providing the Notice]  
**Your Credit Report[s] and the Pricing of Your Account**

<b>What is a credit report?</b>	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
<b>How did we use your credit report[s]?</b>	<p>We have used information from your credit report[s] to review the terms of your account with us.</p> <p>Based on our review of your credit report[s], we have increased the annual percentage rate on your account.</p>
<b>What if there are mistakes in your credit report[s]?</b>	<p>You have a right to dispute any inaccurate information in your credit report[s].</p> <p>If you find mistakes on your credit report[s], contact <b>[insert name of CRA(s)]</b>, which [is/are] [a consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s].</p> <p>It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.</p>
<b>How can you obtain a copy of your credit report[s]?</b>	<p>Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact <b>[insert name of CRA(s)]</b>:</p> <p style="margin-left: 40px;"><i>By telephone:</i>                      Call toll-free: 1-877-xxx-xxxx</p> <p style="margin-left: 40px;"><i>By mail:</i>                                Mail your written request to: <b>[Insert address]</b></p> <p style="margin-left: 40px;"><i>On the web:</i>                            Visit <b>[insert web site address]</b></p>
<b>How can you get more information about credit reports?</b>	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at <a href="http://www.federalreserve.gov">www.federalreserve.gov</a> , or the Federal Trade Commission's web site at <a href="http://www.ftc.gov">www.ftc.gov</a> .

## Your Credit Score and Understanding Your Credit Score

<b>Your credit score</b>	[Insert credit score]  Source: [Insert source]                      Date: [Insert date score was created]
<b>What you should know about credit scores</b>	Your credit score is a number that reflects the information in your credit report.  Your credit score can change, depending on how your credit history changes.
<b>The range of scores</b>	Scores range from a low of [Insert bottom number in the range] to a high of [Insert top number in the range].
<b>Key factors that adversely affected your credit score</b>	[Insert first factor] [Insert second factor] [Insert third factor] [Insert fourth factor] [Insert fifth factor, if applicable]

By order of the Board of Governors of the Federal Reserve System, March 1, 2011.

**Jennifer J. Johnson,**  
*Secretary of the Board.*

By the direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

[FR Doc. 2011-5413 Filed 3-14-11; 8:45 am]

**BILLING CODE 6210-01-P, 6750-01-C**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2011-0220; Directorate Identifier 2010-NM-259-AD]

RIN 2120-AA64

#### **Airworthiness Directives; Fokker Services B.V. Model F.28 Mark 0070 and 0100 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

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

an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

\* \* \* The Federal Aviation Administration (FAA) has published Special Federal Aviation Regulation (SFAR) 88, and the Joint Aviation Authorities (JAA) have published Interim Policy INT/POL/25/12. The review, conducted by Fokker Services on the Fokker 100 and Fokker 70 type design in response to these regulations, revealed that the fuel sense line from the overflow valves may touch the adjacent fuel-quantity indication-probe. Under certain conditions, this may result in an ignition source in the wing tank vapour space.

This condition, if not detected and corrected, could result in a wing fuel tank explosion and consequent loss of the aeroplane.

\* \* \* \* \*

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI. **DATES:** We must receive comments on this proposed AD by April 29, 2011.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* (202) 493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations,

M-30, West Building Ground Floor, Room W12-40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252-627-350; fax +31 (0)252-627-211; e-mail [technicalservices.fokkerservices@stork.com](mailto:technicalservices.fokkerservices@stork.com); Internet <http://www.myfokkerfleet.com>. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425-227-1221.

#### **Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer,

International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1137; fax (425) 227-1149.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2011-0220; Directorate Identifier 2010-NM-259-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

##### Discussion

The European Aviation Safety Agency (EASA), which is the aviation authority for the Member States of the European Community, has issued EASA Airworthiness Directive 2010-0159, dated August 3, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

\* \* \* The Federal Aviation Administration (FAA) has published Special Federal Aviation Regulation (SFAR) 88, and the Joint Aviation Authorities (JAA) have published Interim Policy INT/POL/25/12. The review, conducted by Fokker Services on the Fokker 100 and Fokker 70 type design in response to these regulations, revealed that the fuel sense line from the overflow valves may touch the adjacent fuel-quantity indication-probe. Under certain conditions, this may result in an ignition source in the wing tank vapour space.

This condition, if not detected and corrected, could result in a wing fuel tank explosion and consequent loss of the aeroplane.

For the reasons described above, this AD requires a one-time [general visual] inspection to check the route and clamping of the sense line hose and wiring conduit hose to each wing tank overflow valve and, depending on the findings, the necessary corrective actions.

Corrective actions include installing two brackets next to the overflow valve on the main tank access panel, making a modification to the routing of the hose for the sense line, and installing clamps to keep the hoses in position. Required

actions also include revising the maintenance program to include a Critical Design Configuration Control Limitation (CDCCL). You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled "Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements" (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 ("SFAR 88," Amendment 21-78, and subsequent Amendments 21-82 and 21-83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88. (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the

civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

##### Relevant Service Information

Fokker Services B.V. has issued Fokker Service Bulletin SBF100-28-050, Revision 1, dated July 28, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

##### FAA's Determination and Requirements of This Proposed AD

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

##### Differences Between This AD and the MCAI or Service Information

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

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

##### Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 6 products of U.S. registry. We also estimate that it would take

about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$1,020, or \$170 per product.

In addition, we estimate that any necessary follow-on actions would take about 4 work-hours and require parts costing \$800, for a cost of \$1,140 per product. We have no way of determining the number of products that may need these actions.

#### Authority for This Rulemaking

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

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

#### Regulatory Findings

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

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

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

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

#### List of Subjects in 14 CFR Part 39

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

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Fokker Services B.V.:** Docket No. FAA–2011–0220; Directorate Identifier 2010–NM–259–AD.

#### Comments Due Date

(a) We must receive comments by April 29, 2011.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to all Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes, certificated in any category.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new actions (e.g., inspections) and/or CDCCLs. Compliance with these actions and/or CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (l) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

#### Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

#### Reason

(e) The mandatory continuing airworthiness information (MCAI) states: \* \* \* The Federal Aviation Administration (FAA) has published Special Federal Aviation Regulation (SFAR) 88, and the Joint Aviation Authorities (JAA) have published Interim Policy INT/POL/25/12. The review, conducted by Fokker Services on the Fokker 100 and Fokker 70 type design in response to these regulations, revealed that the fuel sense line from the overflow valves may touch the adjacent fuel-quantity indication-probe. Under certain conditions, this may result in an ignition source in the wing tank vapour space.

This condition, if not detected and corrected, could result in a wing fuel tank explosion and consequent loss of the aeroplane.

\* \* \* \* \*

#### Compliance

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

#### Actions

(g) At a scheduled opening of the fuel tank, but not later than 84 months after the effective date of this AD, do a general visual inspection of the routing and clamping of the sense line hose and wiring conduit hose to each wing tank overflow valve, in accordance with Part 1 of the Accomplishment Instructions of Fokker Service Bulletin SBF100–28–050, Revision 1, dated July 28, 2010.

(h) If incorrect routing or clamping of the hoses is found during the inspection required by paragraph (g) of this AD, before further flight, install two brackets next to the overflow valve on the main tank access panel, make a modification to the routing of the hose for the sense line, and install clamps to keep the hoses in position, in accordance with Part 2 of the Accomplishment Instructions of Fokker Service Bulletin SBF100–28–050, Revision 1, dated July 28, 2010.

#### Critical Design Configuration Control Limitations (CDCCL)

(i) Before further flight after determining that the routing and clamping of the sense line hose and wiring conduit hose to each wing tank overflow valve are correct, as required by paragraph (g) of this AD; or before further flight after doing the modification, as required by paragraph (h) of this AD; as applicable: Revise the aircraft maintenance program by incorporating the CDCCL in paragraph 1.L.(1)(c) of Fokker Service Bulletin SBF100–28–050, Revision 1, dated July 28, 2010.

#### No Alternative Inspections, Inspection Intervals, or CDCCLs

(j) After accomplishing the revision required by paragraph (i) of this AD, no alternative actions (e.g., inspections), intervals, and/or CDCCLs may be used unless the actions, intervals, and/or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (l) of this AD.

#### Credit for Actions Accomplished in Accordance With Previous Service Information

(k) Actions done before the effective date of this AD in accordance with Fokker Service Bulletin SBF100–28–050, dated June 3, 2010, are acceptable for compliance with the corresponding requirements of this AD.

#### FAA AD Differences

**Note 2:** This AD differs from the MCAI and/or service information as follows: Although European Aviation Safety Agency

(EASA) Airworthiness Directive 2010–0159, dated August 3, 2010, specifies revising the maintenance program to include limitations, doing certain repetitive actions (e.g., inspections), and/or maintaining CDCCLs, this AD only requires the revision. Requiring a revision of the maintenance program, rather than requiring individual repetitive actions and/or maintaining CDCCLs, requires operators to record AD compliance only at the time the revision is made. Repetitive actions and/or maintaining CDCCLs specified in the airworthiness limitations must be complied with in accordance with 14 CFR 91.403(c).

#### Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be e-mailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto:9-ANM-116-AMOC-REQUESTS@faa.gov). Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

#### Related Information

(m) Refer to MCAI EASA Airworthiness Directive 2010–0159, dated August 3, 2010; and Fokker Service Bulletin SBF100–28–050, Revision 1, dated July 28, 2010; for related information.

Issued in Renton, Washington, on March 7, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–5897 Filed 3–14–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2011–0222; Directorate Identifier 2010–NM–056–AD]

RIN 2120–AA64

#### Airworthiness Directives; Dassault-Aviation Model FALCON 7X Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.  
**ACTION:** Notice of proposed rulemaking (NPRM).

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

Time between overhaul (TBO) of DC [direct current] generator bearings is set at 1 000 flight hours (FH) in the airworthiness limitations section of the Falcon 7X Aircraft Maintenance Manual Chapter 5.40.

In service report has shown that the bearing current design cannot sustain the current TBO. \* \* \*

\* \* \* \* \*

Failure to comply with those revised maintenance tasks could constitute an unsafe condition.

Failure of the DC generator bearings could lead to loss of the generator and potential loss of electrical power to the fly-by-wire system and subsequent loss of control of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by April 29, 2011.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* (202) 493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Dassault

Falcon Jet, P.O. Box 2000, South Hackensack, New Jersey 07606; telephone 201–440–6700; Internet <http://www.dassaultfalcon.com>. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

#### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2011–0222; Directorate Identifier 2010–NM–056–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

##### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2009–0254, dated December 1, 2009 (referred to after this as “the MCAI”), to correct an unsafe condition for the specified products. The MCAI states:

Time between overhaul (TBO) of DC [direct current] generator bearings is set at 1,000 flight hours (FH) in the airworthiness limitations section of the Falcon 7X Aircraft Maintenance Manual Chapter 5.40.

In service report has shown that the bearing current design cannot sustain the current TBO. In order to prevent unscheduled removal of DC generators, TBO is reduced down to 650 FH.

This change is expected to be introduced in the next scheduled revision of Chapter 5.40 of Falcon 7X Aircraft Maintenance Manual.

The purpose of this AD is to require accomplishment of the more restrictive maximum time limits for DC generators P/N 30089-004 or 30089-005.

Failure to comply with those revised maintenance tasks could constitute an unsafe condition.

Failure of the DC generator bearings could lead to loss of the generator and potential loss of electrical power to the fly-by-wire system and subsequent loss of control of the airplane. You may obtain further information by examining the MCAI in the AD docket.

#### FAA's Determination and Requirements of This Proposed AD

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

#### Differences Between This AD and the MCAI or Service Information

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

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

#### Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 21 products of U.S. registry. We also estimate that it would take

about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$1,785, or \$85 per product.

#### Authority for This Rulemaking

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

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

#### Regulatory Findings

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

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

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

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

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator,

the FAA proposes to amend 14 CFR part 39 as follows:

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Dassault-Aviation:** Docket No. FAA-2011-0222; Directorate Identifier 2010-NM-056-AD.

#### Comments Due Date

(a) We must receive comments by April 29, 2011.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to Dassault-Aviation Model FALCON 7X airplanes, all serial numbers, equipped with DC generators having part number (P/N) 30089-004 or 30089-005; certificated in any category.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new actions (e.g., inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(C), the operator must request approval of an alternative method of compliance (AMOC) according to paragraph (j) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

#### Subject

(d) Air Transport Association (ATA) of America Code 05.

#### Reason

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

Time between overhaul (TBO) of DC [direct current] generator bearings is set at 1,000 flight hours (FH) in the airworthiness limitations section of the Falcon 7X Aircraft Maintenance Manual Chapter 5.40.

In service report has shown that the bearing current design cannot sustain the current TBO. \* \* \*

\* \* \* \* \*

Failure to comply with those revised maintenance tasks could constitute an unsafe condition.

Failure of the DC generator bearings could lead to loss of the generator and potential loss of electrical power to the fly-by-wire system and subsequent loss of control of the airplane.

**Compliance**

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

**Actions**

(g) Within 30 days after the effective date of this AD, revise the maintenance program, to incorporate the limitation for reduced maximum time limit between overhauls

defined below. This may be done by inserting a copy of this AD into the limitations section (Chapter 5-40-00) of Dassault Falcon 7X Maintenance Manual DGT 107838, as revised by Temporary Revision TR-02, dated February 19, 2008.

MPD task	Title	Max time limit
24-31-01-350-801 .....	Restoration of the DC generators (bearing) ....	650 FH (instead of 1,000 FH).

**Note 2:** When a statement identical to that in paragraph (g) of this AD has been included in the general revisions of the maintenance manual, the general revisions may be inserted into the maintenance manual and the copy of this AD may be removed from the maintenance manual provided the relevant information in the general revision is identical to that in paragraph (g) of this AD.

(h) For the maintenance planning document (MPD) task identified in paragraph (g) of this AD, the initial compliance time is the later of the times in paragraphs (h)(1), (h)(2), and (h)(3) of this AD.

(1) Prior to the accumulation of 650 flight hours on the DC generators (bearings).

(2) Within 650 flight hours after the last accomplishment of the restoration of the DC generators (bearing) specified in MPD Task 24-31-01-350-801.

(3) Within 12 flight hours after the effective date of this AD.

**No Alternative Actions or Intervals**

(i) After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (e.g., inspections), or intervals may be used unless the actions or intervals are approved as an AMOC in accordance with the procedures specified in paragraph (j) of this AD.

**FAA AD Differences**

**Note 3:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1137; fax (425) 227-1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they

are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

**Related Information**

(k) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2009-0254, dated December 1, 2009, for related information.

Issued in Renton, Washington, on March 8, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011-5899 Filed 3-14-11; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA-2011-0221; Directorate Identifier 2010-NM-120-AD]

**RIN 2120-AA64**

**Airworthiness Directives; The Boeing Company Model DC-8-11, DC-8-12, DC-8-21, DC-8-31, DC-8-32, DC-8-33, DC-8-41, DC-8-42, and DC-8-43 Airplanes; DC-8-50 Series Airplanes; DC-8F-54 and DC-8F-55 Airplanes; DC-8-60 Series Airplanes; DC-8-60F Series Airplanes; DC-8-70 Series Airplanes; and DC-8-70F Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for certain Model DC-8-11, DC-8-12, DC-8-21, DC-8-31, DC-8-32, DC-8-33, DC-8-41, DC-8-42, and DC-8-43 airplanes, DC-8-50 series airplanes, DC-8F-54 and DC-8F-55 airplanes, DC-8-60 series airplanes, DC-8-60F series airplanes, DC-8-70 series airplanes, and DC-8-70F series airplanes. This proposed AD would require repetitive high frequency eddy current or repetitive low frequency eddy current inspections for cracks on the area around certain fasteners of the

access opening doubler on the left and right wing center spar lower cap, and repair, if necessary. This proposed AD results from reports that cracks in the center spar lower cap and, in some cases, the web of the spar, have been found at stations Xrs=168.00, Xrs=251.00, and Xrs=358.00. We are proposing this AD to detect and correct cracks in the area around certain fasteners of the access opening doubler on the left and right wing center spar lower cap, which could compromise the structural integrity of the wing structure.

**DATES:** We must receive comments on this proposed AD by April 29, 2011.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800-0019, Long Beach, California 90846-0001; telephone 206-544-5000, extension 2; fax 206-766-5683; e-mail [dse.boecom@boeing.com](mailto:dse.boecom@boeing.com); Internet <https://www.myboeingfleet.com>. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425-227-1221.

**Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the



Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Dara Albouyeh, Aerospace Engineer, Airframe Branch, ANM-120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5222; fax (562) 627-5210.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2011-0221; Directorate Identifier 2010-NM-120-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

##### **Discussion**

We received reports that cracks in the center spar lower cap and, in some cases, the web of the spar, have been found at stations Xrs=168.00, Xrs=251.00, and Xrs=358.00. These cracks originate in the most inboard fastener hole of the access opening doublers. A total of 12 cracks have been found in airplanes having accumulated between 26,121 and 50,136 total flight cycles. The cracks appear to be consistent with fatigue cracks. Such cracking in the area around certain fasteners of the access opening doubler on the left and right wing center spar lower cap, if not detected and corrected, could compromise the structural integrity of the wing structure.

##### **Relevant Service Information**

We have reviewed Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010. This service bulletin

describes procedures for repetitive high frequency eddy current (HFEC) inspections or low frequency eddy current (LFEC) inspections for cracks on the area around certain fasteners of the left and right wing center spar lower cap at stations Xrs=168.00, Xrs=251.00, and Xrs=358.00, and repair if necessary.

This service bulletin also describes procedures for repetitive (post-repair) inspections for cracking of the repaired area, using the inspection defined in Method 101 of Section 57-10-06, or Method 101 or 104 of Section 57-10-16, of the McDonnell Douglas DC-8 Supplemental Inspection Document (SID), Report L26-011, Volume II, Revision 8, dated January 2005, as applicable.

For airplanes on which no cracking is found, the repetitive interval is either 1,750 flight cycles or 6,000 flight cycles, depending on the inspection type.

For airplanes on which cracking is found, the repetitive interval for non-repaired areas is either 1,750 flight cycles or 6,000 flight cycles, depending on the inspection type.

For airplanes on which cracking is found, the compliance time for the initial post-repair inspection is between 7,600 flight cycles and 43,000 flight cycles after doing the repair, depending on the configuration and inspection type. The repetitive interval is between 1,400 flight cycles and 5,300 flight cycles, depending on the configuration and inspection type.

##### **Other Relevant Rulemaking**

This proposed AD will affect the inspections, corrective actions, and reports required by AD 2008-25-05, Amendment 39-15763 (73 FR 78936, December 24, 2008), for Principal Structural Elements (PSE) 57.08.013/-014 and 57.08.035/-036 of the DC-8 SID.

##### **FAA's Determination and Requirements of This Proposed AD**

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

##### **Proposed AD Requirements**

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

##### **Differences Between the Proposed AD and the Service Information**

Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010, does not specify a corrective action if cracking is found during the inspections of the repaired area. If cracking is found during the inspections of the repaired area, this proposed AD would require repairing those conditions in one of the following ways:

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

##### **Costs of Compliance**

We estimate that this proposed AD would affect 41 airplanes of U.S. registry. We also estimate that it would take 12 work-hours per product to comply with this proposed AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be \$41,820, or \$1,020 per product.

##### **Authority for This Rulemaking**

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

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

##### **Regulatory Findings**

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

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

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

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

#### List of Subjects in 14 CFR Part 39

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

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

##### § 39.13 [Amended]

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

**The Boeing Company:** Docket No. FAA-2011-0221; Directorate Identifier 2010-NM-120-AD.

#### Comments Due Date

(a) We must receive comments by April 29, 2011.

#### Affected ADs

(b) This AD affects certain requirements of AD 2008-25-05, Amendment 39-15763.

#### Applicability

(c) This AD applies to all The Boeing Company Model DC-8-11, DC-8-12, DC-8-21, DC-8-31, DC-8-32, DC-8-33, DC-8-41, DC-8-42, DC-8-43, DC-8-51, DC-8-52, DC-8-53, DC-8-55, DC-8F-54, DC-8F-55, DC-8-61, DC-8-62, DC-8-63, DC-8-61F, DC-8-62F, DC-8-63F, DC-8-71, DC-8-72, DC-8-73, DC-8-71F, DC-8-72F, and DC-8-73F airplanes, certificated in any category.

#### Subject

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

#### Unsafe Condition

(e) This AD results from reports that cracks in the center spar lower cap and, in some cases, the web of the spar, have been found at stations Xrs=168.00, Xrs=251.00, and Xrs=358.00. The Federal Aviation Administration is issuing this AD to detect and correct cracks in the area around certain fasteners of the access opening doubler on

the left and right wing center spar lower cap, which could compromise the structural integrity of the wing structure.

#### Compliance

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

#### Inspection

(g) Before the accumulation of 20,000 total flight cycles, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later, do a high frequency eddy current (HFEC) or low frequency eddy current (LFEC) inspection for cracks on the area around certain fasteners of the access opening doubler on the left and right wing center spar lower cap, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010. If no crack is found, repeat the inspection thereafter at the applicable interval specified in paragraph 1.E., "Compliance" of Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010.

#### Repair

(h) If any crack is found during any inspection required by paragraph (g) of this AD, do paragraphs (h)(1), (h)(2), and (h)(3) of this AD.

(1) Before further flight, repair the crack in accordance with Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010.

(2) Within 6,000 flight cycles after doing the most recent HFEC inspection, or within 1,750 flight cycles after doing the most recent LFEC inspection; as applicable; do the inspection specified in paragraph (g) of this AD of the non-repaired area, and repeat the inspection of the non-repaired area thereafter at the applicable time in paragraph 1.E. "Compliance," of Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010.

(3) Within the applicable times specified in paragraph 1.E. "Compliance," of Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010, do the inspections of the repaired area, using the inspection defined in Method 101 of Section 57-10-06, or Method 101 or 104 of Section 57-10-16, of the McDonnell Douglas DC-8 Supplemental Inspection Document (SID), Report L26-011, Volume II, Revision 8, dated January 2005, as applicable. Repeat the inspection thereafter at the applicable intervals specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin DC8-57A103, dated May 5, 2010. If any crack is found, before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) The inspections required by paragraph (h)(3) of this AD constitute compliance with paragraph (j) of AD 2008-25-05, Amendment 39-15763, for the repaired area. All requirements of AD 2008-25-05 that are not specifically referenced in this paragraph remain fully applicable and require compliance.

#### Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the

authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

#### Related Information

(k) For more information about this AD, contact Dara Albouyeh, Aerospace Engineer, Airframe Branch, ANM-120L, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5222; fax (562) 627-5210; e-mail: [dara.albouyeh@faa.gov](mailto:dara.albouyeh@faa.gov).

Issued in Renton, Washington, on March 7, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011-5898 Filed 3-14-11; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF STATE

### 22 CFR Parts 123 and 126

[Public Notice 7258]

RIN 1400-AC70

#### Amendment to the International Traffic in Arms Regulations: Replacement Parts/Components and Incorporated Articles

**AGENCY:** Department of State.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of State is amending the International Traffic in Arms Regulations (ITAR) to update policies regarding replacement parts/components and incorporated articles. **DATES:** The Department of State will accept comments on this proposed rule until April 14, 2011.

**ADDRESSES:** Interested parties may submit comments within 30 days of the

date of publication by any of the following methods:

- *E-mail:*

*DDTCResponseTeam@state.gov* with an appropriate subject line.

- *Mail:* PM/DDTC, SA-1, 12th Floor, Directorate of Defense Trade Controls, Office of Defense Trade Controls Policy, Attn: Regulatory Changes—Replacement Parts/Components and Incorporated Articles, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522-0112.

- Persons with access to the Internet may also view this notice by searching for its RIN on the U.S. Government regulations Web site at <http://regulations.gov/index.cfm>.

**FOR FURTHER INFORMATION CONTACT:**

Nicholas Memos, Office of Defense Trade Controls Policy, Department of State, by *telephone:* (202) 663-2804; *fax:* (202) 261-8199; or *e-mail:* [memosni@state.gov](mailto:memosni@state.gov). Attn: Regulatory Changes—Replacement Parts/Components and Incorporated Articles.

**SUPPLEMENTARY INFORMATION:** As a part of the President's Export Control Reform effort, the Department of State proposes to amend Parts 123 and 126 of the ITAR to reflect new policies regarding coverage of replacement parts/components and incorporated articles.

The Department's review of current ITAR treatment of *replacement parts/components* led to the proposed change to streamline the flow of parts and components and to eliminate redundancy in licensing. The current rule regarding parts and components imposes burdensome requirements for additional licenses for licensed end-users and end-uses for systems and components already vetted in earlier licenses. The proposed rule adds a new section (§ 123.28) that facilitates the expeditious repair of U.S. supplied end-items abroad, enabling more timely response to coalition forces, as well as other allies and friends, by eliminating the requirement for a license for parts and components for systems approved in a previous license. This proposed exemption applies only to exporters specifically identified in a previously approved authorization to export the end-item in question. It would not apply to upgrades of capabilities of the original end-item. The type, amount, and frequency of parts and components could not exceed the type, amount, and frequency consistent with normal logistical repair/replacement operations. Nor can the value of the purchase order exceed an amount that would require Congressional notification. The exporter must have in its possession a copy of the purchase order from the foreign

government end-user and cite in its Automated Export System (AES) filing the license number for the original export. The exporter must use the U.S. Postal Service, freight forwarders registered with the Directorate of Defense Trade Controls (DDTC) and eligible, or licensed customs brokers that are subject to background investigation and have passed a comprehensive examination administered by U.S. Customs and Border Protection. Finally, this exemption does not apply to exporters who are otherwise ineligible.

The Department's review of current ITAR treatment of *incorporated articles* led to the proposed change with a view to limit ITAR coverage to where diversion of the embedded defense article is a realistic and practical concern. To this end, the proposed new § 126.19 sets out conditions under which a DDTC license is not required for the export or re-export of defense articles incorporated into an end-item that is "subject to the Export Administration Regulations (EAR)." Those conditions include where the end-item would be "rendered inoperable" by the removal of the defense article, where no technical data for development or production are transferred with the defense article, and where the incorporation of the defense article does not provide (or is not related to) a military application. Additionally, no license is required for the export or re-export of a defense article when that article would be rendered inoperable by removal from the end-item. A license would be required for the export of defense articles that are spare or replacement parts when they are embedded into a larger assembly such that they can be removed without destroying the defense articles. The proposed new § 126.19 would not go into effect until the Department of Commerce amends its regulations such that the ITAR and CCL provide complimentary coverage of the articles in question.

The proposed rules were presented to the Defense Trade Advisory Group (DTAG), a Department of State advisory committee, for purposes of comment and evaluation. The DTAG commented favorably on most aspects of the proposed rules, but also recommended certain changes. Having thoroughly reviewed and evaluated the comments and the recommended changes, the Department has determined that it will proceed with the proposed rules per the Department's evaluation of the written comments and recommendations, as noted in the following paragraphs:

The DTAG commented favorably on the addition of a new § 123.28 (*replacement parts/components*), with some recommended edits. We note that in the interim we changed the title of the section by removing the word "special" before exemption, removing the word "spare" before "parts/components" and replacing it with the word "replacement," to make clear that this exemption applies to the replacement of components for systems already authorized for export. The DTAG recommended elimination of the limitation that the exporter must be the manufacturer of the end-item. We concurred with the change and eliminated that condition.

The DTAG also recommended expanding the wording that defines who is qualified to use the exemption from "original exporter of the end-item" to "applicant of a previously approved authorization." We concurred with that change with minor edits.

The DTAG further suggested modifying the limitation regarding upgrades in capabilities to ensure that it does not preclude "replacement parts or components that would result in enhancements or improvements only in the reliability or maintainability \* \* \*" We concurred with that change in the form of a note.

The DTAG suggested adding a requirement that the exporter use the U.S. Postal Service, registered freight forwarders, and licensed brokers. We concurred with that change.

The DTAG recommended expanding the exemption to apply to a "second exporter" if they met the conditions of (a) and (b). We did not accept that change as the unclear terminology could potentially open up the exemption for unlimited sources. We are willing to explore the possibility of expansion of the exemption to include major subcontractor component suppliers, but the proposed "second exporter" language is too broad.

The DTAG recommended adding a condition that the foreign government end-user is not subject to restrictions under § 126.1. We concurred with that change.

The DTAG commented favorably on the addition of a new § 126.19 (*incorporated articles*), with some recommended edits. The DTAG recommended changing the proposed rule to cover defense articles embedded into "a higher level assembly that is not an end item. \* \* \*" We did not accept that recommendation. The recommendation would remove the assurance contained in the proposed rule that the ultimate end-item would be an article subject to the EAR. It is our

intent to avoid creating a means by which integrated defense articles could find their way into higher level militarily relevant assemblies.

The DTAG proposed alternate models that added defense article exports “solely for integration into and inclusion as an integral part of a higher level assembly \* \* \*” We did not accept that change because it effectively would allow for the export of non-embedded defense articles without a license and would pose too great a risk of diversion. The proposed rule requires that defense articles be pre-embedded or pre-incorporated, which provides a measure of security.

### Regulatory Analysis and Notices

#### *Administrative Procedure Act*

These proposed amendments involve a foreign affairs function of the United States and, therefore, are not subject to the procedures contained in 5 U.S.C. 553 and 554. The Department of State has nevertheless determined that the public interest would be served by publishing this proposed rule and soliciting public comment.

#### *Regulatory Flexibility Act*

Since these proposed amendments are not subject to 5 U.S.C. 553, they do not require analysis under the Regulatory Flexibility Act.

#### *Unfunded Mandates Reform Act of 1995*

These proposed amendments do not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

These proposed amendments have been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

#### *Executive Orders 12372 and 13132*

These proposed amendments will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that these proposed amendments do not have sufficient federalism implications to require

consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to these amendments.

#### *Executive Order 12866*

These proposed amendments are exempt from review under Executive Order 12866, but has been reviewed internally by the Department of State to ensure consistency with the purposes thereof.

#### *Executive Order 12988*

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

#### *Executive Order 13175*

The Department of State has determined that this rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirement of Section 5 of Executive Order 13175 does not apply to this rule.

#### *Paperwork Reduction Act*

This proposed rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

### List of Subjects in 22 CFR Parts 123 and 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 123 and 126 are proposed to be amended as follows:

### PART 123—LICENSES FOR THE EXPORT OF DEFENSE ARTICLES

1. The authority citation for part 123 continues to read as follows:

**Authority:** Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261, 112 Stat. 1920; Sec 1205(a), Pub. L. 107–228.

2. Part 123 is amended by adding § 123.28 to read as follows:

#### **§ 123.28 Exemption for the export of replacement parts or components in support of end-items previously exported from the U.S.**

(a) Port Directors of U.S. Customs and Border Protection shall permit the export without a license of parts or

components of U.S.-origin end-items, as defined in § 121.8(a), held in the inventory of a foreign government when all of the following conditions are met:

(1) The exporter is not subject to policy of denial (*see* §§ 126.7 and 127.7 of this subchapter), is not otherwise ineligible (*see* § 120.1(c) of this subchapter), and the authority to claim the exemption has not been revoked in accordance with paragraph (c) of this section; and

(2) The exporter was the applicant of a previously approved authorization to export the U.S.-origin end-item as defined in § 121.8(a); and

(3) The replacement parts or components being exported do not upgrade the capability of the end item as originally exported. (**Note:** This does not preclude the export of replacement parts or components that would result in enhancements or improvements only in the reliability or maintainability of the U.S.-origin end-item, such as an increased mean time between failure (MTBF) when a part identical to that originally exported is not available); and

(4) The type, amount, and frequency of the exports are consistent with repair and replacement in accordance with normal logistical support requirements for the number of end-items in the end-user inventory; and

(5) The value of the purchase order or contract for the export does not exceed the requirements for congressional notification set forth in § 123.15; and

(6) The consignee of the shipment is the foreign government approved under the original export authorization; and

(7) The foreign government end-user is not subject to restrictions under § 126.1 of this subchapter; and

(8) The replacement parts or components being exported meet all the restrictions, limitations, and provisos (including those on the handling or control of the replacement parts or components) in the original export authorization for the end-item; and

(9) The replacement parts or components being exported are consistent with the U.S. Government authorized maintenance activities.

(b) In order to claim the exemption, the exporter must:

(1) Be in possession of a purchase order from the foreign government end-user; and

(2) Cite in its Automated Export System (AES) filing at the time of export the license number authorizing the previously approved export of the U.S.-origin defense article as required under paragraph (a)(2) of this section; and

(3) Provide, upon request of the Port Director, a copy of the license cited in paragraph (b)(2) of this section and a

copy of a purchase order required by paragraph (b)(1) of this section; and

(4) If the replacement parts or components are shipped, the exporter must use the U. S. Postal Service, or only those freight forwarders registered with the Directorate of Defense Trade Controls and eligible, or licensed customs brokers that are subject to background investigation and have passed a comprehensive examination administered by U.S. Customs and Border Protection. If export is by hand carry, the exporter must ensure that the AES filing is completed at the time of export; and

(5) Maintain records, to be provided on request to the Directorate of Defense Trade Controls, U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and other authorized U.S. law enforcement agencies, that support the exporter's authority to use the exemption in accordance with the requirements of paragraphs (a)(1) through (9) and (b)(1) and (2) of this section.

(c) The authority to use this exemption may be revoked at any time by the Managing Director, Directorate of Defense Trade Controls, if the exporter is found to be not in compliance with the requirements listed in this section.

## PART 126—GENERAL POLICIES AND PROVISIONS

3. The authority citation for part 126 continues to read as follows:

**Authority:** Secs. 2, 38, 40, 42 and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791 and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p.79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p.899; Sec. 1225, Pub. L. 108–375.

4. Part 126 is amended by adding and reserving §§ 126.16–126.18 to read as follows:

**§ 126.16 [Reserved]**

**§ 126.17 [Reserved]**

**§ 126.18 [Reserved]**

5. Add § 126.19 to read as follows:

### **§ 126.19 Policy on the export and re-export of defense articles incorporated into commodities “subject to the EAR.”**

(a) A license or other approval from the Department of State is not required for the export or re-export of a defense article(s) that has/have been incorporated into an end-item subject to the Export Administration Regulations (EAR) (see 15 CFR 734.3), when all of the following conditions are met:

(1) The end-item would be rendered inoperable, for purposes of intended applications or enhanced capabilities

for which the defense article was incorporated into the end-item, by the removal of the defense article(s); and

(2) “Technology” subject to the EAR for the “production,” “development,” or “use” (as defined in 15 CFR 772.1) of the end-item does not include any technical data (as defined by § 120.10) or “technical assistance” (as defined in 15 CFR 772.1) qualifying as defense services (as defined by § 120.9) about the defense article(s) incorporated into the end-item; and

(3) Incorporation of the defense article(s) does/do not provide, nor is it related to, a military application or “military end-use” (as defined in 15 CFR 744.21), or does not result in a “military commodity” (as defined in 15 CFR § 772.1); and

(4) The value of the defense articles is less than 1% of the value of the end-item.

(b) A license or other approval from the Department of State is not required for the export or re-export of a defense article(s) that has/have been incorporated into a component (as defined in ITAR § 121.8(b)) subject to the EAR or an end-item subject to the EAR, when all the following conditions are met:

(1) The defense article would be destroyed (i.e., rendered useless beyond the possibility of restoration) by its removal from the component, major assembly or end-item;

(2) “Technology” subject to the EAR for the “production,” “development,” or “use” (as defined in 15 CFR 772.1) of the component, or major assembly does not include any technical data (as defined by § 120.10) or “technical assistance” (as defined in 15 CFR 772.1) qualifying as defense services (as defined by § 120.9) about the defense article incorporated into the component or major assembly; and

(3) Incorporation of the defense article does not provide, nor is it related to, a military application or “military end-use” (as defined in 15 CFR 744.21), or does not result in a “military commodity” (as defined in 15 CFR 772.1).

(c) A license or other approval from the Department of State is required for the export or re-export of the defense article when exported or re-exported as a replacement part or component for a component, major assembly, or end-item subject to the EAR.

Dated: March 4, 2011.

**Ellen O. Tauscher,**

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

[FR Doc. 2011–5821 Filed 3–14–11; 8:45 am]

**BILLING CODE 4710–25–P**

## DEPARTMENT OF STATE

### 22 CFR Chapter I

### 28 CFR Chapter XI

[Public Notice: 7351]

### Department of State Retrospective Review under E.O. 13563

**AGENCY:** Department of State.

**ACTION:** Request for information and comment.

**SUMMARY:** As part of its implementation of Executive Order 13563, “Improving Regulation and Regulatory Review,” issued by the President on January 18, 2011, the Department of State (DOS) is seeking comments and information from interested parties to assist DOS in reviewing its existing regulations to determine if any of them should be modified or repealed. The purpose of this review is to make DOS’s regulatory program more effective and less burdensome in achieving its regulatory objectives.

**DATES:** Written comments and information are requested on or before March 31, 2011.

**ADDRESSES:** Interested persons are encouraged to submit comments, identified by “Regulatory Review,” by any of the following methods:

*Docket:* For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov> and search on docket number DOS–2011–0047.

*Mail:* U.S. Department of State, A/GIS/DIR, SA–22, Washington, DC 20522–2201.

*E-Mail:* [RegulatoryReview@State.gov](mailto:RegulatoryReview@State.gov). Include “Regulatory Review” in the subject line of the message.

**FOR FURTHER INFORMATION CONTACT:** Thelma Furlong, 202–216–9600.

**SUPPLEMENTARY INFORMATION:** On January 18, 2011, the President issued Executive Order 13563, “Improving Regulation and Regulatory Review,” to ensure that Federal regulations seek more affordable, less intrusive means to achieve policy goals, and that agencies give careful consideration to the benefits and costs of those regulations. The Executive Order can be found at: <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

To implement the Executive Order, the Department is taking two immediate steps to launch its retrospective review of existing regulatory and reporting requirements. *First*, the Department issues this Request for Information (RFI) seeking public comment on how best to

review its existing regulations and to identify whether any of its existing regulations should be modified or repealed. *Second*, the Department has created a link on the DOS Internet site to an e-mail in-box at [RegulatoryReview@State.gov](mailto:RegulatoryReview@State.gov), which interested parties can use to identify to DOS—on a continuing basis—regulations that may be in need of review in the future. These steps will help the Department ensure that its regulations remain necessary, properly tailored, and have up-to-date requirements that effectively achieve regulatory objectives without imposing unwarranted costs.

#### Request for Information

Pursuant to the Executive Order, the Department is developing a preliminary plan for the periodic review of its existing regulations and reporting obligations. The Department's goal is to create a systematic method for identifying those significant rules that are obsolete or simply no longer make sense. While this review will focus on the elimination of rules that are no longer warranted, DOS will also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, as relevant, undertaking new rulemakings.

Consistent with the Department's commitment to public participation in the rulemaking process, the Department is beginning this process by soliciting views from the public on how best to conduct its analysis of existing DOS rules and how best to identify those rules that might be modified or repealed. It is also seeking views from the public on specific rules or Department-imposed obligations that should be altered or eliminated. In short, engaging the public in an open, transparent process is a crucial first step in DOS's review of its existing regulations.

#### List of Questions for Commenters

The following list of questions is intended solely to assist in the formulation of comments and is not intended to be exhaustive or restrict the issues that the public might want to address. The Department requests that anyone submitting comments specify the regulation or reporting requirement at issue, providing legal citation when known, and the reasons why the regulation or reporting requirement should be modified or repealed.

(1) How can the Department best promote meaningful periodic reviews of its existing rules and how can it best identify those rules that might be modified or repealed?

(2) What factors should the agency consider in selecting and prioritizing rules and reporting requirements for review?

(3) Are there regulations that simply make no sense or have become unnecessary, ineffective, or ill advised and, if so, what are they?

(4) Are there rules that are still necessary, but have not operated as well as expected such that a stronger or different approach is justified?

(5) Does the Department currently collect information that it does not need or use effectively to achieve regulatory objectives?

(6) Are there regulations, reporting requirements, or regulatory processes that are unnecessarily complicated or could be streamlined to achieve regulatory objectives in more efficient ways?

(7) Can new technologies be leveraged to modify or do away with existing regulatory or reporting requirements?

(8) How can the Department best obtain and consider accurate, objective information and data about the costs, burdens, and benefits of existing regulations? Are there existing sources of data the Department can use to evaluate the post-promulgation effects of regulations over time?

(9) Are there regulations that are working well that can be expanded or used as a model to fill gaps in other DOS regulatory programs?

(10) Are there other concerns that DOS should consider consistent with Executive Order 13563?

The Department notes that this RFI is issued solely for information and program-planning purposes. While responses to this RFI do not bind DOS to any further actions related to the response, all submissions will be made publicly available on <http://www.regulations.gov>.

Dated: March 3, 2011.

**Patrick F. Kennedy,**

*Under Secretary, Office of the Undersecretary for Management, Department of State.*

[FR Doc. 2011-5813 Filed 3-14-11; 8:45 am]

**BILLING CODE 4710-24-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[REG-140108-08]

RIN 1545-B129

#### Disclosure of Information to State Officials Regarding Tax-Exempt Organizations

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations that amend existing regulations to reflect changes to section 6104(c) of the Internal Revenue Code (Code) made by the Pension Protection Act of 2006 (PPA). These rules provide guidance to states regarding the process by which they may obtain or inspect certain returns and return information (including information about final and proposed denials and revocations of tax-exempt status) for the purpose of administering state laws governing certain tax-exempt organizations and their activities. These regulations will affect such exempt organizations, as well as those state agencies choosing to obtain information from the Internal Revenue Service (IRS) under section 6104(c).

**DATES:** Written or electronic comments and requests for a public hearing must be received by June 13, 2011.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-140108-08), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-140108-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-140108-08).

**FOR FURTHER INFORMATION CONTACT:** Concerning submission of comments, Oluwafunmilayo Taylor, (202) 622-7180 (not a toll-free number); concerning the proposed regulations, Casey Lothamer, (202) 622-6070 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

##### I. In General

This document contains proposed amendments to 26 CFR part 301 under section 6104(c), which will replace

current § 301.6104(c)-1 in its entirety. Section 6104(c) governs when the IRS may disclose to state officials certain information about organizations described in section 501(c)(3) (“charitable organizations”), organizations that have applied for recognition as organizations described in section 501(c)(3) (“applicants”), and certain other exempt organizations. Section 6104(c) was added to the Code by section 101(e) of the Tax Reform Act of 1969 (Pub. L. 91–172, 83 Stat. 523) and significantly amended by section 1224(a) of the PPA (Pub. L. 109–280, 120 Stat. 1091).

Section 501(c)(3) organizations may be affected by the expanded disclosures to state officials authorized under the statute and proposed regulations. First, the IRS is now authorized (under new section 6104(c)(2), as added by the PPA) to disclose information about certain proposed revocations and proposed denials before an administrative appeal has been made and a final revocation or denial has been issued. For those organizations that have received a determination letter stating that they are described in section 501(c)(3), the IRS may disclose a proposed revocation (before any administrative appeal) to an appropriate state officer (ASO). This broader authority applies both where the organization was required under section 508 to apply for the determination letter and where the organization elected to apply for a determination letter even though it was not required to do so. The IRS continues to be authorized to disclose final revocations and final denials issued after any administrative appeal has been concluded for any section 501(c)(3) organization.

Second, under the authority of new section 6104(c)(2)(D), as added by the PPA, the IRS may disclose returns or return information of any section 501(c)(3) organization to ASOs on its own initiative, regardless of whether it has initiated an examination, if it determines that the information may be evidence of noncompliance with state laws under the jurisdiction of the ASO. Thus, if the IRS believes these conditions are met, it may, for example, disclose to ASOs a proposed revocation of exemption for a section 501(c)(3) organization that does not have a determination letter. All disclosures authorized under section 6104(c) may be made only if the state receiving the information is following applicable disclosure, recordkeeping and safeguard procedures.

The statute and proposed regulations also permit disclosure of information to

state officials about all applicants for section 501(c)(3) status.

Exempt organizations other than section 501(c)(3) organizations also may be affected by the disclosures to state officials authorized under the statute and proposed regulations. The IRS is authorized to disclose returns and return information of these organizations to ASOs upon written request, but only to the extent necessary to administer state laws regulating the solicitation or administration of charitable funds or charitable assets. Again, all such disclosures may be made only if the state receiving the information is following applicable disclosure, recordkeeping and safeguard procedures.

Section 6104(c)(1), which is unchanged by the PPA, directs the IRS to share certain information with ASOs regarding charitable organizations and applicants. Specifically, section 6104(c)(1) provides that the IRS is to notify the ASO of the following final determinations: (1) A refusal to recognize an entity as an organization described in section 501(c)(3); (2) the operation of a section 501(c)(3) organization in a manner not meeting, or no longer meeting, the requirements of its exemption; and (3) the mailing of a notice of deficiency for any tax imposed under section 507, chapter 41, or chapter 42. See section 6104(c)(1)(A) and (c)(1)(B). The directive under section 6104(c)(1)(A) to notify ASOs of an organization no longer meeting the requirements for exemption under section 501(c)(3) includes not only notice of a revocation of exemption, but also notice (when the IRS is so informed) that a charitable organization is terminating or has dissolved in accordance with its governing documents. Upon request, an ASO may inspect and copy the returns, filed statements, records, reports, and other information relating to a final determination as described in this paragraph, as are relevant to any determination under state law. See section 6104(c)(1)(C).

## II. PPA Changes to Section 6104(c)

The PPA amended section 6104(c) by striking paragraph (2) and inserting new paragraphs (2) through (6) as follows.

(1) The IRS may disclose to an ASO proposed refusals to recognize organizations as charitable organizations, and proposed revocations of such recognition. The PPA also allows disclosure of notices of proposed deficiencies of excise taxes imposed by section 507 and chapters 41 and 42 relating to charitable organizations. See section 6104(c)(2)(A)(i) and (c)(2)(A)(ii).

Previously, only final determinations of this kind (denials of recognition, revocations, and notices of deficiency) could be disclosed under section 6104(c).

(2) The IRS may disclose to an ASO the names, addresses, and taxpayer identification numbers of applicants. See section 6104(c)(2)(A)(iii). Previously, information on applicants, other than information relating to a denial of recognition, could not be disclosed under section 6104(c).

(3) The IRS may disclose to an ASO the returns and return information of organizations with respect to which information is disclosed as described in paragraphs (1) and (2) of this section II (proposed determinations and applicant identifying information). See section 6104(c)(2)(B). Prior law allowed for disclosure under section 6104(c) only of returns and return information related to final determinations.

(4) Proposed determinations, identifying information, and the related returns and return information with respect to charitable organizations and applicants may be disclosed to an ASO only upon the ASO’s written request and only as necessary to administer state laws regulating charitable organizations, such as laws governing tax-exempt status, charitable trusts, charitable solicitation, and fraud. See section 6104(c)(2)(C). Prior law provided for automatic disclosure (without a request), but only of final determinations and their related returns and return information.

(5) The IRS may disclose to an ASO on its own initiative (without a written request) returns and return information with respect to charitable organizations and applicants if the IRS determines that this information might constitute evidence of noncompliance with the laws under the jurisdiction of the ASO. See section 6104(c)(2)(D). There was no such provision under section 6104(c) previously.

(6) The IRS may disclose returns and return information of section 501(c) organizations other than those described in section 501(c)(1) or (c)(3) to an ASO upon the ASO’s written request, but only to the extent necessary in administering state laws relating to the solicitation or administration of charitable funds or charitable assets of such organizations. See section 6104(c)(3). Previously, only information relating to charitable organizations or applicants was disclosed under section 6104(c).

(7) Returns and return information of organizations and taxable persons disclosed under section 6104(c) may be disclosed in civil administrative and

civil judicial proceedings pertaining to the enforcement of state laws regulating such organizations, under procedures prescribed by the IRS similar to those under section 6103(h)(4). See section 6104(c)(4). There was no such provision under section 6104(c) previously.

(8) No return or return information may be disclosed under section 6104(c) to the extent the IRS determines that such disclosure would seriously impair federal tax administration. See section 6104(c)(5). This disclosure prohibition, though new in the PPA, was provided previously by regulation. See current § 301.6104(c)-1(b)(3)(ii).

(9) The IRS may disclose returns and return information under section 6104(c) to a state officer or employee designated by the ASO to receive such information on the ASO's behalf. See section 6104(c)(2)(C) (flush language) and (c)(3). Prior law did not provide for IRS disclosures to persons other than ASOs.

(10) An ASO is defined as the state attorney general, state tax officer, any state official charged with overseeing charitable organizations (in the case of charitable organizations and applicants), and the head of the state agency charged with the primary responsibility for overseeing the solicitation of funds for charitable purposes (in the case of section 501(c) organizations other than those described in section 501(c)(1) or (c)(3)). See section 6104(c)(6)(B). Before its amendment by the PPA, section 6104(c)(2) defined ASO as the state attorney general, state tax officer, or any state official charged with overseeing organizations of the type described in section 501(c)(3).

### III. Related PPA Provisions

The PPA amended section 6103(p) to make the disclosure of returns and return information under section 6104(c) subject to the disclosure, recordkeeping, and safeguard provisions of section 6103. These provisions include—

(1) section 6103(a), which is the general prohibition on the disclosure of returns and return information, except as authorized by Title 26 of the United States Code;

(2) section 6103(p)(3), which requires the IRS to maintain permanent standardized records of all requests for inspection or disclosure of returns or return information under section 6104(c) and of all such information inspected or disclosed pursuant to those requests; and

(3) section 6103(p)(4), which requires an ASO, as a condition for receiving returns or return information under section 6104(c), to establish and

maintain certain safeguards, such as keeping permanent standardized records of all requests and disclosures, maintaining a secure information storage area, restricting access to the information, and providing whatever other safeguards the IRS deems necessary to protect the confidentiality of the information. See § 301.6103(p)(4)-1 and IRS Publication 1075, Tax Information Security Guidelines for Federal, State and Local Agencies and Entities. Publication 1075 can be found at <http://www.irs.gov/formspubs>.

The PPA also included amendments to sections 7213, 7213A, and 7431 to impose civil and criminal penalties for the unauthorized disclosure or inspection of section 6104(c) information.

### IV. IRS Disclosure Procedures

In general, before any federal or state agency may receive returns and return information from the IRS under a particular Code provision, it must file with the IRS a report detailing the physical, administrative, and technical safeguards implemented by the agency to protect this information from unauthorized inspection or disclosure. Only upon approval of these safeguards by the IRS, as well as satisfaction of any other statutory requirements (such as submission of a written request), may an agency receive the information to which it is entitled under the Code, and then only for the use specified by the relevant statute. See section 6103(p)(4).

Under various disclosure programs, the IRS and other federal and state agencies often execute agreements detailing the responsibilities of the parties and the terms and parameters of the disclosure arrangement. For example, under section 6103(d), the IRS executes a disclosure agreement (the "Basic Agreement") with each state tax agency to which it discloses information. The Basic Agreement, which serves as the written request required by section 6103(d), has been the foundation of the state tax disclosure program under this provision of the Code for over 30 years. See Internal Revenue Manual Exhibit 11.3.32-1 (sample Basic Agreement).

After the PPA, the IRS revised its disclosure procedures under section 6104(c) to model them after the highly successful section 6103(d) program. The section 6104(c) program uses a disclosure agreement patterned after the Basic Agreement but tailored to the specific requirements and restrictions of section 6104(c).

### Explanation of Provisions

These proposed regulations provide guidance regarding disclosures under section 6104(c), as amended by the PPA. The PPA amendments to sections 6104(c) and 6103 expand the scope of information the IRS may disclose to an ASO, but make such disclosures contingent on the ASO adopting the safeguard standards and procedures of section 6103 that apply to federal and state agencies that receive returns and return information under other provisions of the Code. Accordingly, these proposed regulations provide that, without prior safeguard approval, the IRS will not give automatic notification of any determinations or other information that may be disclosed under section 6104(c).

Under these proposed regulations, the IRS may (and currently does) require an ASO to enter into a disclosure agreement with the IRS, which will stipulate the procedures for disclosure under section 6104(c), as well as the restrictions on use and redisclosure. These proposed regulations provide that this agreement, or any similar document, satisfies the requirement under section 6104(c) for a written request for disclosure.

An ASO who meets the safeguard and other procedural requirements of section 6103(p)(4) may receive information from the IRS to be used in the administration of state laws governing charitable organizations, as well as laws governing the solicitation or administration of charitable funds or charitable assets of certain noncharitable exempt organizations. The information available to ASOs under these proposed regulations not only is greater in scope than what was available under section 6104(c) before its amendment by the PPA, but comes at an earlier stage in the IRS administrative and enforcement processes. Thus, the IRS may disclose such information as whether an organization has applied for recognition as a charitable organization and, if so, whether the IRS proposes to deny such recognition, or the organization has withdrawn its application; whether an organization's charitable status has terminated; whether the IRS proposes to assess any chapter 42 excise taxes (for example, the tax on excess benefit transactions under section 4958); and whether the IRS has revoked an organization's exemption, or proposes to revoke the recognition of its exemption.

Without a written request, but still subject to the safeguard requirements of section 6103(p)(4), the IRS has the authority under section 6104(c)(2)(D) to



disclose returns and return information of charitable organizations and applicants if it determines that such information may constitute evidence of noncompliance with the laws under the ASO's jurisdiction. The IRS may make these disclosures on its own initiative. These proposed regulations clarify that the IRS' authority under section 6104(c)(2)(D) is in addition to its disclosure authority under other provisions of section 6104(c)(1) and (c)(2), to the effect that discretionary disclosures may be made before the IRS issues a proposed determination or takes other action. The proposed regulations also make clear that the determination required by the statute concerns possible noncompliance with state laws regulating charitable organizations and not just any state law violation.

The disclosure provisions of section 6104(c), as amended by the PPA, offer significant advantages to states in their enforcement efforts. The ability of the IRS to disclose returns and return information early in its own administrative and enforcement processes, as well as the IRS' authority under section 6104(c)(2)(D) to disclose information on its own initiative, greatly enhance the administration and enforcement of state laws, both tax and nontax, governing charitable activities, funds, and assets.

These proposed regulations define certain key terms for purposes of section 6104(c), including "appropriate state officer", "return", "return information", and "taxable person."

#### *Special Analyses*

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866; therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to the proposed regulations; therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments regarding their impact on small businesses.

#### *Comments and Requests for a Public Hearing*

Before these proposed regulations are adopted as final, any written (signed original and 8 copies) or electronic comments timely submitted to the IRS

will be considered. The IRS and Treasury Department request comments on the clarity of these proposed regulations and how they might be made easier to understand. Of particular interest are comments on whether paragraph (e) of these proposed regulations, describing the organizations to which disclosure applies, lists all the organizations with respect to which ASOs might legitimately need information. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

#### *Drafting Information*

The principal author of these regulations is Casey Lothamer of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), though other persons in the IRS and Treasury Department participated in their development.

#### **List of Subjects in 26 CFR Part 301**

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

#### **PART 301—PROCEDURE AND ADMINISTRATION**

**Paragraph 1.** The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Section 301.6104(c)-1 also issued under 26 U.S.C. 6104(c). \* \* \*

**Par. 2.** Section 301.6104(c)-1 is revised to read as follows:

#### **§ 301.6104(c)-1 Disclosure of certain information to state officials.**

(a) *In general.* (1) Subject to the disclosure, recordkeeping, and safeguard provisions of section 6103, and upon written request by an appropriate state officer (ASO, as defined in paragraph (i)(1) of this section), the IRS may disclose or make available to the ASO the returns and return information described in paragraph (c) of this section with respect to—

(i) any organization described or formerly described in section 501(c)(3) and exempt or formerly exempt from taxation under section 501(a) (a charitable organization); or

(ii) any organization that has applied for recognition as an organization described in section 501(c)(3) (an applicant).

Such information shall be disclosed or made available only as necessary to administer state laws regulating charitable organizations.

(2) Subject to the disclosure, recordkeeping, and safeguard provisions of section 6103, and upon written request by an ASO, the IRS may disclose or make available to the ASO returns and return information regarding any organization described or formerly described in section 501(c) other than section 501(c)(1) or (c)(3). Such information shall be disclosed or made available only as necessary to administer state laws regulating the solicitation or administration of the charitable funds or charitable assets of these organizations.

(b) *Disclosure agreement.* The IRS may require an ASO to execute a disclosure agreement or similar document specifying the procedures, terms, and conditions for the disclosure or inspection of information under section 6104(c), including compliance with the safeguards prescribed by section 6103(p)(4), as well as specifying the information to be disclosed. Such an agreement or similar document shall constitute the request for disclosure required by section 6104(c)(1)(C), as well as the written request required by section 6104(c)(2)(C)(i) and (c)(3). For security guidelines and other safeguards for protecting returns and return information, see guidance published by the IRS. *See, for example, IRS Publication 1075, "Tax Information Security Guidelines for Federal, State and Local Agencies and Entities."*

(c) *Disclosures regarding charitable organizations and applicants.* (1) With respect to any organization described in paragraph (d) of this section, the IRS may disclose or make available for inspection under section 6104(c)(1) and (c)(2) to an ASO the following returns and return information with respect to a charitable organization or applicant:

(i) A refusal or proposed refusal to recognize an organization's exemption as a charitable organization (a final or proposed denial letter).

(ii) Information regarding a grant of exemption following a proposed denial.

(iii) A revocation of exemption as a charitable organization (a final revocation letter), including a notice of termination or dissolution.

(iv) A proposed revocation of recognition of exemption as a charitable organization (a proposed revocation letter).

(v) Information regarding the final disposition of a proposed revocation of recognition other than by final revocation.

(vi) A notice of deficiency or proposed notice of deficiency of tax imposed under section 507 or chapter 41 or 42 on the organization or a taxable person (as described in paragraph (i)(4) of this section).

(vii) Information regarding the final disposition of a proposed notice of deficiency of tax imposed under section 507 or chapter 41 or 42 on the organization other than by issuance of a final notice of deficiency.

(viii) The names, addresses, and taxpayer identification numbers of applicants for charitable status, provided on an applicant-by-applicant basis or by periodic lists of applicants. Under this provision the IRS may respond to inquiries from an ASO as to whether a particular organization has applied for recognition of exemption as a charitable organization.

(ix) Information regarding the final disposition of an application for recognition of exemption where no proposed denial letter is issued, including whether the application was withdrawn or whether the applicant failed to establish its exemption.

(x) Returns and other return information relating to the return information described in this paragraph (c)(1), except for returns and return information relating to proposed notices of deficiency described in paragraph (c)(1)(vi) of this section with respect to taxable persons.

(2) The IRS may disclose or make available for inspection returns and return information of a charitable organization or applicant, if the IRS determines that such information might constitute evidence of noncompliance with the laws under the jurisdiction of the ASO regulating charitable organizations and applicants. Such information may be disclosed on the IRS' own initiative. Disclosures under this paragraph (c)(2) may be made before the IRS issues a proposed determination (denial of recognition, revocation, or notice of deficiency) or any other action by the IRS described in this section.

(d) *Organizations to which disclosure applies.* Regarding the information described in paragraphs (a)(2) and (c) of this section, the IRS will disclose or make available for inspection to an ASO such information only with respect to—

(1) an organization formed under the laws of the ASO's state;

(2) an organization, the principal office of which is located in the ASO's state;

(3) an organization that, as determined by the IRS, is or might be subject to the laws of the ASO's state regulating charitable organizations or the solicitation or administration of charitable funds or charitable assets; or

(4) a private foundation required by § 1.6033-2(a)(iv) to list the ASO's state on any of the foundation's returns filed for its last five years.

(e) *Disclosure limitations.* Notwithstanding any other provision of this section, the IRS will not disclose or make available for inspection under section 6104(c) any information, the disclosure of which it determines would seriously impair federal tax administration, including, but not limited to—

(1) identification of a confidential informant or interference with a civil or criminal tax investigation; and

(2) information obtained pursuant to a tax convention between the United States and a foreign government (*see* section 6105(c)(2) for the definition of *tax convention*).

(f) *Disclosure recipients*—(1) *In general.* The IRS may disclose returns and return information under section 6104(c) to, or make it available for inspection by—

(i) an ASO, as defined in paragraph (i)(1) of this section, or

(ii) a person other than an ASO, but only if that person is a state officer or employee designated by the ASO to receive information under section 6104(c) on behalf of the ASO, as specified in paragraph (f)(2) of this section.

(2) *Designation by ASO.* An ASO may designate state officers or employees to receive information under section 6104(c) on the ASO's behalf by specifying in writing each person's name and job title, and the name and address of the person's office. The ASO must promptly notify the IRS in writing of any additions, deletions, or other changes to the list of designated persons.

(g) *Rediscovery.* An ASO to whom a return or return information has been disclosed may thereafter disclose such information—

(1) to another state officer or employee only as necessary to administer state laws governing charitable organizations or state laws regulating the solicitation or administration of charitable funds or charitable assets of noncharitable exempt organizations; or

(2) except as provided in paragraph (h)(1) of this section, to another state officer or employee who is personally and directly preparing for a civil proceeding before a state administrative body or court in a matter involving the enforcement of state laws regulating organizations with respect to which information can be disclosed under this section, solely for use in such a proceeding, but only if—

(i) the organization or a taxable person is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the civil liability of the organization or a taxable person, or collecting such civil liability, under state laws governing organizations with respect to which information can be disclosed under this section;

(ii) the treatment of an item reflected on such a return is directly related to the resolution of an issue in the proceeding; or

(iii) the return or return information directly relates to a transactional relationship between the organization or a taxable person and a person who is a party to the proceeding that directly affects the resolution of an issue in the proceeding.

(h) *Rediscovery limitations.* (1) Before disclosing in a state administrative or judicial proceeding, or to any party as provided by paragraph (g)(2) of this section, any return or return information received under section 6104(c), the ASO shall notify the IRS of the intention to make such a disclosure. No state officer or employee shall make such a disclosure except in accordance with any conditions the IRS might impose in response to the ASO's notice of intent. No such disclosure shall be made if the IRS determines that the disclosure would seriously impair Federal tax administration.

(2) An ASO to whom a return or return information has been disclosed shall not disclose that information to an agent or contractor.

(i) *Definitions.* (1) *Appropriate state officer* means—

(i) the state attorney general;

(ii) the state tax officer;

(iii) with respect to a charitable organization or applicant, any state officer other than the attorney general or tax officer charged with overseeing charitable organizations; and

(iv) with respect to a section 501(c) organization that is not described in section 501(c)(1) or (c)(3), the head of the agency designated by the state attorney general as having primary responsibility for overseeing the solicitation of funds for charitable purposes. A state officer described in

paragraph (i)(1)(iii) or (i)(1)(iv) of this section must show that the officer is an ASO by presenting a letter from the state attorney general describing the functions and authority of the officer under state law, with sufficient facts for the IRS to determine that the officer is an ASO.

(2) *Return* has the same meaning as in section 6103(b)(1).

(3) *Return information* has the same meaning as in section 6103(b)(2).

(4) *Taxable person* means any person who is liable or potentially liable for excise taxes under chapter 41 or 42. Such a person includes—

(i) a disqualified person described in section 4946(a)(1), 4951(e)(4), or 4958(f);

(ii) a foundation manager described in section 4946(b);

(iii) an organization manager described in section 4955(f)(2) or 4958(f)(2);

(iv) a person described in section 4958(c)(3)(B);

(v) an entity manager described in section 4965(d); and

(vi) a fund manager described in section 4966(d)(3).

(j) *Failure to comply*. Upon a determination that an ASO has failed to comply with the requirements of section 6103(p)(4), the IRS may take the actions it deems necessary to ensure compliance, including the refusal to disclose any further returns or return information to the ASO until the IRS determines that the requirements have been met. For procedures for the administrative review of a determination that an authorized recipient has failed to safeguard returns or return information, see § 301.6103(p)(7)-1.

(k) *Effective/applicability date*. The rules of this section apply to taxable years beginning on or after the date of publication in the **Federal Register** of the Treasury decision adopting these rules as final regulations.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2011-6011 Filed 3-14-11; 8:45 am]

**BILLING CODE 4830-01-P**

## POSTAL SERVICE

### 39 CFR Part 952

#### Rules of Practice in Proceedings Relative to False Representation and Lottery Orders

**AGENCY:** Postal Service.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service is proposing to adopt revised rules for proceedings relative to false representation and lottery orders. The primary purpose of this exercise is to update and align the rules with current practices.

**DATES:** Comments must be received on or before April 14, 2011.

**FOR FURTHER INFORMATION CONTACT:** Diane M. Mego, Esq., 703-812-1905.

**SUPPLEMENTARY INFORMATION:** The Postal Service is proposing to adopt revised rules for 39 CFR Part 952. These revised rules of procedure have the same general coverage as the existing rules. However, the revised rules have been updated, are more comprehensive than the existing rules, and are intended to reflect more precisely current practice.

These revised rules will completely replace the existing rules of practice and once adopted as a final rule, will be effective immediately in accordance with section 952.2. While the language of the proposed rules may have changed considerably for clarity, and to reflect more precisely the practices in these matters, we here identify the most significant changes of substance.

Section 952.7 is renamed from “Notice of answer and hearing” to “Notice of docketing and answer.” Under the previous rules, a hearing was automatically scheduled for hearing thirty days from receipt of the complaint. Hearings are now scheduled as needed by the presiding officer after the pleadings have been received. The notice from the Recorder will include the notice that the matter has been docketed and advise Respondent that an answer is required within 30 days.

Section 952.8 is modified to simplify service of the complaint and now requires Complainant to complete service of the notice of docketing and answer due date along with a copy of the complaint. Previously, the Recorder was required to forward the complaint and the notice of docketing and hearing due date to the local postmaster, who in turn served Respondent. The local postmasters have been removed from the procedure. The Recorder will now forward a copy of the notice of docketing and answer due date (see revised section 952.7), a copy of these rules and a docketed copy of the complaint to Complainant. Complainant is then responsible for obtaining service through certified mail, return receipt requested. Service is now complete upon mailing. Complainant is required to file either a receipt acknowledging the delivery of the notice or an affidavit of service if the mail is returned. Service may also be accomplished by hand.

Section 952.9 is modified to require the parties, after the filing of the initial complaint, to serve all pleadings, motions, proposed orders and other documents for the record on the opposing party and provide an appropriate affidavit of service. The new rule clarifies that discovery does not need to be filed with the presiding officer unless the parties are seeking to include it in the record or the presiding officer so orders. In addition, the rule is changed to allow the filing of pleadings, motions, proposed orders and other documents by facsimile and electronic mail at the discretion of the presiding officer.

Section 952.11 is modified to authorize the presiding officer to rule that a party that fails to respond to or comply with any order is in default. Currently, only a Respondent can be found in default and only for either failing to file an answer or for failing to appear at a hearing. The new rule will allow the presiding officer to enter a default against a non-responding party even if the initial pleadings have been received.

Section 952.16 requires an attorney representing Respondent to file a notice of appearance. An attorney for either party who is seeking to withdraw from representation must file a motion to withdraw, which will be granted at the discretion of the presiding officer. If a successor attorney is not appointed at the same time for Respondent, the withdrawn attorney must provide adequate contact information for Respondent.

Section 952.17(b)(10) is added to allow the presiding officer to resolve the proceeding on the written record without a hearing either at the request of the parties or on the presiding officer's own initiative. The current rules do not specifically allow for proceeding on the written record without a hearing.

Section 952.17(b)(11) is added to allow for a hearing to be conducted by telephone, video conference, or other appropriate means.

Section 952.21 is modified to allow the parties to participate in voluntary discovery without the intervention of the presiding officer and to clarify the discovery rules.

Accordingly, the Postal Service invites public comment on the following proposed rules.

#### List of Subjects in 39 CFR Part 952

Administrative practice and procedure, Fraud, False Representations, Lotteries, Penalties, Postal Service.

For the reasons stated in the preamble, the Postal Service proposes to revise 39 CFR part 952 to read as follows:

**PART 952—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO FALSE REPRESENTATION AND LOTTERY ORDERS**

- Sec.
- 952.1 Authority.
  - 952.2 Scope.
  - 952.3 Informal dispositions.
  - 952.4 Office business hours.
  - 952.5 Complaints.
  - 952.6 Interim impounding.
  - 952.7 Notice of docketing and answer.
  - 952.8 Service.
  - 952.9 Filing documents for the record.
  - 952.10 Answer.
  - 952.11 Default.
  - 952.12 Amendment of pleadings.
  - 952.13 Continuances and extensions.
  - 952.14 Hearings.
  - 952.15 Change of place of hearings.
  - 952.16 Appearances.
  - 952.17 Presiding officers.
  - 952.18 Evidence.
  - 952.19 Subpoenas.
  - 952.20 Witness fees.
  - 952.21 Discovery.
  - 952.22 Transcript.
  - 952.23 Proposed findings and conclusions.
  - 952.24 Decisions.
  - 952.25 Exceptions to initial decision or tentative decision.
  - 952.26 Judicial Officer.
  - 952.27 Motion for reconsideration.
  - 952.28 Orders.
  - 952.29 Modification or revocation of orders.
  - 952.30 Supplemental orders.
  - 952.31 Computation of time.
  - 952.32 Official record.
  - 952.33 Public information.
  - 952.34 Ex parte communications.

**Authority:** 39 U.S.C. 204, 401, 3005, 3012, 3016.

**§ 952.1 Authority.**

These rules of practice are issued by the Judicial Officer of the United States Postal Service (see § 952.26) pursuant to authority delegated by the Postmaster General, and in accordance with 39 U.S.C. 3005, and are governed by the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*

**§ 952.2 Scope.**

These rules of practice shall be applicable in all formal proceedings before the Postal Service under 39 U.S.C. 3005, including such cases instituted under prior rules of practice pertaining to these or predecessor statutes, unless timely shown to be prejudicial to Respondent.

**§ 952.3 Informal dispositions.**

This part does not preclude the disposition of any matter by agreement

between the parties either before or after the filing of a complaint when time, the nature of the proceeding, and the public interest permit.

**§ 952.4 Office business hours.**

The offices of the officials identified in these rules are located at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, and are open Monday through Friday except holidays from 8:15 a.m. to 4:45 p.m.

**§ 952.5 Complaints.**

When the Chief Postal Inspector or his or her designated representative believes that a person is using the mails in a manner requiring formal administrative action under 39 U.S.C. 3005, he or she shall prepare and file with the Recorder a complaint which names the person involved; states the name, address and telephone number of the attorney representing Complainant; states the legal authority and jurisdiction under which the proceeding is initiated; states the facts in a manner sufficient to enable the person named therein to answer; and requests the issuance of an appropriate order or orders and/or the assessment of civil penalties. Complainant shall attach to the complaint a copy of the order or orders requested which may, at any time during the proceedings, be modified. The person named in the complaint shall be known as “Respondent”, and the Chief Postal Inspector or his or her designee shall be known as “Complainant”. The term “person” (1 U.S.C. 1) shall include any name, address, number or other designation under or by use of which Respondent seeks remittances of money or property through the mail.

**§ 952.6 Interim impounding.**

In preparation for or during the pendency of a proceeding initiated under 39 U.S.C. 3005, mail addressed to Respondent may be impounded upon obtaining an appropriate order from a United States District Court, as provided in 39 U.S.C. 3007.

**§ 952.7 Notice of docketing and answer.**

(a) Upon receipt of a complaint filed against a Respondent whose mailing address is within the United States, the Recorder shall issue a notice of docketing and answer due date stating the date for an answer which shall not exceed 30 days from the service of the complaint and a reference to the effect of failure to file an answer and/or the assessment of civil penalties authorized by 39 U.S.C. 3012. (See §§ 952.10 and 952.11).

(b) Upon receipt of a complaint filed against a Respondent whose mailing

address is not within the United States, the Judicial Officer shall review the complaint and any supporting information and determine whether a prima facie showing has been made that Respondent is engaged in conduct warranting issuance of the orders authorized by 39 U.S.C. 3005(a). Where the Judicial Officer concludes that a prima facie showing has not been made the complaint shall be dismissed. Where the Judicial Officer concludes that a prima facie showing has been made, he or she shall issue a tentative decision and orders which: set forth findings of fact and conclusions of law; direct Respondent to cease and desist from engaging in conduct warranting the issuance of an order authorized by 39 U.S.C. 3005(a); direct that postal money orders drawn to the order of Respondent not be paid for 45 days from date of the tentative decision; direct that mail addressed to Respondent be forwarded to designated facilities and detained for 45 days from the date of the tentative decision subject to survey by Respondent and release of mail unrelated to the matter complained of; tentatively assess such civil penalties as he considers appropriate under applicable law; and provide that unless Respondent presents, within 45 days of the date of the tentative decision, good cause for dismissing the complaint, or modifying the tentative decision and orders, the tentative decision and orders shall become final. The Judicial Officer may, upon a showing of good cause made within 45 days of the date of the tentative decision, hold a hearing to determine whether the tentative decision and orders should be revoked, modified, or allowed to become final. Should a hearing be granted, the Judicial Officer may modify the tentative decision and orders to extend the time during which the payment of postal money orders payable to Respondent is suspended and mail addressed to Respondent is detained.

**§ 952.8 Service.**

(a) Where Respondent’s mailing address is within the United States, the Recorder shall cause a notice of docketing and answer due date (the “Notice”), a copy of these rules of practice, and a copy of the complaint to be transmitted to Complainant who shall serve those documents upon Respondent or his or her agent by certified mail, return receipt requested. Service shall be complete upon mailing. A receipt acknowledging delivery of the notice shall be secured from Respondent or his or her agent and forwarded to the Recorder, U.S. Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington,

VA 22201–3078, to become a part of the official record. In the absence of a receipt, Complainant shall file an Affidavit of Service, along with returned undelivered mail, or other appropriate evidence of service, with the Recorder. In the alternative Complainant may, in its discretion, effectuate service by hand on Respondent and file an Affidavit of Service with the Recorder.

(b) Where the only address against which Complainant seeks relief is outside the United States, a copy of the complaint, the tentative decision, and a copy of these rules of practice shall be sent by international mail, return receipt requested, by the Recorder to the address cited in the complaint. A written statement by the Recorder noting the time and place of mailing shall be accepted as evidence of service in the event a signed return receipt is not returned to the Recorder.

#### **§ 952.9 Filing documents for the record.**

(a) Each party shall file with the Recorder pleadings, motions, proposed orders, and other documents for the record. Discovery need not be filed except as may be sought to be included in the record, or as may be ordered by the presiding officer. Each filing after the initial complaint shall be served upon all other parties to the proceeding by the filing party, and an affidavit of such service signed and dated by the filing party shall be included on the last page of such filing, which shall state as follows:

I, [name of filing party] hereby certify that I served the within [title of document] upon each party of record by electronic mail or first class mail on [date].

(b) The parties shall file one original of all documents filed under this section unless otherwise ordered by the presiding officer.

(c) Documents shall be dated and state the docket number and title of the proceeding. Any pleading or other document required by order of the presiding officer to be filed by a specified date must be received by the Recorder on or before such date. The date of filing shall be entered thereon by the Recorder.

(d) The presiding officer may permit filing of pleadings, motions, proposed orders, and other documents for the record by facsimile or by electronic mail with the Recorder.

#### **§ 952.10 Answer.**

(a) The answer shall contain a concise statement admitting, denying, or explaining each of the allegations set forth in the complaint.

(b) Any facts alleged in the complaint which are not denied or are expressly

admitted in the answer may be considered as proved, and no further evidence regarding these facts need be adduced at the hearing.

(c) The answer shall be signed personally by an individual Respondent, or in the case of a partnership by one of the partners, or, in the case of a corporation or association, by an officer thereof.

(d) The answer shall set forth Respondent's address, electronic mail address, and telephone number or the name, address, electronic mail address, and telephone number of an attorney representing Respondent.

(e) The answer shall affirmatively state whether the Respondent will appear in person or by counsel at the hearing.

(f) In lieu of appearing at the hearing in person or by counsel, Respondent may request that the matter be submitted for determination pursuant to § 952.17(b)(10).

#### **§ 952.11 Default.**

(a) If Respondent fails to file an answer within the time specified in the notice of docketing and answer, Respondent may be deemed in default, and to have waived hearing and further procedural steps. The Judicial Officer may thereafter issue orders and/or assess civil penalties without further notice.

(b) If Respondent files an answer but fails to appear at the hearing, Respondent may, unless timely indications to the contrary are received, be deemed to have abandoned the intention to present a defense to the charges of the complaint, and the Judicial Officer, without further notice to Respondent, may issue the orders and/or assess civil penalties sought in the complaint.

(c) If Respondent or Complainant fails to respond to or comply with an order of the presiding officer, the party may be held in default, and absent good cause shown, the party may be deemed to have abandoned the intention to present a defense, or to prosecute the complaint, and the presiding officer or Judicial Officer, without further notice to the offending party, may, as appropriate, dismiss the complaint or issue the orders and/or assess civil penalties sought in the complaint.

#### **§ 952.12 Amendment of pleadings.**

(a) Amendments shall be filed with the Recorder.

(b) By consent of the parties, a pleading may be amended at any time. Also, a party may move to amend a pleading at any time prior to the close of the hearing and, provided that the

amendment is reasonably within the scope of the proceeding initiated by the complaint, the presiding officer rule on the motion as he or she deems to be fair and equitable to the parties.

(c) When issues not raised by the pleadings but reasonably within the scope of the proceedings initiated by the complaint are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments as may be necessary to conform the pleadings to the evidence and to raise such issues may be allowed at any time upon the motion of any party.

(d) If a party objects to the introduction of evidence at the hearing on the ground that it is not within the issues raised by the pleadings, but fails to satisfy the presiding officer that an amendment of the pleadings would prejudice him or her on the merits, the presiding officer may allow the pleadings to be amended and may grant a continuance to enable the objecting party to rebut the evidence presented.

(e) The presiding officer may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions, occurrences, or events which have occurred since the date of the pleading sought to be supplemented and which are relevant to any of the issues involved.

#### **§ 952.13 Continuances and extensions.**

Continuances and extensions will not be granted by the presiding officer except for good cause shown.

#### **§ 952.14 Hearings.**

Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer. Time, date, and location for the hearing shall be set by the presiding officer in his or her sole discretion.

#### **§ 952.15 Change of place of hearings.**

A party may file a request that a hearing be held to receive evidence in his or her behalf at a place other than that designated in § 952.14. The party shall support the request with a statement outlining:

(a) The evidence to be offered in such place;

(b) The names and addresses of the witnesses who will testify; and,

(c) The reasons why such evidence cannot be produced at Arlington, VA.

The presiding officer shall give consideration to the convenience and necessity of the parties and witnesses and the relevance of the evidence to be offered.

**§ 952.16 Appearances.**

(a) Respondent may appear and be heard in person or by attorney. A Notice of Appearance must be filed by any attorney representing Respondent.

(b) An attorney may practice before the Postal Service in accordance with applicable rules issued by the Judicial Officer. See 39 CFR part 951.

(c) When Respondent is represented by an attorney, all pleadings and other papers subsequent to the complaint shall be mailed to the attorney.

(d) Withdrawal by any attorney representing a party must be preceded by a motion to withdraw stating the reasons therefore, and shall be granted in the discretion of the presiding officer. If a successor attorney is not appointed at the same time, withdrawing counsel shall provide adequate contact information for Respondent.

(e) Parties must promptly file a notice of change of attorney.

**§ 952.17 Presiding officers.**

(a) The presiding officer at any hearing shall be an Administrative Law Judge qualified in accordance with law or the Judicial Officer (39 U.S.C. 204). The Chief Administrative Law Judge shall assign cases. The Judicial Officer may, for good cause shown, preside at the hearing if an Administrative Law Judge is unavailable.

(b) The presiding officer shall have authority to:

- (1) Administer oaths and affirmations;
- (2) Examine witnesses;
- (3) Rule upon offers of proof, admissibility of evidence, and matters of procedure;
- (4) Order any pleading amended upon motion of a party at any time prior to the close of the hearing;
- (5) Maintain discipline and decorum and exclude from the hearing any person acting in an inappropriate manner;
- (6) Require the filing of briefs or memoranda of law on any matter upon which he or she is required to rule;
- (7) Order prehearing conferences for the purpose of the settlement or simplification of issues by the parties;
- (8) Order the proceeding reopened at any time prior to his or her decision for the receipt of additional evidence;
- (9) Render an initial decision, which becomes the final agency decision unless a timely appeal is taken, except that the Judicial Officer may issue a tentative or a final decision;
- (10) Rule on motion by either party, or on his or her own initiative, for a determination on the written record in lieu of an oral hearing in his or her sole discretion;
- (11) Rule on motion by either party, or on his or her own initiative, to permit

a hearing to be conducted by telephone, video conference, or other appropriate means;

(12) Rule upon applications and requests filed under §§ 952.19 and 952.21; and,

(13) Exercise all other authority conferred upon the presiding officer by the Administrative Procedure Act or other applicable law.

**§ 952.18 Evidence.**

(a) Except as otherwise provided in these rules, the Federal Rules of Evidence shall govern. However, such rules may be relaxed to the extent that the presiding officer deems proper to ensure a fair hearing. The presiding officer may exclude irrelevant, immaterial, or repetitious evidence.

(b) Testimony shall be under oath or affirmation and witnesses shall be subject to cross-examination.

(c) Agreed statements of fact may be received in evidence.

(d) Official notice, judicial notice or administrative notice of appropriate information may be taken in the discretion of the presiding officer.

(e) Authoritative writings of the medical or other sciences, may be admitted in evidence but only through the testimony of expert witnesses or by stipulation.

(f) Lay testimonials may be received in evidence as proof of the efficacy or quality of any product, service, or thing sold through the mails, in the discretion of the presiding officer.

(g) The written statement of a competent witness may be received in evidence provided that such statement is relevant to the issues, that the witness shall testify under oath at the hearing that the statement is in all respects true, and, in the case of expert witnesses, that the statement correctly states the witness's opinion or knowledge concerning the matters in question.

(h) A party which objects to the admission of evidence shall explain the grounds for the objection. Formal exceptions to the rulings of the presiding officer are unnecessary.

**§ 952.19 Subpoenas.**

(a) *General.* Upon written request of either party filed with the Recorder or on his or her own initiative, the presiding officer may issue a subpoena requiring:

(1) *Testimony at a deposition.* The deposing of a witness in the city or county where the witness resides or is employed or transacts business in person, or at another location convenient for the witness that is specifically determined by the presiding officer;

(2) *Testimony at a hearing.* The attendance of a witness for the purpose of taking testimony at a hearing; and

(3) *Production of records.* The production by the witness at a deposition or hearing of records designated in the subpoena.

(b) *Voluntary cooperation.* Each party is expected:

(1) To cooperate and make available witnesses and evidence under its possession, custody or control as requested by the other party, without issuance of a subpoena, and

(2) To secure voluntary production of desired third-party records whenever possible.

(c) *Requests for subpoenas.* (1) A request for a subpoena shall to the extent practical be filed:

(i) At the same time a request for deposition is filed; or

(ii) Fifteen (15) days before a scheduled hearing where the attendance of a witness at a hearing is sought.

(2) A request for a subpoena shall state the reasonable scope and relevance to the case of the testimony and of any records sought.

(3) The presiding officer, in his or her sole discretion, may honor requests for subpoenas not presented within the time limitations specified in this paragraph.

(d) *Motion to quash or modify.* (1) Upon written request by the person subpoenaed or by a party, the presiding officer may:

(I) Quash or modify the subpoena if it is unreasonable, oppressive or for other good cause shown, or

(II) Require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed records. Where circumstances require, the presiding officer may act upon such a request at any time after a copy has been served upon the opposing party.

(2) Motions to quash or modify a subpoena shall be filed within 10 days of service, or at least one day prior to any scheduled hearing, whichever first occurs. The presiding officer, in his or her sole discretion, may entertain motions to quash or modify not made within the time limitations specified in this paragraph.

(e) *Form; issuance.* (1) Every subpoena shall state the title of the proceeding, shall cite 39 U.S.C. 3016(a)(2) as the authority under which it is issued, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified records at a time and place therein specified. In issuing a subpoena to a requesting party, the presiding officer shall sign the subpoena

and may, in his or her discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness in accordance with 28 U.S.C. 1821, or other applicable law, and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the presiding officer as sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

(f) *Service*—(1) *In general*. The party requesting issuance of a subpoena shall arrange for service.

(2) *Service within the United States*. A subpoena issued under this section may be served by a person designated under 18 U.S.C. 3061 or by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age at any place within the territorial jurisdiction of any court of the United States.

(3) *Service outside the United States*. Any such subpoena may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States may assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such court would have if such person were personally within the jurisdiction of such court.

(4) *Service on business persons*. Service of any such subpoena may be made upon a partnership, corporation, association, or other legal entity by:

(i) Delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(ii) Delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity; or

(iii) Depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(5) *Service on natural persons*.

Service of any subpoena may be made upon any natural person by:

(i) Delivering a duly executed copy to the person to be served; or

(ii) Depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such person at his or her residence or principal office or place of business.

(6) *Verified return*. A verified return by the individual serving any such subpoena setting forth the manner of such service shall constitute proof of service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such subpoena, or a statement of service by registered or certified mail in the event that receipt of delivery is unavailable.

(g) *Contumacy or refusal to obey a subpoena*. In the case of refusal to obey a subpoena, the Judicial Officer may request the Attorney General to petition the district court for any district in which the person receiving the subpoena resides, is found, or conducts business (or in the case of a person outside the territorial jurisdiction of any district court, the district court for the District of Columbia) to issue an appropriate order for the enforcement of such subpoena. Any failure to obey such order of the court may be punishable as contempt.

#### § 952.20 Witness fees.

The Postal Service does not pay fees and expenses for Respondent's witnesses or for depositions requested by Respondent, unless otherwise ordered by the presiding officer.

#### § 952.21 Discovery.

(a) *Voluntary discovery*. The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the presiding officer may issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) *Discovery disputes*. The parties are required to make a good faith effort to resolve objections to discovery requests informally. A party receiving an objection to a discovery request, or a party which believes that another party's response to a discovery request is incomplete or entirely absent, may file a motion to compel a response, but

such a motion must include a representation that the moving party has tried in good faith, prior to filing the motion, to resolve the matter informally. The motion to compel shall include a copy of each discovery request at issue and the response, if any.

(c) *Discovery limitations*. The presiding officer may limit the frequency or extent of use of discovery methods described in these rules. In doing so, generally the presiding officer will consider whether:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or

(3) The discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

(d) *Interrogatories*. At any time after service of the complaint, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 30 days. Upon timely objection, the presiding officer will determine the extent to which the interrogatories will be permitted.

(e) *Requests for admission*. At any time after service of the complaint, a party may serve upon the other party a request for the admission of specified facts. Within 30 days after service, the party served shall answer each requested fact or file objections thereto. The factual propositions set out in the request may be ordered by the presiding officer as deemed admitted upon the failure of a party to respond timely and fully to the request for admissions.

(f) *Requests for production of documents*. At any time after service of the complaint, a party may serve on the other party written requests for the production, inspection, and copying of any documents, electronically stored information, or things, to be answered within 30 days. Upon timely objection, the presiding officer will determine the extent to which the requests must be satisfied, and if the parties cannot themselves agree thereon, the presiding officer shall specify just terms and conditions for compliance.

(g) *Depositions*. Except as stated herein, depositions shall be conducted in accordance with Rule 30 of the Federal Rules of Civil Procedure.

(1) After a complaint has been filed and docketed, the parties may mutually

agree to, or the presiding officer may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(2) The time, place, and manner of conducting depositions shall be as mutually agreed by the parties or, failing such agreement, and upon proper application, governed by order of the presiding officer.

(3) No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at or before such hearing. It will not ordinarily be received in evidence if the deponent is available to testify at the hearing, but the presiding officer may admit testimony taken by deposition in his or her discretion. A deposition may be used to contradict or impeach the testimony of the witness given at the hearing. In cases submitted on the written record in lieu of an oral hearing, the presiding officer may, in his or her discretion, receive depositions as evidence in supplementation of that record.

(4) Each party shall bear its own expenses associated with the taking of any deposition unless otherwise ordered by the presiding officer.

(h) *Sanctions.* If a party fails to appear for a deposition, after being served with a proper notice, or fails to serve answers or objections to interrogatories, requests for admissions, or requests for the production or inspection of documents, after proper service, the party seeking discovery may request that the presiding officer impose appropriate orders. Failure of a party to comply with an order pursuant to this rule may result in the presiding officer's ruling that the disobedient party may not support or oppose designated charges or defenses or may not introduce designated matters in evidence. The presiding officer may also infer from the disobedient party's failure to comply with the order that the facts to which the order related would, if produced or admitted, be adverse to such party's interests. In the sole discretion of the presiding officer, failure of a party to comply with an order pursuant to this rule may result in the presiding officer's issuance of an order of default under § 952.11(c).

#### § 952.22 Transcript.

(a) Hearings shall be reported and transcribed by a court reporter. Argument upon any matter may be excluded from the transcript by order of the presiding officer. A copy of the transcript shall be a part of the record and the sole official transcript of the proceeding. Copies of the transcript shall be supplied to the parties to the proceeding by the reporter at rates not to exceed the maximum rates fixed by contract between the Postal Service and the reporter. Copies of parts of the official record including exhibits admitted into evidence, other than the transcript, may be obtained by Respondent from the Recorder upon the payment of reasonable copying charges. Items that cannot reasonably be photocopied may be photographed and furnished in that form.

(b) Changes in the official transcript may be ordered by the presiding officer only to correct errors affecting substance and then only in the manner herein provided. Within 10 days after the receipt by any party of a copy of the official transcript, or any part thereof, he or she may file a motion requesting correction of the transcript. Opposing counsel shall, within such time as may be specified by the presiding officer, notify the presiding officer in writing of his or her concurrence or disagreement with the requested corrections. Failure to interpose timely objection to a proposed correction shall be considered to be concurrence. Thereafter, the presiding officer shall by order specify the corrections to be made in the transcript. The presiding officer on his or her own initiative may order corrections to be made in the transcript with prompt notice to the parties of the proceeding. Any changes ordered by the presiding officer other than by agreement of the parties shall be subject to objection and exception.

#### § 952.23 Proposed findings and conclusions.

(a) Each party to a proceeding, except one who fails to answer the complaint or, having answered, either fails to appear at the hearing or indicates in the answer that he or she does not desire to appear, may, unless at the discretion of the presiding officer such is not appropriate, submit proposed findings of fact, conclusions of law, orders and supporting reasons either in oral or written form in the discretion of the presiding officer. The presiding officer may also require parties to any proceeding to submit proposed findings of fact, conclusions of law, orders, and supporting reasons. Unless given orally, the date set for filing of proposed

findings of fact, conclusions of law, orders and supporting reasons shall be within 30 days after the delivery of the official transcript to the Recorder who shall notify both parties of the date of its receipt. The filing date for proposed findings of fact, conclusions of law, orders and supporting reasons shall be the same for both parties. If not submitted by such date, or unless extension of time for the filing thereof is granted, they will not be included in the record or given consideration.

(b) Except when presented orally before the close of the hearing, proposed findings of fact shall be set forth in serially numbered paragraphs and shall state with particularity all evidentiary facts in the record with appropriate citations to the transcript or exhibits supporting the proposed findings. Each proposed conclusion shall be separately stated.

(c) Except when presented orally before the close of the hearing, proposed orders shall state the statutory basis of the order and, with respect to orders proposed to be issued pursuant to 39 U.S.C. 3005(a)(3), shall be set forth in serially numbered paragraphs stating with particularity the representations Respondent and its representative shall cease and desist from using for the purpose of obtaining money or property through the mail.

#### § 952.24 Decisions.

(a) *Initial decision by Administrative Law Judge.* A written initial decision shall be rendered by an Administrative Law Judge as soon as practical after completion of the hearing, or after close of the record in matters heard upon the written record in lieu of an oral hearing under § 952.17(b)(10). The initial decision shall include findings and conclusions with the reasons therefor upon all the material issues of fact or law presented on the record, and the appropriate orders or denial thereof. The initial decision shall become the final agency decision unless an appeal is taken in accordance with § 952.25.

(b) *Tentative or final decision by the Judicial Officer.* When the Judicial Officer presides at the hearing he or she shall issue a final or a tentative decision. Such decision shall include findings and conclusions with the reasons therefor upon all the material issues of fact or law presented on the record, and the appropriate orders or denial thereof. The tentative decision shall become the final agency decision unless exceptions are filed in accordance with § 952.25.

(c) *Oral decisions.* The presiding officer may render an oral decision (an initial decision by an Administrative



Law Judge, or a tentative or final decision by the Judicial Officer) at the close of the hearing when the nature of the case and the public interest warrant. A party which desires an oral decision shall notify the presiding officer and the opposing party at least 5 days prior to the date set for the hearing. Either party may submit proposed findings, conclusions, and proposed orders either orally or in writing at the conclusion of the hearing.

**§ 952.25 Exceptions to initial decision or tentative decision.**

(a) A party in a proceeding presided over by an Administrative Law Judge may appeal to the Judicial Officer by filing exceptions in a brief on appeal within 15 days from the receipt of the Administrative Law Judge's initial decision.

(b) A party in a proceeding presided over by the Judicial Officer may file exceptions within 15 days from the receipt of the Judicial Officer's tentative decision.

(c) If an initial or tentative decision is rendered orally by the presiding officer at the close of the hearing, he or she may then orally provide notice to the parties participating in the hearing of the time limit within which an appeal must be filed.

(d) The date for filing the reply to an appeal brief or to a brief in support of exceptions to a tentative decision by the Judicial Officer is 10 days after the receipt thereof. No additional briefs shall be received unless requested by the Judicial Officer.

(e) Briefs upon appeal or in support of exceptions to a tentative decision by the Judicial Officer and replies thereto shall be filed in duplicate with the Recorder and contain the following matter:

(1) A subject index of the matters presented, with page references; a table of cases alphabetically arranged; a list of statutes and texts cited with page references;

(2) A concise abstract or statement of the case in briefs on appeal or in support of exceptions;

(3) Numbered exceptions to specific findings and conclusions of fact, conclusions of law, or recommended orders of the presiding officer in briefs on appeal or in support of exceptions; and

(4) A concise argument clearly setting forth points of fact and of law relied upon in support of or in opposition to each exception taken, together with specific references to the parts of the record and the legal or other authorities relied upon.

(f) Unless permission is granted by the Judicial Officer no brief shall exceed 50 printed pages double spaced, using 12 point type.

(g) The Judicial Officer will extend the time to file briefs only upon written application for good cause shown. If the appeal brief or brief in support of exceptions is not filed within the time prescribed, the defaulting party may be deemed to have abandoned the appeal or waived the exceptions, and the initial or tentative decision shall become the final agency decision.

**§ 952.26 Judicial Officer.**

(a) The Judicial Officer is authorized:

(1) To act as presiding officer;

(2) To render tentative decisions;

(3) To render final agency decisions;

(4) To issue Postal Service orders for the Postmaster General;

(5) To refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final agency decision;

(6) To remand a case to the presiding officer for consideration; and,

(7) To revise or amend these rules of practice.

(b) In determining appeals from initial decisions or exceptions to tentative decisions, the entire official record will be considered before a final agency decision is rendered. Before rendering a final agency decision, the Judicial Officer may order the hearing reopened for the presentation of additional evidence by the parties.

**§ 952.27 Motion for reconsideration.**

A party may file a motion for reconsideration of a final agency decision within 10 days after receiving it or within such longer period as the Judicial Officer may order. Each motion for reconsideration shall be accompanied by a brief clearly setting forth the points of fact and of law relied upon in support of said motion.

**§ 952.28 Orders.**

(a) If an order is issued which prohibits delivery of mail to Respondent it shall be incorporated in the record of the proceeding. The Recorder shall cause notice of the order to be published in the Postal Bulletin and cause the order to be transmitted to such postmasters and other officers and employees of the Postal Service as may be required to place the order into effect.

(b) If an order is issued which requires Respondent to cease and desist from using certain representations for the purpose of obtaining money or property through the mail, it shall be incorporated in the record of the

proceeding and a copy thereof shall be served upon Respondent or his or her or its agent by certified mail or by personal service, or if no person can be found to accept service, service shall be accomplished by ordinary mail to the last known address of Respondent or his or her or its agent. If service is not accomplished by certified mail, a statement, showing the time and place of delivery, signed by the postal employee who delivered the order, shall be forwarded to the Recorder.

**§ 952.29 Modification or revocation of orders.**

A party against which an order or orders have been issued may file an application for modification or revocation thereof. The Recorder shall transmit a copy of the application to the Chief Postal Inspector or his or her designee, who shall file a written reply within 10 days after filing or such other period as the Judicial Officer may order. A copy of the reply shall be sent to the applicant by the Recorder. Thereafter an order granting or denying such application will be issued by the Judicial Officer.

**§ 952.30 Supplemental orders.**

When the Chief Postal Inspector or his or her designee, or the Chief Postal Inspector's designated representative shall have reason to believe that a person is evading or attempting to evade the provisions of any such orders by conducting the same or a similar enterprise under a different name or at a different address, he or she may file a petition with accompanying evidence setting forth the alleged evasion or attempted evasion and requesting the issuance of a supplemental order or orders against the name or names allegedly used. Notice shall then be given by the Recorder to the person that the order has been requested and that an answer may be filed within 10 days of the notice. The Judicial Officer, for good cause shown, may hold a hearing to consider the issues in controversy, and shall, in any event, render a final decision granting or denying the supplemental order or orders.

**§ 952.31 Computation of time.**

A designated period of time under these rules excludes the day the period begins, and includes the last day of the period unless the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the close of business on the next business day.

**§ 952.32 Official record.**

The hearing transcript together with all pleadings, orders, exhibits, briefs and other documents filed in the proceeding

shall constitute the official record of the proceeding.

#### § 952.33 Public information.

The Librarian of the Postal Service maintains for public inspection in the Library copies of all initial, tentative and final agency decisions and orders. The Recorder maintains the complete official record of every proceeding.

#### § 952.34 Ex parte communications.

The provisions of 5 U.S.C. 551(14), 556(d), and 557(d) prohibiting ex parte communications apply to proceedings under these rules of practice.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

[FR Doc. 2011-5872 Filed 3-14-11; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2011-0131, FRL-9280-5]

#### Approval and Promulgation of Air Quality Implementation Plans; State of California; Regional Haze State Implementation Plan and Interstate Transport Plan; Interference With Visibility Requirement

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a revision to the California State Implementation Plan (SIP) that addresses regional haze for the first implementation period through 2018. This revision addresses the requirements of the Clean Air Act (CAA or "Act") and EPA's rules that require states to prevent any future and remedy any existing anthropogenic impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the "regional haze program"). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas.

In addition, we are proposing to approve certain portions of this Regional Haze SIP revision and a related SIP revision submitted by California on November 16, 2007, as meeting the requirements of CAA Section 110(a)(2)(D)(i)(II) regarding interference with other states' measures to protect visibility for the 1997 8-hour ozone and 1997 particulate matter (PM<sub>2.5</sub>) National

Ambient Air Quality Standards (NAAQS).

**DATES:** Written comments must be received at the address below on or before April 14, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R09-OAR-2011-0131 by one of the following methods:

1. *Federal Rulemaking portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. *E-mail:* [Wamsley.Jerry@epa.gov](mailto:Wamsley.Jerry@epa.gov).

3. *Fax:* 415-947-3579 (Attention: Jerry Wamsley).

4. *Mail:* Jerry Wamsley, EPA Region 9, Air Division, Planning Office (Air-2), 75 Hawthorne Street, San Francisco, California 94105.

5. *Hand Delivery or Courier:* Such deliveries are only accepted Monday through Friday, 8:30 a.m.-4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R09-OAR-2011-0131. Our policy is that EPA will include all comments received in the public docket without change. EPA may make comments available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information through <http://www.regulations.gov> or e-mail that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through <http://www.regulations.gov>, EPA will include your e-mail address 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 docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at <http://www.regulations.gov>, or in hard copy at the EPA Region 9, Air Division, Planning Office, Air-2, 75 Hawthorne Street, San Francisco, CA 94105. EPA requests that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 9-5:30 PST, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Jerry Wamsley, U.S.E.P.A., Region 9, Air Division, Planning Office, Air-2, 75 Hawthorne Street, San Francisco, CA 94105; via telephone at (415) 947-4111; or via electronic mail at [wamsley.jerry@epa.gov](mailto:wamsley.jerry@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document, "we," "us," or "our," refer to EPA.

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## I. The State's Submittals

Today's proposed action concerns two submittals from California. The first submittal from the state is the California Regional Haze Plan (CRHP). The second submittal from the state is the 2007 Transport SIP, submitted as Appendix C to the State Strategy for California's 2007 State Implementation Plan for the 1997 ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards. Details on both submittals follow below.

The California Air Resource Board (ARB) submitted the California Regional Haze Plan (CRHP) to EPA on March 16, 2009.<sup>1</sup> ARB submitted additional materials to EPA on September 8, 2009.<sup>2</sup> After discussion with EPA staff regarding BART-eligible sources, ARB submitted updated information about these sources on June 9, 2010.<sup>3</sup> ARB's

<sup>1</sup> See the following documents: Transmittal letter dated March 16, 2009 from James N. Goldstone, Executive Officer, California Air Resources Board, to Laura Yoshii, Acting Regional Administrator USEPA Region IX; and, State of California, Air Resource Board Resolution 09-4, dated January 22, 2009, adopting the California Regional Haze Plan.

<sup>2</sup> Transmittal letter dated September 8, 2009 from James N. Goldstone, Executive Officer, California Air Resources Board, to Laura Yoshii, Acting Regional Administrator, USEPA Region IX, with attachments.

<sup>3</sup> Transmittal letter dated June 9, 2010 from James N. Goldstone, Executive Officer, California Air

Resources Board, to Jared Blumenfeld, Regional Administrator, USEPA Region IX, with attachments.

March 16, 2009 submittal includes public process documentation for the CRHP and documentation of a duly noticed public hearing held on January 22, 2009.

On November 16, 2007, ARB submitted the State Strategy for California's 2007 State Implementation Plan to attain the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS (2007 State Strategy).<sup>4</sup> Appendix C of the 2007 State Strategy, as modified by Attachment A,<sup>5</sup> contains the "Interstate Transport State Implementation Plan (SIP) for 8-hour Ozone and PM<sub>2.5</sub> to satisfy the Requirements of Clean Air Act section 110(a)(2)(D)(i) for the State of California" (2007 Transport SIP). The 2007 Transport SIP addresses the Transport SIP requirements of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS. ARB's November 16, 2007 submittal includes public process documentation for the 2007 State Strategy, including the 2007 Transport SIP. In addition, the SIP revision includes documentation of a duly noticed public hearing held on September 27, 2007 on the proposed 2007 State Strategy.

For the portion of today's proposed action related to the 2007 Transport SIP, we are proposing action only with regard to the section 110(a)(2)(D)(i)(II) requirement that the SIP must prohibit any source or other type of emissions activity in California from emitting pollutants that will interfere with another state's measures to protect visibility. EPA intends to act in separate proposals on other portions of California's 2007 Transport SIP that address the remaining elements of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS.<sup>6</sup>

Resources Board, to Jared Blumenfeld, Regional Administrator, USEPA Region IX, with attachments.

<sup>4</sup> See transmittal letter dated November 16, 2007, from James N. Goldstone, Executive Officer, CARB, to Wayne Natri, Regional Administrator, EPA Region 9, with enclosures, and CARB Resolution No. 07-28 (September 27, 2007).

<sup>5</sup> See "Technical and Clarifying Modifications to April 26, 2007 Revised Draft Air Resources Board's Proposed State Strategy for California's 2007 State Implementation Plan and May 7, 2007 Revised Draft Appendices A through G," included as Attachment A to CARB's Board Resolution 07-28 (September 27, 2007).

<sup>6</sup> The other elements of CAA section 110(a)(2)(D)(i) require that California emission sources do not (a) contribute significantly to nonattainment of the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS in any other State, (b) interfere with maintenance of these standards by any other State, and (c) interfere with measures required under Part C of the CAA to prevent significant deterioration of air quality in regard to these standards.

## II. What is the background for EPA's proposed action?

### A. The Regional Haze Problem

Regional haze is visibility impairment produced by a multitude of sources and activities located across a broad geographic area that emit fine particles (PM<sub>2.5</sub>) (e.g., sulfates, nitrates, organic carbon, elemental carbon, and soil dust), and their precursors (e.g., sulfur dioxide (SO<sub>2</sub>), oxides of nitrogen (NO<sub>x</sub>) and in some cases, ammonia (NH<sub>3</sub>) and volatile organic compounds (VOC)). Fine particle precursors react in the atmosphere to form fine particulate matter which impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity, color, and visible distance that one can see. PM<sub>2.5</sub> can also cause serious health effects and mortality in humans and contributes to environmental impacts, such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the "Interagency Monitoring of Protected Visual Environments" (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range in many Class I areas (i.e., national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States is 100-150 kilometers, or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution.<sup>7</sup> In most of the eastern Class I areas of the United States, the average visual range is less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. 64 FR 35715 (July 1, 1999).

### B. Requirements of the CAA and EPA's Regional Haze Rule

In section 169A(a)(1) of the 1977 Amendments to the CAA, Congress created a program to protect visibility in the nation's national parks and wilderness areas.<sup>8</sup> This section of the

<sup>7</sup> Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

<sup>8</sup> Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA and after consulting with the Department of the Interior, EPA promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a

CAA establishes as a national goal the “prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution.” On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is “reasonably attributable” to a single source or small group of sources, *i.e.*, “reasonably attributable visibility impairment” (RAVI). 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling, and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999, the Regional Haze Rule (RHR) (64 FR 35713). The RHR revised the existing visibility regulations to integrate provisions addressing regional haze impairment and to establish a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA’s visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III of this preamble. The requirement to submit a regional haze plan revision to the SIP applies to all 50 states, the District of Columbia and the Virgin Islands.<sup>9</sup> 40 CFR 51.308(b) requires states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

### C. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-

mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to “mandatory Class I Federal areas.” Each mandatory Class I Federal area is the responsibility of a “Federal Land Manager.” 42 U.S.C. 7602(i). When we use the term “Class I area” in this action, we mean a “mandatory Class I Federal area.”

<sup>9</sup> Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

term regional coordination among states, tribal governments and various federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to address effectively the problem of visibility impairment in Class I areas, states need to develop coordinated strategies with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to regional haze can originate from sources located across broad geographic areas, EPA has encouraged the states and tribes across the United States to address visibility impairment from a regional perspective. Five regional planning organizations (RPOs) were developed to address regional haze and related issues. The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country, and then pursued the development of regional strategies to reduce emissions of particulate matter (PM) and other pollutants leading to regional haze.

The Western Regional Air Partnership (WRAP), one of five RPOs nationally, is a voluntary partnership of State, Tribal, Federal, and local air agencies dealing with air quality in the west. WRAP member states include: Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. WRAP Tribal members include Campo Band of Kumeyaay Indians, Confederated Salish and Kootenai Tribes, Cortina Indian Rancheria, Hopi Tribe, Hualapai Nation of the Grand Canyon, Native Village of Shungnak, Nez Perce Tribe, Northern Cheyenne Tribe, Pueblo of Acoma, Pueblo of San Felipe, and Shoshone-Bannock Tribes of Fort Hall.

### D. Interstate Transport Pollution and Visibility Requirements

On July 18, 1997, EPA promulgated new NAAQS for 8-hour ozone and for PM<sub>2.5</sub>. See 62 FR 38856; 62 FR 38652. Section 110(a)(1) requires states to submit a plan to address certain requirements for a new or revised NAAQS within three years after promulgation of such standards, or within such shorter time as EPA may prescribe. Section 110(a)(2) lists the elements that such new plan submissions must address, as applicable, including section 110(a)(2)(D)(i), which pertains to the interstate transport of certain emissions.

On April 25, 2005, EPA issued a “Finding of Failure to Submit SIPs for

Interstate Transport for the 8-hour Ozone and PM<sub>2.5</sub> NAAQS.” 70 FR 21147. This included a finding that California and other states had failed to submit SIPs to address interstate transport of emissions affecting visibility and started a two-year clock for the promulgation of a Federal Implementation Plan (FIP) by EPA, unless the state made a submission to meet the requirements of section 110(a)(2)(D)(i) and EPA approves such submission. *Id.*

On August 15, 2006, EPA issued guidance on this topic entitled, “Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards” (“2006 Guidance”).

As identified in the 2006 Guidance, the “good neighbor” provisions in section 110(a)(2)(D)(i) of the CAA require each state to have a SIP that prohibits emissions that adversely affect other states in ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or, (4) interfere with efforts to protect visibility in other states.

With respect to establishing that emissions from sources in the state would not interfere with measures in other states to protect visibility, the 2006 Guidance recommended that states make a submission indicating that it was premature, at that time, to determine whether there would be any interference with measures in the applicable SIP for another state designed to “protect visibility” until the submission and approval of regional haze SIPs. Regional haze SIPs were required to be submitted by December 17, 2007. See 74 FR 2392. At this later point in time, however, EPA believes it is now necessary to evaluate such section 110(a)(2)(D)(i) submissions from a state to ensure that the existing SIP, or the SIP as modified by the submission, contains adequate provisions to prevent interference with the visibility programs of other states, such as for consistency with the assumptions for controls relied upon by other states in establishing reasonable progress goals to address regional haze.

The regional haze program, as reflected in the RHR, recognizes the

importance of addressing the long-range transport of pollutants for visibility and encourages states to work together to develop plans to address haze. The regulations explicitly require each state to address its "share" of the emission reductions needed to meet the reasonable progress goals for neighboring Class I areas. Working together through a regional planning process, states are required to address an agreed upon share of their contribution to visibility impairment in the Class I areas of their neighbors. 40 CFR 51.308(d)(3)(ii). Given these requirements, we anticipate that regional haze SIPs will contain measures that will achieve these emissions reductions, and that these measures will meet the requirements of section 110(a)(2)(D)(i).

As a result of the regional planning efforts in the west, all states in the WRAP region contributed information to a Technical Support System (TSS) which provides an analysis of the causes of haze, and the levels of contribution from all sources within each state to the visibility degradation of each Class I area. The WRAP states consulted in the development of reasonable progress goals, using the products of this technical consultation process to co-develop their reasonable progress goals for the western Class I areas. The modeling done by the WRAP relied on assumptions regarding emissions over the relevant planning period and embedded in these assumptions were anticipated emissions reductions in each of the states in the WRAP, including reductions from installation of Best Available Retrofit Technology (BART) at appropriate sources and other measures to be adopted as part of the state's long-term strategy for addressing regional haze. The reasonable progress goals in the draft and final regional haze SIPs that have now been prepared by states in the west accordingly are based, in part, on the emissions reductions from nearby states that were agreed on through the WRAP process.

California's 2007 Transport SIP refers to EPA's 2006 Guidance and states that the Regional Haze SIP would address interstate regional haze impacts. We interpret this to mean that California intended its Regional Haze Plan to address the interstate visibility requirement of section 110(a)(2)(D)(i) for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS. Accordingly, our evaluation of the 2007 Transport SIP and whether it meets these CAA section 110(a)(2)(D)(i) visibility requirements relies on our evaluation of relevant information from California's Regional Haze Plan.

### III. What are the requirements for regional haze SIPs?

#### A. The CAA and the Regional Haze Rule

Regional haze SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment. The specific regional haze SIP requirements are discussed in further detail below.

#### B. Determination of Baseline, Natural, and Current Visibility Conditions

The RHR establishes the deciview as the principal metric for measuring visibility. This visibility metric expresses uniform changes in haziness in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility expressed in deciviews is determined by using air quality measurements to estimate light extinction and then transforming the value of light extinction using a logarithm function. The deciview is a more useful measure for tracking progress in improving visibility than light extinction itself because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.<sup>10</sup>

The deciview is used to express reasonable progress goals (RPGs) (which are interim visibility goals towards meeting the national visibility goal), defining baseline, current and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure "reasonable progress" toward the national goal of preventing and remedying visibility impairment in Class I areas caused by anthropogenic air pollution by reducing anthropogenic emissions that cause regional haze. The national goal is a return to natural conditions, *i.e.*, anthropogenic sources of air pollution would no longer impair visibility in Class I areas.

<sup>10</sup> The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725 (July 1, 1999).

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437), and, as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP submittal and periodically review progress every five years midway through each ten-year implementation period. To do this, the RHR requires states to determine the degree of impairment (in deciviews) for the average of the 20 percent least impaired ("best") and 20 percent most impaired ("worst") visibility days over a specified time period at each of their Class I areas. In addition, states must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. EPA has provided guidance to states regarding how to calculate baseline, natural and current visibility conditions in documents titled, EPA's *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule*, September 2003, (EPA-454/B-03-005 located at [http://www.epa.gov/ttncaaa1/t1/memoranda/rh\\_envcurhr\\_gd.pdf](http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf)), (hereinafter referred to as "EPA's 2003 Natural Visibility Guidance"), and *Guidance for Tracking Progress Under the Regional Haze Rule* (EPA-454/B-03-004 September 2003 located at [http://www.epa.gov/ttncaaa1/t1/memoranda/rh\\_tpurhr\\_gd.pdf](http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf)), (hereinafter referred to as "EPA's 2003 Tracking Progress Guidance").

For the first regional haze SIPs that were due by December 17, 2007, "baseline visibility conditions" were the starting points for assessing "current" visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent least impaired days and 20 percent most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current conditions will indicate the

amount of progress made. In general, the 2000–2004 baseline period is considered the time from which improvement in visibility is measured.

### C. Determination of Reasonable Progress Goals

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two RPGs (*i.e.*, two distinct goals, one for the “best” and one for the “worst” days) for every Class I area for each (approximately) ten-year implementation period. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for “reasonable progress” toward achieving natural (*i.e.*, “background”) visibility conditions. In setting reasonable progress goals (RPGs), states must provide for an improvement in visibility for the most impaired days over the (approximately) ten-year period of the SIP, and ensure no degradation in visibility for the least impaired days over the same period.

States have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in EPA’s RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and, (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in EPA’s *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program*, July 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 5–1) (“EPA’s Reasonable Progress Guidance”). In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (referred to as the “uniform rate of progress” (URP) or the “glide path”) and the emission reduction measures needed to achieve that rate of progress over the ten-year period of the SIP. Uniform progress towards achievement of natural conditions by the year 2064 represents a rate of progress that states are to use for analytical comparison to the amount of progress they expect to achieve. In

setting RPGs, each state with one or more Class I areas (“Class I state”) must also consult with potentially “contributing states,” *i.e.*, other nearby states with emission sources that may be affecting visibility impairment at the Class I state’s areas. 40 CFR 51.308(d)(1)(iv).

### D. Best Available Retrofit Technology

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources<sup>11</sup> built between 1962 and 1977 procure, install, and operate the “Best Available Retrofit Technology (BART)” as determined by the state. Under the RHR, states are directed to conduct BART determinations for such “BART-eligible” sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at Appendix Y to 40 CFR Part 51 (hereinafter referred to as the “BART Guidelines”) to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. In making a BART determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts, a state must use the approach set forth in the BART Guidelines. A state is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are SO<sub>2</sub>, NO<sub>x</sub> and PM. EPA has indicated that states should use

their best judgment in determining whether VOC or NH<sub>3</sub> compounds impair visibility in Class I areas.

Under the BART Guidelines, states may select an exemption threshold value for their BART modeling, below which a BART-eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources’ impacts. An exemption threshold set by the state should not be higher than 0.5 deciview.

In their SIPs, states must identify potential BART sources, described in the RHR as “BART-eligible sources”, and document their BART control determination analyses. In making BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors: (1) The costs of compliance; (2) the energy and non-air quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and, (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. States are free to determine the weight and significance assigned to each factor.

A regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. Once a state has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date EPA approves the regional haze SIP. CAA section 169(g)(4). 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source. States have the flexibility to choose the type of control measures they will use to meet the requirements of BART.

### E. Long-Term Strategy

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a ten-

<sup>11</sup> The set of “major stationary sources” potentially subject to BART is listed in CAA section 169A(g)(7).

to fifteen-year strategy for making reasonable progress, section 51.308(d)(3) of the RHR requires that states include a long-term strategy (LTS) in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include “enforceable emissions limitations, compliance schedules, and other measures needed to achieve the reasonable progress goals” for all Class I areas within and affected by emissions from the state. 40 CFR 51.308(d)(3).

When a state’s emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with contributing states to develop coordinated emissions management strategies. 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included in its SIP, all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultation between states may be required to sufficiently address interstate visibility issues (*e.g.*, where two states belong to different RPOs).

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and, (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. 40 CFR 51.308(d)(3)(v).

#### *F. Coordination of the Regional Haze SIP and Reasonably Attributable Visibility Impairment*

As part of the RHR, EPA revised 40 CFR 51.306(c) regarding the LTS for

RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state’s first plan addressing regional haze visibility impairment, which was due December 17, 2007, in accordance with 40 CFR 51.308(b) and (c). On or before this date, the state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and regional haze, and the state must submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTSs, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state’s LTS must report on both regional haze and RAVI impairment and must be submitted to EPA as a SIP revision.

#### *G. Monitoring Strategy and Other Implementation Plan Requirements*

Section 51.308(d)(4) of the RHR requires a monitoring strategy for measuring, characterizing, and reporting on regional haze visibility impairment that is representative of all mandatory Class I areas within the state. The strategy must be coordinated with the monitoring strategy required in 40 CFR 51.305 for RAVI. Compliance with this requirement may be met through “participation” in the Interagency Monitoring of Protected Visual Environments (IMPROVE) network, *i.e.*, review and use of monitoring data from the network. The monitoring strategy is due with the first regional haze SIP, and it must be reviewed every five years. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in

the state, and where possible, in electronic format;

- Developing a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions.

A state must also make a commitment to update the inventory periodically; and,

- Other elements, including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every ten years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject to BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

#### *H. Consultation With States and Federal Land Managers*

The RHR requires that states consult with Federal Land Managers (FLMs) before adopting and submitting their SIPs. 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least sixty days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Furthermore, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state’s visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

#### IV. EPA's Analysis of the California Regional Haze Plan

As described in Section I, the California Regional Haze SIP consists of the CRHP and two supplemental submittals. ARB submitted the CRHP to EPA on March 16, 2009. ARB submitted additional materials to EPA on September 8, 2009. ARB submitted updated information about BART-eligible sources on June 9, 2010.

##### A. Affected Class I Areas in California

There are twenty-nine affected Class I areas in California.<sup>12</sup> These Class I areas include the following national parks, national monuments, and wilderness areas managed by the U.S. National Park Service, the U.S. Forest Service, and the U.S. Bureau of Land Management (USBLM):

1. Redwood National Park;
2. Marble Mountain Wilderness;
3. Lava Beds National Monument;
4. South Warner Wilderness;
5. Thousand Lakes Wilderness;
6. Lassen Volcanic National Park;
7. Caribou Wilderness;
8. Yolla Bolly Middle Eel Wilderness (includes land managed by USBLM);
9. Point Reyes National Seashore;
10. Ventana Wilderness;
11. Pinnacles National Monument;
12. Desolation Wilderness;
13. Mokelumne Wilderness;
14. Emigrant Wilderness;
15. Hoover Wilderness;
16. Yosemite National Park;
17. Ansel Adams Wilderness;
18. Kaiser Wilderness;
19. John Muir Wilderness;
20. Kings Canyon National Park;
21. Sequoia National Park;
22. Dome Lands Wilderness (includes land managed by the USBLM);
23. San Rafael Wilderness;
24. San Gabriel Wilderness;
25. Cucamonga Wilderness;
26. San Geronio Wilderness;
27. San Jacinto Wilderness;
28. Agua Tibia Wilderness; and,
29. Joshua Tree National Park.

As part of its analysis, ARB apportioned the state's twenty-nine Class I areas into the following four sub-

regions: Northern California; Sierra California; Coastal California; and, Southern California. Within each sub-region, the Class I areas are assigned to a specific representative IMPROVE monitor. For example, within the Northern California sub-region, Class I areas are assigned as follows: The Marble Mountain Wilderness and the Yolla-Bolly-Middle Eel Wilderness are assigned to the Trinity IMPROVE monitor; the Lava Beds National Monument and South Warner Wilderness are assigned to the Lava Beds IMPROVE monitor; and, the Lassen Volcanic National Park, the Caribou wilderness, and the Thousand Lakes wilderness are assigned to the Lassen Volcanic IMPROVE monitor.<sup>13</sup>

California's four sub-regions for analyzing regional haze represent groupings that consider the unique terrain, ecology, land use, and weather patterns around each IMPROVE monitor. ARB's detailed examination of the resultant ambient air monitoring data showed similarities within definable intra-State regions. These four sub-regions are different from each other based on physiographic features and land use patterns. California has grouped its Class I Areas by geographic sub-region to facilitate comparison of different landscapes, meteorological conditions, the impacts of local and regional emissions, and the results of local and regional control measures.

California identified Class I areas outside of the state that are affected by California's regional haze pollutants. (CRHP, Figure 8.1) The CRHP also examined specific visibility effects of emissions on the following Class I areas outside of the state: Jarbidge Wilderness Area, Nevada; Kalmiopsis Wilderness Area and Crater Lake National Park, Oregon; and, Sycamore Canyon Wilderness Area and Grand Canyon National Park, Arizona.

To conclude, we believe that California has identified all of Class I areas in the state that may be affected by emissions from California. Also, California identified Class I areas in

neighboring states that may be affected by emissions from California. (CRHP, Figure 8.1)

##### B. Visibility Conditions and Uniform Rate of Progress

ARB developed the visibility estimates in the CRHP using models and analytical tools provided by the WRAP. We have reviewed the models and analytical tools used by the WRAP and those used by ARB in developing the CRHP. In summary, we found that the models were used appropriately, consistent with EPA guidance in effect at the time of their use. The models used by the WRAP were state-of-the-science at the time the modeling was conducted and model performance was adequate for the purposes that they were used.<sup>14</sup>

##### 1. Baseline and Natural Visibility Conditions

Baseline visibility conditions represent the degree of visibility impairment for the 20 percent least impaired days and 20 percent most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. Appendix B of the CRHP provides the details of these 2000–2004 baseline deciview calculations for each Class I area.

For each Class I area, ARB calculated, in deciviews, the current visibility conditions (worst 20 percent of days) for the 2000–2004 baseline period (Table 1, column A) and the future natural conditions for 2064 (Table 1, column D), the long-term programmatic goal. ARB calculated the deciview value representing the best visibility days during 2000–2004 baseline conditions, a value that must be maintained in future years.<sup>15</sup>

<sup>14</sup> For our detailed review and discussion, please see "Technical Support Document for Technical Products Prepared by the Western Regional Air Partnership in Support of Western Regional Haze Plans", Final, February 2011 (WRAP TSD).

<sup>15</sup> See Table 8 for a complete listing of the "best 20 percent of days" and "worst 20 percent of days" and a comparison between 2000–2004 and 2018 deciview values for each California Class I area.

<sup>12</sup> See Figure 1–2, "California's Class I Areas and IMPROVE Monitoring Network, page 1–4, CRHP, for a listing and a map showing the twenty-nine Class I areas.

<sup>13</sup> Table 2–1, "IMPROVE monitors and Visibility at California Class I Areas", page 2–3, CRHP provides a detailed listing of IMPROVE monitor assignments. Also, see Figure 2–1, CRHP, "California's Geographic Sub-regions", page 2–6 for a visual representation.



TABLE 1—VISIBILITY CALCULATIONS FOR CALIFORNIA CLASS I AREAS  
[Grouped by related IMPROVE monitor and reported in deciviews]

Class I Area (NP = National Park, WA = Wilderness Area, NM = National Monument, NS = National Seashore)	2000–04 Baseline (worst 20% of days) (A)	2018 Reasonable Progress Goal (RPG) (worst 20% of days) (B)	2018 Uniform Rate of Progress estimate (URP) (C)	2064 Natural condition (D)	Date natural condition reached at RPG rate of improvement (E)
Marble Mountain WA, Yolla Bolly Middle Eel WA (TRIN monitor) .....	17.4	16.4	15.2	7.9	2137
Lava Beds NM, South Warner WA (LABE monitor) .....	15.1	14.4	13.4	7.9	2148
Lassen Volcanic NP, Caribou WA, Thousand Lakes WA (LAVO monitor) .....	14.2	13.3	12.6	7.3	2123
Desolation WA, Mokelumne WA (BLIS monitor) .....	12.6	12.3	11.1	6.1	2307
Hoover WA (HOOV monitor) .....	12.9	12.5	11.7	7.7	2186
Yosemite NP, Emigrant WA (YOSE monitor) .....	17.6	16.7	15.3	7.6	2160
Ansel Adams WA, Kaiser WA, John Muir WA (KAIS monitor) .....	15.5	14.9	13.6	7.1	2200
Sequoia NP, Kings Canyon NP (SEQU monitor) .....	25.4	22.7	21.2	7.7	2096
Dome Lands WA (DOME monitor) .....	19.4	18.1	16.6	7.5	2132
Redwood NP (REDW monitor) .....	18.5	17.8	17.4	13.9	2096
Point Reyes NS (PORE monitor) .....	22.8	21.3	21.2	15.8	2069
Pinnacles NM, Ventana WA (PINN monitor) .....	18.5	16.7	16.0	8.0	2086
San Rafael WA (RAFA monitor) .....	18.8	17.3	16.2	7.6	2109
San Gabriel WA, Cucamonga WA (SAGA monitor) .....	19.9	17.4	16.9	7.0	2076
San Geronio WA, San Jacinto WA (SAGO monitor) .....	22.2	19.9	18.7	7.3	2095
Agua Tibia WA (AGTI monitor) .....	23.5	21.6	19.8	7.6	2121
Joshua Tree NP (JOSH monitor) .....	19.6	17.9	16.7	7.2	2106

Source: Table 7–2, page 7–10, CRHP.

2. Uniform Rate of Progress Estimate

ARB calculated the uniform rate of progress (URP) estimate for each Class I area using the 2000–2004 baseline deciview and 2064 programmatic goal deciview values. Essentially, the URP is represented as the line drawn between a given Class I area’s 2004 baseline value and 2064 natural condition or programmatic goal value. This line is linear and assumes the same increment of progress every year for 60 years. Figure 7–1 of the CRHP provides an illustration of the uniform rate of progress calculation and its graphic representation. ARB then calculated each Class I area’s URP estimate for 2018.<sup>16</sup> The URPs for each Class I area are listed in Table 1, column C.

EPA has determined that California has produced the following visibility estimates in deciviews for each Class I area: Baseline visibility conditions; a ten-year reasonable progress estimate for

2018; a 2018 uniform rate of progress estimate for comparison purposes; and a 2064 natural condition estimate. We propose to find that these estimates are consistent with the requirements of the RHR, particularly those requirements at 40 CFR 51.308(d)(2)(i) and (iii). Also, we propose to find that California has produced URP estimates consistent with the requirement in 40 CFR 51.308(d)(1)(i)(B).

C. California Emissions Inventories

The RHR requires a statewide emissions inventory of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any mandatory Class I area. 40 CFR 51.308(d)(4)(v). In establishing baseline visibility conditions in each Class I area, the CRHP provides an emissions inventory for 2002, representing the mid-point of the 2000–2004 baseline timeframe. Also, to chart progress in

each Class I area, the CRHP estimated emissions for 2018, the first ten-year programmatic milestone. The emissions inventories estimate annual emissions for the following haze producing pollutants: Oxides of nitrogen (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), volatile organic compounds (VOC), ammonia (NH<sub>3</sub>), particulate matter smaller than 10 microns but larger than 2.5 microns (PM coarse), fine particulate matter from organic carbon (OC Fine PM), fine particulate matter from elemental carbon (EC Fine PM), and fine particulate matter from other sources (Other Fine PM). The emissions inventories are divided into four source categories: Stationary sources, area sources, mobile sources, and natural sources. See Table 2. This information was also analyzed to compare anthropogenic versus natural sources of emissions. See Table 3.

TABLE 2—EMISSIONS INVENTORY FOR CALIFORNIA REGIONAL HAZE POLLUTANTS BY SOURCE CATEGORY FOR 2002 AND 2018

[Tons per year]

Pollutant	Stationary (tpy)		Area (tpy)		Mobile (tpy)		Natural (tpy)	
	2002	2018	2002	2018	2002	2018	2002	2018
NO <sub>x</sub> .....	104,991	109,514	112,988	112,789	909,380	370,385	93,043	93,043

<sup>16</sup> See Table 7–2, “Summary of Reasonable Progress Goal and Uniform Rate of Progress to

Future Natural Conditions, 2018 Worst Days URP,” page 7–10, CRHP.

TABLE 2—EMISSIONS INVENTORY FOR CALIFORNIA REGIONAL HAZE POLLUTANTS BY SOURCE CATEGORY FOR 2002 AND 2018—Continued

[Tons per year]

Pollutant	Stationary (tpy)		Area (tpy)		Mobile (tpy)		Natural (tpy)	
	2002	2018	2002	2018	2002	2018	2002	2018
SO <sub>2</sub> .....	42,227	49,632	9,139	10,134	11,588	3,800	9,840	9,840
VOC .....	54,632	54,631	335,114	594,843	518,405	232,839	2,890,198	2,890,198
NH <sub>3</sub> .....	433	0	202,045	193,486	22,679	30,430	7,595	7,595
PM Coarse .....	10,172	13,700	263,902	291,429	5,075	6,389	23,124	23,124
Fine PM OC .....	5,515	3,696	44,986	36,777	13,991	15,834	92,097	92,097
Fine PM EC .....	933	835	5,887	5,503	21,577	12,589	19,078	19,078
Other PM Fine .....	10,537	12,317	55,005	54,016	2,125	2,929	5,880	5,880

Source: Table 3-2, "Individual Pollutants and Source Categories," page 3-4 CRHP.

TABLE 3—2002 EMISSIONS INVENTORY FOR ANTHROPOGENIC AND NATURAL SOURCES

Pollutant	Source (tons/year)		Anthropogenic share (percent)
	Anthropogenic	Natural	
NO <sub>x</sub> .....	1,127,359	93,043	92
SO <sub>2</sub> .....	62,954	9,840	86
VOC .....	908,151	2,890,198	24
NH <sub>3</sub> .....	225,157	7,595	97
PM Coarse .....	279,148	23,124	92
OC Fine PM .....	64,491	92,097	41
EC Fine PM .....	28,397	19,078	60
Other PM Fine .....	67,667	5,880	92

Source: Based on Table 3-1, "Overall Emission Source Inventory," page 3-3 CRHP.

D. Sources of Visibility Impairment

Within Appendix B of the CRHP, ARB analyzed the contribution of various pollutants to light extinction (*i.e.*,

visibility impairment) for each Class I area in the state. EPA compiled California's data for each of the Class I areas into a single table. Table 4 shows

how much each pollutant contributed to light extinction at each of California's Class I areas during the period from 2000 to 2004.

TABLE 4—PERCENTAGE OF LIGHT EXTINCTION CONTRIBUTED BY EACH POLLUTANT IN CALIFORNIA CLASS I AREAS ON WORST 20% OF DAYS, 2000–2004

[Averaged observations]

Class I area	NO <sub>3</sub> and/or AmNO <sub>3</sub>	SO <sub>4</sub> and/or AmSO <sub>4</sub>	OMC	EC	CM	Soil	Sea salt
Marble Mountain WA, Yolla Bolly-Middle Eel WA (TRIN monitor) .....	12.7	17.1	54.5	8.6	4.8	1.8	0.6
Lava Beds NM, South Warner WA (LABE monitor) .....	8.9	17.3	55.9	8.4	6.6	2.5	0.3
Lassen Volcanic NP, Caribou WA, Thousand Lakes WA (LAVO monitor) ..	10.9	20.1	50.8	9.1	5.9	3.0	0.09
Desolation WA, Mokelumne WA (BLIS monitor) .....	8.7	18.4	50.9	10.8	7.6	3.6	0.07
Hoover WA (HOOV monitor) .....	5.2	16.2	50.0	7.8	15.3	5.2	0.32
Yosemite NP, Emigrant WA (YOSE monitor) .....	14.8	14.4	52.9	8.8	7.3	1.6	0.18
Ansel Adams WA, Kaiser WA, John Muir WA (KAIS monitor) .....	18.1	21.9	38.3	7.2	11.1	2.3	0.56
Sequoia NP, Kings Canyon NP (SEQU monitor) .....	54.6	14.9	18.8	5.2	5.6	0.76	0.25
Dome Lands WA (DOME monitor) .....	25.8	19.5	27.8	6.3	17.9	2.4	0.32
Redwood NP (REDW monitor) .....	13.1	27.9	15.0	2.8	7.7	0.56	33.0
Point Reyes NS (PORE monitor) .....	39.6	14.5	12.5	3.4	7.7	0.41	21.9
Pinnacles NM, Ventana WA (PINN monitor) .....	31.6	25.7	24.4	8.5	7.0	1.1	1.7
San Rafael WA (RAFA monitor) .....	20.2	36.0	22.8	4.9	12.6	1.8	1.8
San Gabriel WA, Cucamonga WA (SAGA monitor) .....	40.0	17.8	22.1	6.2	12.0	1.3	0.58
San Geronio WA, San Jacinto WA (SAGO monitor) .....	53.0	15.6	16.5	6.1	7.2	1.3	0.24
Agua Tibia WA (AGTI monitor) .....	31.1	33	18.2	6.7	8.9	1.4	0.83
Joshua Tree NP (JOSH monitor) .....	42.9	19.3	16.2	6.5	12.3	2.5	0.31

Class I Abbreviations: NP = National Park, WA = Wilderness Area, NM = National Monument, NS = National Seashore.

Pollutant Abbreviations: NO<sub>3</sub> = Nitrate; AmNO<sub>3</sub> = Ammonium Nitrate; SO<sub>4</sub> = Sulfate; AmSO<sub>4</sub> = Ammonium Sulfate; OMC = Organic Matter Carbon; EC = Elemental Carbon; Soil = PM Soil; CM = Coarse Matter.

Source: Appendix B, CA RHP. See each monitor analysis chapter.

As the data in Table 4 show, the three primary contributors or drivers of haze

in California are: Nitrates, organic carbon, and sulfates. Conversely, the

monitoring data also show that coarse mass particulate matter, elemental

carbon, and fine soils do not drive visibility impairment on worst case days.

#### 1. Sources of Visibility Impairment in California Class I Areas

According to Appendix B of the CRHP, light extinction from nitrate is a key driver of haze at many California Class I sites, especially in Southern California and other sites located near major urban areas and transportation corridors. (CRHP, Section 4.7.3) This finding is consistent with the WRAP's Particulate Source Apportionment Technology (PSAT) showing that NO<sub>x</sub> from mobile sources was the most significant precursor of nitrate pollution at these Class I areas. The CRHP states, "The gradient of least to most influence in light extinction corresponds directly to the amount of mobile source NO<sub>x</sub> emissions nearby." (CRHP, page 7–3, *see also* sub-regional discussions in CRHP, Section 4.7)

Appendix B of the CRHP also shows that organic carbon is the significant cause of worst day haze, in all of the state but Southern California. The WRAP source apportionment analysis, which formed the basis for the analysis in the CRHP, suggests that wildfires, biogenics (natural plant, animal, and soil organism emissions), and area sources are the primary contributors to organic carbon constituting from 25 percent to 90 percent on worst visibility days. Biogenic emissions peak during the dry wildfire season, and contribute the most natural organic carbon, annually. Much of the directly emitted organic carbon in California comes from wildfires. Also, source apportionment modeling found that the majority of secondary organic carbon is derived from biogenic emission sources. A review of the PSAT analysis indicates that pollution from wildfires dominates in Class I areas with more than 50 percent light extinction from organic carbon.

Using PSAT modeling again, ARB found sulfates also drive haze at some Class I areas on some worst days, with the influence most perceptible along the coast. PSAT results indicate that Offshore and non-WRAP region sources are the largest contributors, accounting for approximately 50 to 75 percent of the measured sulfate levels. In-state anthropogenic sulfate emissions are estimated to account for 1 percent to 35 percent. (CRHP, Section 6.2.3). There are very few large SO<sub>x</sub> sources in California and low sulfur fuel is already required for both mobile and stationary sources. Offshore emissions appear to contribute both natural marine sulfates and SO<sub>x</sub> from marine commercial

shipping activities. The Coastal sub-region and Southern California experience larger impacts from offshore shipping. Class I Areas in Southern California show slightly higher contributions from California anthropogenic sulfate (22 percent to 35 percent) than other Class I Areas, reflecting the proximity to point sources such as refineries and port-related activities.

Coarse mass particulates do not drive haze on worst days in California. Occasionally, coarse mass particulates may contribute to a single worst day at some of the drier Class I areas in the Mojave Desert and on the lee side of the Sierra Nevada. The days with slightly elevated coarse mass particulates are almost always associated with windblown dust events. These wind-driven events also cause very slight elevations in fine soil (PM<sub>2.5</sub> fraction of dust), but this species never drives worst days.

Elemental carbon is not a driver of haze on worst days in California. Despite its strong capability to extinguish light, emissions are very low and are not expected to increase through 2018.

Fine soil contributes least to haze statewide and is not a driver of haze on worst days. Fine soil is less than 1 percent of the annual contribution to light extinction at many IMPROVE monitors on best and worst days, with the highest annual average worst day contribution being just over 5 percent at one isolated IMPROVE monitor (HOOV) in the rain shadow (drier lee side) of the Sierra Nevada. On a day-to-day basis, fluctuations in concentration at the IMPROVE monitors are associated with high wind events.

To summarize, ARB found the three primary drivers of haze in California to come from the following source categories: Mobile sources for nitrate, natural sources for organic carbon, and off-shore and non-WRAP region sources for sulfate. These three sources are likely to retain a large influence on visibility conditions in the future as well. Studies show coarse mass particulate matter, elemental carbon, and fine soils do not drive visibility impairment on worst-case days.

Regarding emissions from other western states and their visibility effects, given mountains in the east and north, the Pacific Ocean to the west, and prevailing weather patterns that move from west to east, emissions from neighboring states are not expected to significantly affect visibility in California's Class I areas. Smoke, however, from large wildfires in

neighboring states, is an exception as it would be expected to impair visibility.

To conclude, California's largest source of controllable visibility impairing emissions is NO<sub>x</sub> from mobile sources (see the 2002 emissions inventory estimate in Table 2). Results from California's source apportionment analysis show that other anthropogenic emissions contributing to haze come from sources that are not within California's control. For example, organic carbon emissions from natural sources such as wildfires and biogenics, whether from in-state or out-of-state, contribute significantly to impaired visibility at all Class I areas in California. Also, visibility impairment from sulfates is caused by international sources outside the WRAP states, such as shipping. While California has programs to reduce in-state organic carbon and SO<sub>2</sub> emissions, the CRHP indicates that reductions in anthropogenic sources of NO<sub>x</sub>, especially NO<sub>x</sub> from mobile sources, will lead to significant visibility improvements in California Class I areas.

#### 2. California Contributions to Visibility Impairment in Class I Areas Outside of the State

Within the baseline years, California is estimated to have a very small impact on visibility impairment in the following Class I areas in nearby states: Jarbidge Wilderness Area, Nevada; Kalmiopsis Wilderness Area and Crater Lake National Park, Oregon; and, Sycamore Canyon Wilderness Area and Grand Canyon National Park, Arizona. The CRHP shows the NO<sub>x</sub> and SO<sub>x</sub> contributions to haze during the baseline years in these neighboring out-of-state Class I areas.<sup>17</sup> The measured contribution of NO<sub>x</sub> and SO<sub>x</sub> emissions to particle light extinction is relatively small in these Class I areas, as is the estimated contribution of California NO<sub>x</sub> and SO<sub>x</sub> sources within these measurements. When combined, these 2002 estimates of California's contribution to visibility impairment in out-of-state Class I areas suggest that California emissions are responsible for only a very small part of existing visibility impairment at out-of-state Class I areas. These base year estimates, however, do not reflect future reductions in California's emissions inventory through 2018.

To conclude, the state has provided an emissions inventory of natural and

<sup>17</sup> See Table 8.1 Nitrate Contribution to Haze in Baseline Years, page 8–3 and Table 8.2, Sulfate Contribution to Haze In Baseline Years, page 8–4, CRHP.

anthropogenic sources that contribute to visibility impairment in Class I areas. California estimated stationary, area, and mobile sources emissions for the required base year, 2002, and for 2018. Also, with the WRAP, the state did source apportionment analyses of visibility impairment to determine the relative contributions of haze causing pollutants in Class I areas, both inside and outside of California. We found these analyses to be valid and technically correct. (See WRAP TSD.) Consequently, we propose to find that the state has met the requirements of 40 CFR 51.308(d)(3)(iv) and (d)(4)(v).

*E. Best Available Retrofit Technology Evaluation*

California is required to evaluate the use of best available retrofit technology (BART) controls at 26 types of major stationary sources<sup>18</sup> built between 1962 and 1977 that have the potential to emit 250 tons or more of any pollutant and may reasonably be anticipated to cause or contribute to any impairment of visibility in any Class I area. CAA Section 169A(b)(2)(A) and 40 CFR 51.308(e). The state must submit a list of all BART-eligible sources within the state, and a determination of BART controls, including emission limitations and schedules for compliance, for those sources subject to BART. Each source subject to BART is required to install and operate BART, as expeditiously as practicable, but no later than five years after EPA approval of the statewide regional haze SIP revision. CAA Section 169(g)(4) and 40 CFR 51.308(e)(1)(iv).

1. Sources Potentially Subject to BART

The first phase of a BART evaluation is to identify all the BART-eligible sources within a state's boundaries. BART eligible sources are those sources which have the potential to emit 250 tons per year or more of a visibility-

impairing air pollutant, were put in place between August 7, 1962 and August 7, 1977 and whose operations fall within one or more of 26 specifically listed source categories. 40 CFR 51.301. California assumed that any source meeting the emission criteria which fell into the 26 listed source categories was BART-eligible unless there was adequate documentation to verify that the source was not put into place during the time period defined in the RHR. This analysis yielded a list of 28 sources, found in Table 5–2 of the plan.<sup>19</sup> Three of the sources identified in this table were determined to have shut down: The BART-eligible units at the TXI Cement plant in Oro Grande;<sup>20</sup> the Spreckels Sugar plant in Mendota;<sup>21</sup> and, the Mirant electric generating station in San Francisco.<sup>22</sup> These sources have shutdown and/or decommissioned their BART eligible sources and so were eliminated from further review by ARB.<sup>23</sup>

2. Sources Not Contributing to Visibility Impairment

The second phase of the BART determination process is to identify those BART-eligible sources that may reasonably be anticipated to cause or contribute to visibility impairment at any Class I area and are, therefore, subject to BART. As explained above, EPA has issued guidelines that provide states with guidance for addressing the BART requirements. 40 CFR Part 51 Appendix Y; see also, 70 FR 39104 (July 6, 2005). The BART Guidelines describe how states may consider exempting some BART-eligible sources from further BART review based on dispersion modeling showing that the sources contribute below a certain threshold amount. Generally, states may not establish a contribution threshold that exceeds 0.5 deciview impact. 70 FR 39161 (July 6, 2005).

California established a threshold of 0.5 deciview. With this threshold, any source with an impact of greater than 0.5 deciview in any Class I area would be subject to a BART analysis and, if appropriate, BART emissions limitations.

California did not provide an explanation for selecting the 0.5 deciview threshold for determining whether a BART source may be reasonably anticipated to cause or contribute to any visibility impairment in a Class I area. Based on EPA's review of the BART-eligible sources in California, however, EPA is proposing to find that a 0.5 dv threshold is appropriate, given the specific facts in California.

EPA's BART Guidelines recommend that states "consider the number of BART sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts." 70 FR 39104, 39161. The BART Guidelines also state, "In general, a larger number of BART sources causing impacts in a Class I area may warrant a lower contribution threshold." *Id.* An email from Christine M. Suarez-Murias, California Air Resources Board to Greg Nudd, USEPA, dated February 11, 2011 (Suarez-Murias email) included an attachment with details about the Class I areas nearest to BART sources for those BART sources that either showed an impact less than 0.5 deciview, or were consistent with EPA's model plant analysis. Modeling for the sources in the Regional Clean Air Incentives Market (RECLAIM) program in the South Coast Air Quality Management District (SCAQMD) showed that their collective impact would be well below the 0.5 deciview threshold, therefore further documentation regarding the Class I areas is not necessary. Table 5 shows these details from the Suarez-Murias e-mail.

TABLE 5—CLASS I AREAS IMPACTED BY BART-ELIGIBLE SOURCES BELOW THE 0.5 DECIVIEW (dv) THRESHOLD

Source	Model result	Emission rate [tpy]	Distance [km]	Nearest class I area
Searles Industrial .....	0.208 dv .....	*~1900	70	Dome Lands WA.
Big West Refineries .....	Model plant ...	313	80	Dome Lands WA.
Chevron Richmond Refinery .....	0.393 dv .....	*~1900	30	Pt. Reyes NS.
Conoco Phillips Refinery Rodeo .....	0.366 dv .....	*~2200	40	Pt. Reyes NS.
Tesoro Refinery Martinez .....	0.069 dv .....	*~500	50	Pt. Reyes NS.
Rhodia Sulfuric Acid Plant (Martinez) .....	0.092 dv .....	~700	50	Pt. Reyes NS.
Shell Refinery Martinez .....	0.169 dv .....	*~1100	50	Pt. Reyes NS.
Valero Refinery Benicia .....	0.291 dv .....	*~7700	50	Pt. Reyes NS.

<sup>18</sup> The set of "major stationary sources" potentially subject to BART is listed in CAA section 169A(g)(7).

<sup>19</sup> The final version of this table may be found in the technical supplement to the SIP submitted on June 9, 2010.

<sup>20</sup> June 2010 supplement, August 4, 2009 letter from Alan J. De Salvo, Mojave Desert Air Quality Management District to Karen Magliano, California Air Resources Board with attachment.

<sup>21</sup> *Ibid.*

<sup>22</sup> See California Energy Commission San Francisco Electric Reliability Project Power Plant

Licensing Case Docket Number 04–AFC–1. (<http://www.energy.ca.gov/sitingcases/sanfrancisco/index.html>)

<sup>23</sup> See Revised Table 5–2 (March 2010 version) in attachments to June 2010 supplement.

TABLE 5—CLASS I AREAS IMPACTED BY BART-ELIGIBLE SOURCES BELOW THE 0.5 DECIVIEW (DV) THRESHOLD—Continued

Source	Model result	Emission rate [tpy]	Distance [km]	Nearest class I area
Mirant Pittsburg .....	Model plant ...	559	74	Pt. Reyes NS.
Mirant Antioch .....	Model plant ...	277	79	Pt. Reyes NS.
Rhodia Sulfuric Acid Plant Ventura .....	Model plant ...	314	48	San Gabriel WA.
So Cal Gas .....	Model plant ...	212	52	San Gabriel WA.
Coolwater Reliant Dagget .....	0.489 dv .....	*~3100	70	San Geronio WA.
Reliant .....	Model plant ...	659	70	San Rafael WA.
JR Simplot Lathrop .....	Model plant ...	600	101	Yosemite NP.

\* Annual emissions of NO<sub>x</sub> and SO<sub>2</sub> estimated by rounding up from 24-hr max emissions used in modeling, multiplied by 365 days.

Table 5 shows that there are three Class I areas affected by multiple BART-eligible sources that California has determined are not subject to BART: Dome Lands WA, San Gabriel WA, and Point Reyes NS. The Dome Lands WA is impacted by two BART-eligible sources. The Searles Industrial source was modeled to have a 0.208 deciview effect, which is well below the 0.5 deciview threshold. The Big West Refineries plant is well within the parameters of the EPA model plant. Furthermore, since it has a lower emission rate than Searles Industrial and is further from the Dome Lands Class I area, it is reasonable to assume that Big West Refineries maximum contribution to visibility impairment is also well below the 0.5 deciview threshold. The San Gabriel WA is also affected by two BART-eligible sources. Each source is well below the EPA model plant parameters and both are unlikely to have a significant effect on visibility at that Class I area.

The Point Reyes NS is affected by several BART-eligible sources that California has determined are not subject to BART. California's analysis, however, supports its claim that these sources are not causing visibility impairment at Point Reyes NS. Appendix B to the CRHP shows that

visibility impairment on the worst 20 percent of days at Point Reyes NS is caused primarily by nitrate (39.59%), sea salt (21.86%) and sulfate (14.54%). (CRHP, page B-105) Sea salt is clearly non-anthropogenic. According to the WRAP source apportionment study relied upon for the CRHP, nitrate extinction on the worst 20 percent of days is overwhelmingly from mobile sources of NO<sub>x</sub>, not stationary sources. (CRHP, page B-108) The sulfate on the worst 20 percent of days at Point Reyes NS is primarily from SO<sub>2</sub> emitted from offshore sources and wildfires in Oregon during the 2000-2004 base year period, and the base year period contribution from California stationary sources is relatively small. Moreover, the stationary source contribution occurred during the baseline period, which was before the Valero Refinery in Benicia was required to achieve significant SO<sub>2</sub> reductions as a result of an EPA-negotiated consent decree. (CRHP, Page 5-24) In conclusion, based on the factors discussed above, the EPA finds the 0.5 deciview threshold to be appropriate for California.

The BART Guidelines allow using model plants to determine which BART eligible sources are not reasonably expected to cause or contribute to visibility impairment. That is, one can

evaluate the visibility impacts of an example facility and apply those results to similar facilities. Based on EPA's model plant analysis, we believe that a state that has established 0.5 deciview as a contribution threshold could reasonably exempt from the BART review process sources that emit less than 500 tons per year of NO<sub>x</sub> or SO<sub>2</sub> (or combined NO<sub>x</sub> and SO<sub>2</sub>), as long as these sources are located more than 50 kilometers from any Class I area; and sources that emit less than 1000 tons per year of NO<sub>x</sub> or SO<sub>2</sub> (or combined NO<sub>x</sub> and SO<sub>2</sub>) that are located more than 100 kilometers from any Class I area. If a state has BART eligible sources that fall within these parameters, then it is reasonable to assume that these sources do not cause or contribute to visibility impairment at Class I areas; therefore, they are not subject to BART controls.

California evaluated its remaining BART eligible sources and determined that only three sources were subject to BART. The other sources demonstrated that, considering their emissions and distance to the nearest Class I area, they were not causing or contributing to visibility impairment at Class I areas. The results of this analysis are shown in Table 6.

TABLE 6—RESULTS OF SUBJECT TO BART ANALYSIS IN CALIFORNIA

BART eligible source	Analysis results deciview (dv)
Tesoro Refinery Martinez .....	0.069 dv.
Rhodia Sulfuric Acid Plant Martinez .....	0.092 dv.
Shell Refinery Martinez .....	0.169 dv.
Searles Industrial .....	0.208 dv.
Valero Refinery Benicia .....	0.291 dv.
Conoco Phillips Refinery Rodeo .....	0.366 dv.
Chevron Richmond Refinery .....	0.393 dv.
Coolwater Reliant Dagget .....	0.489 dv.
BP Refinery (Carson) .....	SCAQMD modeling <0.244 dv.
California Portland Cement .....	SCAQMD modeling <0.244 dv.
Chevron Refinery (El Segundo) .....	SCAQMD modeling <0.244 dv.
Conoco Refinery (Carson) .....	SCAQMD modeling <0.244 dv.
Conoco Refinery (Wilmington) .....	SCAQMD modeling <0.244 dv.
Exxon Refinery (Torrance) .....	SCAQMD modeling <0.244 dv.
Tesoro Refinery (Wilmington) .....	SCAQMD modeling <0.244 dv.
Ultramar Refinery .....	SCAQMD modeling <0.244 dv.

TABLE 6—RESULTS OF SUBJECT TO BART ANALYSIS IN CALIFORNIA—Continued

BART eligible source	Analysis results deciview (dv)
Big West Refineries .....	Comparable to EPA model plant.
JR Simplot Lathrop .....	Comparable to EPA model plant.
Mirant Power Plant (Antioch) .....	Comparable to EPA model plant.
Mirant Power Plant (Pittsburg) .....	Comparable to EPA model plant.
Reliant Ventura County .....	Comparable to EPA model plant.
Rhodia Sulfuric Acid Plant (South Coast) .....	Comparable to EPA model plant.
So Cal Gas .....	Comparable to EPA model plant.
Cabrillo Encina Plant .....	Subject to BART.
Duke Energy South Bay .....	Subject to BART.
Dynegy Moss Landing .....	Subject to BART.

Source: e-mail from Christine M. Suarez-Murias, California Air Resources Board to Greg Nudd, USEPA, dated February 11, 2011.

The air control districts with authority over these sources modeled the visibility impacts of the first eight sources on Table 5 using CalPUFF (Tesoro Refinery Martinez through Coolwater Reliant Dagget). These sources were modeled individually and the results indicated that they do not cause or contribute to visibility impairment at Class I areas. The next nine sources were modeled collectively

by the SCAQMD. All of these sources are part of the RECLAIM emissions cap and trade system in the SCAQMD. The SCAQMD modeled all of the sources in RECLAIM (including these nine sources) and demonstrated that the entire universe of sources in RECLAIM has an aggregate impact of less than a 0.244 deciview on Class I areas. Therefore, each individual source must have a less than 0.244 deciview impact

on visibility at Class I areas, meaning none of them cause or contribute to visibility impairment at these protected areas. The EPA evaluated the modeling analyses conducted by all the districts and found them to be valid and technically correct.<sup>24</sup> (See BART TSD.)

The next seven sources used the EPA model plant analysis described previously in this section. The details on these sources are shown in Table 7.

TABLE 7—CALIFORNIA BART SOURCES MEETING THE EPA MODEL PLANT REQUIREMENTS

Source	Emissions (tons per year)	Distance (kilometers)	Class I area affected
Big West Refineries .....	313	80	Domelands WA.
JR Simplot Lathrop .....	600	101	Yosemite NP.
Mirant Power Plant Antioch .....	277	79	Pt. Reyes NS.
Mirant Power Plant Pittsburg .....	559	74	Pt. Reyes NS.
Reliant Ventura County .....	659	70	San Rafael WA.
Rhodia Sulfuric Acid Plant (South Coast) .....	314	48	San Gabriel WA.
So Cal Gas .....	212	52	San Gabriel WA.

Source: e-mail from Christine M. Suarez-Murias, California Air Resources Board to Greg Nudd, USEPA, dated February 11, 2011.

EPA’s model plant analysis indicated that a source emitting less than 500 tons per year (tpy) of combined NO<sub>x</sub> and SO<sub>x</sub> would not contribute to visibility impairment if it were located more than 50 kilometers from the nearest Class I area. Four of the sources in Table 6 emit less than 500 tpy and three of them are more than 50 kilometers away from the nearest Class I area. The Rhodia Sulfuric Acid Plant is 48 kilometers from the San Gabriel Wilderness Area. However, since its emission rate is well below 500 tons per year, this source is also consistent with the model plant analysis. The EPA model plant analysis also indicated that sources that emit less than 1000 tons per year do not contribute to visibility impairment if they are located more than 100 kilometers away from the nearest Class I area. Three of the sources in Table 6

exceed 500 tpy but emit less than 1000 tpy. The JR Simplot Lathrop source is over 100 kilometers from the nearest Class I area and so is consistent with the model plant. The Mirant Power Plant in Pittsburg and the Reliant Plant in Ventura County are somewhat less than 100 kilometers from their respective Class I areas; however, their emissions are significantly less than 1000 tpy. For these reasons, we propose to find that these are also consistent with the EPA model plant analysis.

3. Sources Already Controlled to BART

The remaining BART eligible sources, Cabrillo Encina Plant, Duke Energy (South Bay), and Dynegy Moss Landing are subject to BART. These plants are all natural gas burning electric generating units. Since these sources burn natural gas, their SO<sub>x</sub> emissions are not significant with respect to visibility.

NO<sub>x</sub> emissions are the primary concern, considering visibility impairment. Each of these sources already control NO<sub>x</sub> emissions with selective catalytic reduction (SCR) technology. This technology is recognized as the Best Available Control Technology for natural gas burning electric generating units and is required on most new sources of this type. As such, SCR represents BART for these sources.

To conclude, California evaluated the required universe of sources for applicability of BART controls using the criteria in the RHR and the BART Guidance. The state found that three sources were eligible for the application of BART controls: Cabrillo Encina Plant, Duke Energy (South Bay), and Dynegy Moss Landing. After a review of the control technologies in use at these BART eligible plants, California found that BART level controls were already

<sup>24</sup> For our detailed review and discussion, please see “Technical Support Document for USEPA’s

Review of the California Regional Haze Plan’s Modeling for the Best Available Retrofit Technology

(BART) Evaluation”, Prepared by USEPA Region 9, March 4, 2011 (BART TSD).

in place at the sources with a potential to impair visibility at Class I areas. We propose to find that California has conducted a BART evaluation consistent with the requirement in 40 CFR 51.308(e).

*F. Visibility Projections for 2018 and the Reasonable Progress Goals*

The RHR requires states to establish a goal, expressed in deciviews, for each Class I area within the state that provides for reasonable progress toward achieving natural visibility conditions by 2064. The RPG must improve visibility for the most impaired days,

and ensure no degradation in visibility for the least impaired days over the period of the SIP.

The RPGs for the CRHP show visibility improvement by 2018 for both “worst 20 percent of days” and “best 20 percent of days” in all Class I areas when compared to the baseline “worst” and “best” days. See Table 8.

TABLE 8—BASELINE VERSUS 2018 VISIBILITY CONDITIONS FOR CALIFORNIA CLASS I AREAS

[Grouped by respective IMPROVE monitor and reported in deciviews]

Class I area (NP = National Park, WA = Wilderness Area, NM = National Monument, NS = National Seashore)	2000–04 Baseline worst haze days	2018 Estimated worst haze days (RPG)	2018 URP estimate	2000–04 Baseline best haze days	2018 Estimated best haze days
	(A)	(B)	(C)	(D)	(E)
Marble Mountain WA, Yolla Bolly Middle Eel WA (TRIN monitor) .....	17.4	16.4	15.2	3.4	3.2
Lava Beds NM, South Warner WA (LABE monitor) .....	15.1	14.4	13.4	3.2	3.0
Lassen Volcanic NP, Caribou WA, Thousand Lakes WA ... (LAVO monitor) .....	14.2	13.3	12.6	2.7	2.5
Desolation WA, Mokelumne WA (BLIS monitor) .....	12.6	12.3	11.1	2.5	2.5
Hoover WA (HOOV monitor) .....	12.9	12.5	11.7	1.4	1.3
Yosemite NP, Emigrant WA (YOSE monitor) .....	17.6	16.7	15.3	3.4	3.2
Ansel Adams WA, Kaiser WA, John Muir WA (KAIS monitor) .....	15.5	14.9	13.6	2.3	2.1
Sequoia NP, Kings Canyon NP (SEQU monitor) .....	25.4	22.7	21.2	8.8	8.1
Dome Lands WA (DOME monitor) .....	19.4	18.1	16.6	5.1	4.7
Redwood NP (REDW monitor) .....	18.5	17.8	17.4	6.1	5.8
Point Reyes NS (PORE monitor) .....	22.8	21.3	21.2	10.5	10.1
Pinnacles NM, Ventana WA (PINN monitor) .....	18.5	16.7	16.0	8.9	8.1
San Rafael WA (RAFA monitor) .....	18.8	17.3	16.2	6.4	5.8
San Gabriel WA, Cucamonga WA (SAGA monitor) .....	19.9	17.4	16.9	4.1	4.8
San Geronio WA, San Jacinto WA (SAGO monitor) .....	22.2	19.9	18.7	5.4	5.0
Agua Tibia WA (AGTI monitor) .....	23.5	21.6	19.8	9.6	8.9
Joshua Tree NP (JOSH monitor) .....	19.6	17.9	16.7	6.1	5.7

Sources: Table 6–1, page 6–10; and Table 7–2, page 7–10, CRHP.

Also, as required by the RHR, California estimated the time each Class I area would take to reach natural conditions under the RPG rate of visibility improvement (see Table 1, column E). While some of the time estimates are close to the 2064 natural conditions goal, none of the estimates show that natural conditions will be achieved by 2064 in California’s Class I areas.

1. Establishing the Reasonable Progress Goals

Because California’s RPG estimates provide for a rate of improvement in visibility slower than the rate needed to show attainment of natural conditions by 2064, the RHR requires the state to demonstrate why its RPGs are reasonable and why a rate of progress leading to attainment by 2064 is not reasonable.<sup>25</sup> 40 CFR 51.308(d)(1)(ii).

<sup>25</sup> The RHR also requires that the state provide to the public an assessment of the number of years it will take to reach natural visibility conditions. 40 CFR 51.308(d)(1)(ii). California’s estimates were noticed to the public during the public review and

The RHR specifies that RPGs, as well as the demonstration of the reasonableness of attainment beyond 2064, are to be evaluated through the use of four factors: Costs of compliance; time necessary for compliance; energy and, non-air quality environmental impacts of compliance; and remaining useful life of any potentially affected sources. 40 CFR 51.308(d)(1)(i)(A); 51.308(d)(1)(ii). As explained below, we believe the CRHP demonstrates these four factors and that the RPGs in the plan are reasonable.

California’s RPGs are projected visibility levels based on atmospheric modeling performed by the WRAP. The WRAP modeling was based, in part, on California’s 2018 emissions projections derived from the emissions reductions described in California’s 2018 Progress Strategy. California’s 2018 Progress Strategy is based on the identification of the major drivers of haze on worst days, as well as the sources of these pollutants

comment process prior to ARB’s adoption of the CRHP.

and their precursors. In particular, the 2018 Progress Strategy predicts significant reductions in the nitrate component of haze from NO<sub>x</sub> emission reductions achieved by California’s mobile source control programs. Weighted emissions, or back trajectory analyses, along with predictive modeling show that substantial reductions in nitrate, roughly 50 percent at every Class I area, can be achieved through mobile source NO<sub>x</sub> emission reductions in the 2018 Progress Strategy. (CRHP, page 7–3)

The analysis of the sources of haze from section 4.7 of CRHP shows that the primary anthropogenic source of haze within California is NO<sub>x</sub> emissions. Therefore, the largest impact California can make to improve visibility is by reducing anthropogenic sources of the NO<sub>x</sub> emissions that lead to the formation of nitrates, especially, NO<sub>x</sub> from mobile sources. According to ARB’s 2018 emissions inventory, California will have reduced NO<sub>x</sub> emissions by 47 percent compared to 2002, with the majority of those

emission reductions coming from mobile sources. The 2018 emissions inventory also shows that reductions in mobile source SO<sub>x</sub> emissions will offset increases in other source categories. (See Table 2) In addition, the 2018 emissions inventory predicts reductions in organic carbon PM and mobile source elemental carbon PM emissions.

TABLE 9—PERCENTAGE CHANGE IN ANTHROPOGENIC EMISSIONS INVENTORY FROM 2002 TO 2018

Pollutant	2002 Anthropogenic emissions inventory (tpy)	2018 Anthropogenic emissions inventory (tpy)	Percentage change
NO <sub>x</sub> .....	1,127,359	592,688	- 47
SO <sub>2</sub> .....	62,954	63,566	1
VOC .....	908,151	882,313	- 3
NH <sub>3</sub> .....	225,157	223,916	- 1
PM Coarse .....	279,149	311,518	12
Fine PM OC .....	64,492	56,307	- 13
Fine PM EC .....	28,397	18,927	- 33
Other PM Fine .....	67,667	69,262	2

California also evaluated all source categories that could reasonably be expected to contribute to visibility impairment at Class I areas.<sup>26</sup> This analysis considered, for each sub-region, the species contributing to haze and the source categories responsible for anthropogenic emissions of precursors to those species. For example, in the Sierra Nevada mountain range, nitrate pollution accounts for 17 percent of light extinction on the most impaired days of the baseline period. Because nitrate is the predominant anthropogenic pollutant in this area and most of the emissions are from within the state, California examined the anthropogenic sources of NO<sub>x</sub> in that area. A PSAT analysis indicated that 76 percent of those emissions were from mobile sources. California also considered SO<sub>2</sub> emissions, which comprise 14 percent of light extinction on the most impaired days; 45 percent of these emissions were shown by PSAT to be from outside the modeling domain while 22 percent were from within California. California examined these sources and demonstrated that they were already reasonably controlled. (CRHP, Chapter 4, Section 4.7)

In addition, through the state's efforts to attain and maintain the Federal and State health-based air quality standards, the state asserts that every reasonable measure is included in the state's 2018 Progress Strategy underlying the RPGs for Class I areas.

EPA also notes that there is a degree of uncertainty, due to wildfires and biogenic emissions, in the values representing baseline and natural conditions.

Furthermore, as explained in the EPA's RPG Guidance, the 2018 URP estimate is not a presumptive target, and

RPGs may be greater, lesser, or equivalent to the glide path. The glide path to 2064 represents a rate of progress which states are to use for analytical comparison to the amount of progress they expect to achieve. Given the strenuous efforts needed in California to achieve the emission reductions described in Tables 2 and 9, the resulting 2018 RPGs, and the constraints and uncertainties described above, we believe it would be unreasonable to require the CRHP to meet the 2018 URP estimates.

Consequently, we propose to find that the state has demonstrated that its 2018 RPGs are reasonable and consistent with the requirements of 40 CFR 51.308(d)(1) and 51.308(d)(1)(ii).

2. Interstate Consultation

The CRHP, along with its RPGs, is the result of California's continuous consultation with thirteen other western states through regular meetings of the WRAP Working Groups and Forums, via conference calls, face-to-face meetings, and workshops over the timeframe of several years. Through the WRAP consultative process, California resolved technical tasks and policy decisions related to monitoring, emissions, fire tracking, application of BART, source attribution, modeling, and control measure issues. Emissions from other western US states are not expected to affect California significantly, except for smoke from large wildfires.

Furthermore, there were no comments on the CRHP from neighboring states regarding the plan's baseline visibility estimates, 2018 visibility projections, RPGs, or 2018 Progress Strategy.

G. Long-Term Strategy

The RHR requires California to submit a long-term strategy addressing regional haze visibility impairment for the Class I areas affected by the emissions from

the state. California's 2018 Progress Strategy reflects the measures that were included in the 2002 and 2018 emission inventories and WRAP analyses that produced California's reasonable progress goals. The RHR requires that a state's strategy consider emission reductions from on-going control programs, construction activity mitigation, source retirement and replacement, and smoke management techniques. Due to California's severe air quality problems, the state has emissions control programs that address these RHR considerations.

California's 2018 Progress Strategy (Chapter 4 of the CRHP) includes Federal, State and local control measures. As reflected in the 2018 emissions inventory, these control measures address the main anthropogenic constituents of California's visibility problem: NO<sub>x</sub>, SO<sub>x</sub>, and directly emitted particulate matter emissions. As the RPGs in Table 8 suggest, the measures in the 2018 Progress Strategy will improve visibility in all California Class I areas. Also, implementation of the 2018 Progress Strategy is expected to minimize California's existing very small contribution to visibility impairment in downwind states. The CRHP describes ongoing state and local emission control measures, as summarized below.

1. Ongoing Air Pollution Control Programs

Air pollution control programs in California are divided among the state, multi-county air districts, and county level air quality control agencies. Among state agencies, ARB is responsible for regulating mobile sources emissions (except where preempted by Federal law) and consumer products, developing fuel specifications, establishing gasoline vapor recovery standards and certifying

<sup>26</sup> Please see CRHP Chapter 4, Section 4.7, Regional Analysis of Source Categories.



vapor recovery systems. Local air districts have primary responsibility for regulating stationary and area wide sources.

#### a. Mobile Source Programs

California's regulation of mobile source emissions covers new vehicle emissions standards, low polluting fuel formulations, and off-road sources such as lawn and garden equipment, recreational vehicles and boats, and construction equipment. With the implementation of the 2018 Control Strategy, the state predicts that reductions from mobile sources will occur as the result of several regulatory efforts.

For example, according to the CRHP, California's 2008 low-emission vehicle standards and reformulated gasoline reduced VOC emissions to less than 50 pounds per 100,000 miles traveled, and predicted reductions for the 2010 model year to be approximately 10 pounds per 100,000 miles. California also points out that mobile source organic carbon emissions are reduced beyond what is required under national regulations. (CRHP, page 4–2 to 4–3)

ARB's efforts with EPA to regulate large diesel, gasoline and liquid petroleum gas equipment will result in new large off-road equipment that will be 98 percent cleaner. These regulations will reduce both NO<sub>x</sub> and elemental carbon emissions. (CRHP, page 4–4)

In addition, ARB has worked with EPA to reduce emissions from goods movement sources. For example, the CRHP estimates that low-sulfur fuel requirements will reduce SO<sub>x</sub> emissions from ship auxiliary engines by 96 percent and new locomotive engines by 50–60 percent. (CRHP, Table 4–1 and discussion, page 4–4)

ARB plans to reduce emissions from smaller engines, such as lawn and garden equipment, recreational vehicles, and boats, achieving 82–90 percent fewer NO<sub>x</sub> emissions than uncontrolled units. (CRHP, Table 4–1, and discussion, page 4–4)

The CRHP describes California's efforts to reduce diesel PM emissions since 2000, when California began implementing its Diesel Risk Reduction Plan, aimed at reducing diesel PM emissions by 85 percent by 2020. Through engine retrofits and replacements, ARB predicts these control measures will reduce NO<sub>x</sub> emissions as well as diesel PM emissions. (CRHP, Section 4.2.3, page 4–6) The CRHP states that this program has already provided visibility benefits as shown by elemental carbon trends at IMPROVE monitors. In 2013 and 2018, the state predicts more visibility

improvement as related rules adopted during the 2000–2004 baseline period continue their implementation. (CRHP, page 7–4)

#### b. Stationary and Area Source Regulations by Local Air Agencies

California's thirty-five local air districts and air quality control agencies are primarily responsible for regulating emissions from stationary and area-wide sources through rules and permitting programs. For example, air district regulated sources include industrial sources like factories, refineries, and power plants; commercial sources like gas stations, dry cleaners, and paint spray booth operations; residential sources like fireplaces, water heaters, and house paints; and miscellaneous non-mobile sources like emergency generators. Air districts also inspect and test fuel vapor recovery systems to check that such systems are operating as certified.<sup>27</sup>

#### 2. Construction Activities

Many air districts have adopted stringent rules to control fugitive dust emissions from construction activities. These rules include the following examples: San Joaquin Valley Air Pollution Control District (SJVAPCD) Regulation 8—Fugitive PM–10 Prohibitions, adopted in 2004 (71 FR 8461, (February 17, 2006)); and, SCAQMD Rule 403—Fugitive Dust (73 FR 12639, (March 10, 2008)).

In July 2007, ARB adopted a regulation designed to reduce diesel and NO<sub>x</sub> emissions from the state's estimated 180,000 off-road vehicles used in construction, mining, airport ground support and other industries. These regulations were not adopted in time to be considered by the WRAP and the state when producing the RPGs; however, ARB estimates that by 2020 “particulate matter will be reduced by 74 percent and NO<sub>x</sub> will be reduced by 32 percent compared to current levels.” (CRHP, page 4–11)

#### 3. Source Retirement and Replacement Schedules

ARB reports that older and high polluting sources produce the majority of mobile source emissions; as a result, California has directed its source retirement strategy towards mobile sources. California has pursued the

retirement of engines using incentive funding programs together with in-use regulations. For example, using the Carl Moyer Program, the state has invested up to \$170 million annually to clean up as many as 7,500 older, higher-emitting engines, thereby reducing NO<sub>x</sub> emissions by as much as 24 tons per day. (CRHP, pages 4–11 to 4–12)

#### 4. Smoke Management Programs

California's “Smoke Management Guidelines for Agricultural and Prescribed Burning (SMG)” is the basis for the state's Smoke Management Program. Together, the ARB and the local air pollution control districts implement the SMG. ARB oversees the program and makes daily burn/no burn day decisions for each of the air basins in the state. In turn, air districts have adopted comprehensive smoke management programs and regulations to implement and enforce the SMG. These smoke management programs contain requirements for agricultural and prescribed burns permits; daily burn authorizations; annual reporting; registration and smoke management plans for prescribed burns.<sup>28</sup> According to the CRHP, smoke management plans must specifically consider Class I Areas as sensitive receptors. (CRHP, pages 4–12 and 4–13)

#### 5. Enforceability of Measures in the Long-Term Strategy

The RHR requires that the state's long-term strategy include enforceable measures necessary to achieve the reasonable progress goals at every Class I area (inside and outside the state) affected by emissions from that state. 40 CFR 51.308(d)(3). California's RPGs are based on the region-wide inventory developed by the WRAP states that included data for California sources. The emissions inventory from California was based on rules adopted through 2004. (CRHP, page 3–1)

Table 2 of this notice shows changes in emissions by pollutant and source category between 2002 and 2018. The pollutants of concern for visibility impairment are NO<sub>x</sub>, SO<sub>2</sub>, and VOC (as organic carbon precursor). A review of Table 2 indicates that moderate increases of SO<sub>2</sub> and VOC from

<sup>27</sup> For a complete listing of local California air district rules within the federally enforceable SIP, please see our online database at <http://www.epa.gov/region9/air/sips/index.html>. This database is organized first by state and then local agency. The rules are listed by number, title, adoption date, and the date the rule was approved into the SIP.

<sup>28</sup> Examples of local air district rules implementing the SMG are as follows: Sacramento Metropolitan Air Pollution Control District Rule 501—Agricultural Burning (49 FR 47490 (December 5, 1984)); adopted in 1992 and amended since, SJVAPCD Rule 4103—Open Burning (74 FR 57907 (November 10, 2009)); SJVAPCD Rule 4106—Prescribed Burning and Hazard Reduction (67 FR 8894 (February 27, 2002)); and, Northern Sierra Air Quality Management District Regulation 3—Open Burning (62 FR 48480 (September 16, 1997) and 64 FR 45170 (August 19, 1999)).

stationary and area sources are offset by significant reductions in emissions from mobile sources. Table 2 also shows that the reductions in NO<sub>x</sub> statewide are attributable to a decrease in emissions from mobile sources of over 530,000 tons per year. Therefore, the enforceability of mobile source measures is a critical consideration when evaluating the measures necessary to achieve the reasonable progress goals.

California's mobile source measures fall within two categories: Measures for which the state has obtained or has applied to obtain a waiver of federal pre-emption under CAA section 209 (section 209 waiver measure or waiver measure) and those for which the state is not required to obtain a waiver (non-waiver measures).

EPA's position on the creditability of California's mobile source control measures in SIP attainment demonstrations has been addressed in previous actions. See EPA's proposed approval and final approval of the SJV 1-Hour Ozone Plan at 74 FR 33933, 33938, (July 14, 2009) and 75 FR 10420, 10424 (March 8, 2010).

EPA recently evaluated California mobile source measures as part of our November 10, 2010 proposed action on the San Joaquin Valley 2008 PM<sub>2.5</sub> plan and the San Joaquin Valley portions of the revised 2007 state strategy. See, e.g., 75 FR 74517 (Nov. 10, 2010). In taking this action, we described how EPA had either approved California's mobile source rules into the SIP, or granted a waiver of federal pre-emption under CAA section 209.

Based on this analysis, EPA proposes to find that the measures in the CRHP are sufficient to achieve the reasonable progress goals, as required by 40 CFR 51.308(d)(3).

To conclude, California has submitted a long-term strategy addressing visibility impairment due to regional haze within Class I areas, both inside and outside of the state. Through participation in the WRAP, California consulted with neighboring states and coordinated its 2018 Progress Strategy, as well as developed and documented the technical basis for the 2018 Progress Strategy. Within the 2018 Progress Strategy, the state has considered and addressed measures to mitigate the impacts of construction activities, source retirement and replacement schedules, and smoke management for agricultural and forestry practices. The state has estimated the 2002 base year and 2018 anthropogenic and natural source emissions inventory and the emission reductions resulting from the 2018 Progress Strategy's control measures. Consequently, we propose to

find that California has met the requirements of 40 CFR 51.308(d)(3).

#### *H. Monitoring Strategy*

According to the CRHP, California intends to rely on the IMPROVE monitoring program to collect and report data for reasonable progress tracking for all Class I Areas in the state. Because the RHR requires a long-term tracking program over a 60-year implementation period, the CRHP states that California expects the configuration of the monitors, sampling site locations, laboratory analysis methods and data quality assurance, and network operation protocols will not change; or, if they are changed, any future IMPROVE program will remain comparable to the one operating during the 2000–2004 RHR baseline period. Through 2018, the CRHP does not specify any additional monitors beyond the existing IMPROVE network. Also, California will continue to meet the requirement to coordinate its CRHP monitoring with its monitoring for RAVI by participating in the IMPROVE monitoring network. Finally, California plans to use data reported by the IMPROVE program as part of the regional technical support analysis tools found at the Visibility Information Exchange Web System (VIEWS), as well as other analysis tools and efforts sponsored by the WRAP. (CRHP, page 9–1)

To conclude, California has submitted a monitoring strategy for measuring, characterizing and reporting on regional haze visibility impairment in the state's Class I areas. The state will depend on the IMPROVE monitoring program to collect and report data for tracking reasonable progress, as specified in the RHR for all Class I areas in the state. The state will use data reported by the IMPROVE program and the regional analysis tools found at the VIEWS. Consequently, we propose to find that the state has met the requirements of 40 CFR 51.308(d)(4).

#### *I. Federal Land Manager Consultation and Coordination*

The RHR requires states to coordinate the development and implementation of their visibility protection programs with the Federal Land Managers (FLMs). In particular, states must provide FLMs an opportunity for consultation at least sixty days prior to holding any public hearing on the SIP. Consultation must include the opportunity for the FLMs to discuss their assessment of visibility impairment in any Class I areas, and offer recommendations on the development of RPGs and strategies to address visibility impairment. A state

must describe in its SIP how it addressed any comments provided by the FLMs and include procedures for continuing consultation between the state and FLMs on program implementation. In the future, FLMs must have the opportunity for consultation with the state on the development and review of plan revisions and five-year progress reports as well as on the implementation of other programs that might contribute to visibility impairment in Class I areas.

The CRHP states that California has provided a list of ARB contacts to the FLMs, as required by the RHR. In November 2006, ARB sponsored a "Regional Haze Teach-In," with participants from several federal agencies (the U.S. Forest Service, the National Park Service, the Bureau of Land Management, the U.S. Fish and Wildlife Service, the EPA), and interested air districts. ARB staff presented and discussed the state's proposed 2018 Progress Strategy and RPGs. (CRHP, page 8–5) Subsequently, an ARB/Federal Land Managers Regional Haze Steering Committee (Steering Committee) was formed. The participants conducted monthly conferences to review progress on regional haze planning and to obtain input from FLMs. California's RPGs were also discussed during these calls. (CRHP, page 8–5)

Prior to the January 22, 2009 ARB adoption hearing, ARB provided the FLMs with a draft of the CRHP and requested comment. ARB also provided a webcast workshop on December 15, 2008 to allow participation by federal land management agency field office staff in remote locations. (CRHP, page 8–6) Appendix F of the CRHP includes the FLMs' official comments, along with responses prepared by ARB.

The CRHP states that California will continue to coordinate and consult with the FLMs over the course of the implementation period. California intends to use three existing coordination mechanisms for this purpose: the Interagency Air and Smoke Council, the Air and Land Managers Group, and the WRAP. (CRHP, page 8–7)

To conclude, beginning in November 2006, California provided numerous and regular opportunities for FLM review of the CRHP as it was developed. Prior to ARB adoption of the CRHP on January 22, 2009, ARB provided a 60-day comment period for FLMs and a formal public comment period beginning December 5, 2008, and a video-conferencing forum to solicit FLM comment on the final draft CRHP. FLM comments and ARB responses were

included with the CRHP in Appendix F. In the future, the state will consult and coordinate regional haze activities with FLMs through three existing venues: The Interagency Air and Smoke Council, the Air and Land Managers Group, and the WRAP. Consequently, we propose to find that the state has met the FLM coordination and consultation requirements of 40 CFR 51.308(i).

#### *J. Periodic SIP Revisions and Five-Year Progress Reports*

The CRHP states that California will perform a mid-course review in 2013 to assess progress towards reaching the RPGs. California's mid-course review will consider post-2004 control measures that were not included in the 2018 Progress Strategy. The CRHP states that the mid-course review will also do the following: "Update natural conditions to reflect new information, if available; update the RPGs with latest WRAP modeling, if appropriate; re-evaluate the RPGs to determine if they should be adjusted to better reflect achievable improvements in visibility, as future control measures are adopted and implemented; compare the actual deciview calculations against progress towards reaching the RPGs and the uniform rate of progress; assess the impact at the monitors from BART-specific and post-2004 adopted and implemented measures; and, evaluate the adequacy of the existing CRHP elements." (CRHP, Section 9.3, page 9–2)

In 2018, California will revise the CRHP, following procedures for coordination with other western states and FLMs. California intends for the 2018 CRHP revision to include the following updates: "Current calculation methodologies for visibility; evaluation of the appropriateness of natural condition levels and updates, if appropriate; current visibility conditions for most impaired and least impaired days; progress towards natural conditions; effectiveness of California's 2018 Progress Strategy; affirmation or revision of reasonable progress goals; updated emission inventories; and, re-evaluation of the monitoring strategy." (CRHP, Section 9.4, pages 9–2 to 9–3)

To conclude, California has submitted a plan with commitments to provide a 2013 progress report evaluating the January 22, 2009 CRHP and RPGs, as well as a 2018 regional haze plan revision. Consequently, we propose to find that the state has met the requirements of 40 CFR 51.308(f) and (g).

#### **V. EPA's Analysis of How California's Regional Haze Plan Meets Interstate Transport Requirements**

Section 110(a)(2)(D)(i)(II) requires SIP revision to contain "adequate provisions \* \* \* prohibiting \* \* \* any source or other types of emission activity within the State from emitting any air pollutant in amounts which will \* \* \* interfere with measures required to be included in the applicable implementation plan for any other State \* \* \* to protect visibility." EPA is proposing to find that the SIP submitted by California to address regional haze contains adequate provisions to meet the "good neighbor" provisions of section 110(a)(2)(D)(i)(II) with respect to visibility.

As an initial matter, EPA notes that section 110(a)(2)(D)(i)(II) does not specify explicitly how EPA should ascertain whether a state's SIP contains adequate provisions to prevent emissions from sources in that state from interfering with measures required in another state to protect visibility. Thus, the statute is ambiguous on its face, and EPA must interpret this provision.

Our 2006 Guidance recommended that a state could meet the visibility prong of the transport requirements for section 110(a)(2)(D)(i)(II) by submitting a regional haze SIP, due in December 2007. EPA's reasoning was that the development of the regional haze SIPs was intended to occur in a collaborative environment among the states, and that through this process states would coordinate on emissions controls to protect visibility on an interstate basis. In fact, in developing their respective reasonable progress goals, WRAP states consulted with each other through the WRAP's work groups. As a result of this process, the common understanding was that each state would take action to achieve the emissions reductions relied upon by other states in their reasonable progress demonstrations under the RHR. This interpretation is consistent with the RHR requirement that a state participating in a regional planning process must include "all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process." 40 CFR 51.308(d)(3)(ii).

As discussed above in sections IV.F and IV.G of this proposed rule, as a WRAP member, California developed the 2018 Progress Strategy in consultation with 13 other WRAP states to address regional haze visibility impairment in Class I areas affected by California emissions. California also developed a set of emissions inventories reflecting the state's implementation of

a broad range of emission control measures included in the 2018 Progress Strategy. See sections IV.C and IV.G.5 above for a discussion of these emissions inventories and control measures. As part of the WRAP's regional consultative process, California provided the WRAP with these emissions inventories for the WRAP's regional 2018 future year modeling. The WRAP projected visibility levels for all Class I areas in California and neighboring states based on California's projected 2018 emissions inventories and the 2018 inventories supplied by other WRAP states. Each of the WRAP states then developed its regional haze plan using these visibility projections.

As a result, California's 2018 Progress Strategy and projected emissions inventories, including the control measures upon which they rely, were accounted for in the WRAP's apportionment of emission reduction obligations among the member states. Each of the WRAP states then developed their respective reasonable progress goals based upon an understanding that California's implementation of the emission control measures included in the 2018 Progress Strategy would achieve California's projected 2018 emissions inventory levels. Thus, the following elements of the CRHP ensure that emissions from California will not interfere with the reasonable progress goals for neighboring states' Class I areas: Chapter 3 (Emissions Inventory), chapter 4 (California 2018 Progress Strategy), and chapter 8 (Consultation). We propose to determine that these elements of the CRHP adequately address California's apportionment of emission reduction obligations agreed upon through the WRAP consultative process and, therefore, satisfy the requirement in CAA section 110(a)(2)(D)(i)(II) regarding measures required in other states to protect visibility for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS.

#### **VI. EPA's Proposed Action**

Because EPA believes the California Regional Haze Plan fulfills all the relevant requirements of Section 169B and the Regional Haze Rule, we are proposing to fully approve the plan as described in section 110(k)(3) of the Act. In sum, we are proposing to find that California has met the following Regional Haze Rule requirements: The state has established baseline visibility conditions and reasonable progress goals for each of its Class I areas; the state has developed a long-term strategy with enforceable measures ensuring reasonable progress towards meeting the Reasonable Progress Goals for the first

ten-year planning period, through 2018; the state has addressed adequately the application of Best Available Retrofit Technology to specific stationary sources; the state has an adequate regional haze monitoring strategy; the state has provided for consultation and coordination with federal land managers in producing its regional haze plan; and, provided for the regional haze plan's future revisions.

In addition, we are proposing to approve California's 2007 Transport SIP and the following specific elements of the CRHP as satisfying the CAA Section 110(a)(2)(D)(i)(II) requirement to prohibit emissions that will interfere with measures to protect visibility in another state for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS: Chapter 3 (Emissions Inventory), chapter 4 (California 2018 Progress Strategy), and, chapter 8 (Consultation).

## VII. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Visibility, Volatile organic compounds.

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

Dated: March 9, 2011.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

[FR Doc. 2011-6003 Filed 3-14-11; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2010-0958-201104; FRL-9280-7]

### Approval and Promulgation of Implementation Plans; South Carolina: Prevention of Significant Deterioration and Nonattainment New Source Review; Fine Particulate Matter and Nitrogen Oxides as a Precursor to Ozone

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a revision to the South Carolina State Implementation Plan (SIP), submitted by the State of South Carolina, through the South Carolina Department of Health and Environmental Control (SC DHEC), to EPA on December 2, 2010, for

parallel processing. The proposed SIP revision modifies South Carolina's New Source Review (NSR) Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) programs. The proposed revision makes two changes for which EPA is proposing approval in today's rulemaking. First, the revision incorporates NSR provisions for fine particulate matter (also known as PM<sub>2.5</sub>) as amended in EPA's 2008 NSR PM<sub>2.5</sub> Implementation Rule (hereafter referred to as the "NSR PM<sub>2.5</sub> Rule") into the South Carolina SIP. Second, the proposed revision addresses a PSD permitting requirement promulgated in the 1997 8-Hour Ozone National Ambient Air Quality Standards (NAAQS) Implementation Rule NSR Update Phase II (hereafter referred to as the "Ozone Implementation NSR Update or Phase II Rule"). Both changes in the proposed SIP revision are necessary to comply with federal regulations related to South Carolina's NSR permitting program. EPA is proposing approval of the December 2, 2010, proposed SIP revision because the Agency has preliminarily determined that the revisions are in accordance with the Clean Air Act (CAA or Act) and EPA regulations regarding NSR permitting.

**DATES:** Comments must be received on or before April 14, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2010-0958 by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

2. *E-mail:* [benjamin.lynorae@epa.gov](mailto:benjamin.lynorae@epa.gov).

3. *Fax:* (404) 562-9019.

4. *Mail:* EPA-R04-OAR-2010-0958, 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:* Ms. 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-2010-0958." EPA's policy is that all comments

received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through <http://www.regulations.gov> or e-mail, information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy 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:** For information regarding the South Carolina SIP, contact Ms. Twunjala Bradley, 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. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: [bradley.twunjala@epa.gov](mailto:bradley.twunjala@epa.gov). For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams' telephone number is (404) 562-9241; e-mail address: [adams.yolanda@epa.gov](mailto:adams.yolanda@epa.gov). For information regarding the Phase II Rule, contact Ms. Jane Spann, Regulatory Development Section, at the same address above. Ms. Spann's telephone number is (404) 562-9029; e-mail address: [spann.jane@epa.gov](mailto:spann.jane@epa.gov). For information regarding the PM<sub>2.5</sub> NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the same address above. Mr. Huey's telephone number is (404) 562-9104; e-mail address: [huey.joel@epa.gov](mailto:huey.joel@epa.gov).

#### SUPPLEMENTARY INFORMATION:

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##### I. What action is EPA proposing in today's notice?

On December 2, 2010, SC DHEC submitted a proposed revision to EPA for approval into the South Carolina SIP to adopt Federal requirements for NSR permitting. The December 2, 2010, submittal addresses PSD and NNSR requirements related to the implementation of the 2006 PM<sub>2.5</sub> NAAQS as well as adding a provision of the PSD NO<sub>x</sub> as a precursor requirement established in the Phase II Rule. Pursuant to section 110 of the CAA, EPA is proposing to approve these changes into the South Carolina SIP.

South Carolina's December 2, 2010, SIP revision was submitted as a draft SIP revision and is not yet state-effective. Therefore, South Carolina requested that EPA "parallel process"

the SIP revision.<sup>1</sup> Under this procedure, the EPA Regional Office works closely with the state while developing new or revised regulations. Generally, the state submits a copy of the proposed regulation or other revisions to EPA before conducting its public hearing. EPA reviews this proposed state action and prepares a notice of proposed rulemaking. EPA publishes this notice of proposed rulemaking in the **Federal Register** and solicits public comment in approximately the same time frame during which the state is holding its public hearing. The state and EPA thus provide for public comment periods on both the State and the Federal actions in parallel.

After South Carolina submits the formal state-effective SIP revision request (including a response to all public comments raised during the state's public participation process), EPA will prepare a final rulemaking notice for the SIP revision. If changes are made to the SIP revision after EPA's notice of proposed rulemaking, such changes must be acknowledged in EPA's final rulemaking action. If the changes are significant, then EPA may be obligated to re-propose the action. In addition, if the changes render the SIP revision not approvable, EPA's re-proposal of the action would be a disapproval of the revision.

##### II. What is the background for the action proposed by EPA in today's notice regarding NSR permitting requirements for the PM<sub>2.5</sub> NAAQS?

Today's proposed action to revise the South Carolina SIP relates to EPA's "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM<sub>2.5</sub>)," Final Rule, 73 FR 28321 (May 16, 2008) (the "NSR PM<sub>2.5</sub> Rule"). In the NSR PM<sub>2.5</sub> Rule, EPA finalized regulations to implement the NSR program for the PM<sub>2.5</sub> NAAQS. As a result of EPA's final NSR PM<sub>2.5</sub> Rule, states are required to provide SIP submissions no later than May 16, 2011, to address these requirements for both the PSD and NNSR programs. South Carolina's December 2, 2010, proposed SIP revision addresses the PSD and NNSR requirements for the PM<sub>2.5</sub> NAAQS. More detail on the NSR PM<sub>2.5</sub> Rule can be found in EPA's May 16, 2008, final rule and is summarized below.

<sup>1</sup> While the transmittal letter for South Carolina's submission is dated October 20, 2010, EPA did not officially receive South Carolina's request for parallel processing until December 2, 2010.

### A. Fine Particulate Matter and the NAAQS

Fine particles in the atmosphere are made up of a complex mixture of components. Common constituents include sulfate (SO<sub>4</sub>); nitrate (NO<sub>3</sub>); ammonium; elemental carbon; a great variety of organic compounds; and inorganic material (including metals, dust, sea salt, and other trace elements) generally referred to as “crustal” material, although it may contain material from other sources. Airborne particulate matter (PM) with a nominal aerodynamic diameter of 2.5 micrometers or less (a micrometer is one-millionth of a meter, and 2.5 micrometers is less than one-seventh the average width of a human hair) are considered to be “fine particles” and are also known as PM<sub>2.5</sub>. “Primary” particles are emitted directly into the air as a solid or liquid particle (e.g., elemental carbon from diesel engines or fire activities, or condensable organic particles from gasoline engines). “Secondary” particles (e.g., sulfate and nitrate) form in the atmosphere as a result of various chemical reactions.

The health effects associated with exposure to PM<sub>2.5</sub> include potential aggravation of respiratory and cardiovascular disease (i.e., lung disease, decreased lung function asthma attacks and certain cardiovascular issues). Epidemiological studies have indicated a correlation between elevated PM<sub>2.5</sub> levels and premature mortality. Groups considered especially sensitive to PM<sub>2.5</sub> exposure include older adults, children, and individuals with heart and lung diseases. For more details regarding health effects and PM<sub>2.5</sub> see EPA’s Web site at <http://www.epa.gov/oar/particulatepollution/> (see heading “Health and Welfare”).

On July 18, 1997, EPA revised the NAAQS for PM to add new standards for fine particles, using PM<sub>2.5</sub> as the indicator. Previously, EPA used PM<sub>10</sub> (inhalable particles smaller than or equal to 10 micrometers in diameter) as the indicator for the PM NAAQS. EPA established health-based (primary) annual and 24-hour standards for PM<sub>2.5</sub>, setting an annual standard at a level of 15 micrograms per cubic meter (µg/m<sup>3</sup>) and a 24-hour standard at a level of 65 µg/m<sup>3</sup>. 62 FR 38652. At the time the 1997 primary standards were established, EPA also established welfare-based (secondary) standards identical to the primary standards. The secondary standards are designed to protect against major environmental effects of PM<sub>2.5</sub>, such as visibility impairment, soiling, and materials damage. On October 17, 2006, EPA

revised the primary and secondary NAAQS for PM<sub>2.5</sub>. In that rulemaking, EPA reduced the 24-hour NAAQS for PM<sub>2.5</sub> to 35 µg/m<sup>3</sup> and retained the existing annual PM<sub>2.5</sub> NAAQS of 15 µg/m<sup>3</sup>. 71 FR 61236.

### B. What is the NSR program?

The CAA NSR program is a preconstruction review and permitting program applicable to certain new and modified stationary sources of air pollutants regulated under the CAA. The program includes a combination of air quality planning and air pollution control technology requirements. The CAA NSR program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in Part C of title I of the CAA and applies in areas that meet the NAAQS “attainment areas” as well as areas where there is insufficient information to determine if the area meets the NAAQS—“unclassifiable areas.” The NNSR program is established in Part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS—“nonattainment areas.” The Minor NSR program addresses construction or modification activities that do not qualify as “major” and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as NSR programs. EPA regulations governing the implementation of these programs are contained in 40 Code of Federal Regulations (CFR) Parts 51.165, 51.166, 52.21, 52.24, and part 51, Appendix S.

Section 109 of the CAA requires EPA to promulgate a primary NAAQS to protect public health and a secondary NAAQS to protect public welfare. Once EPA sets those standards, states must develop, adopt, and submit a SIP to EPA for approval that includes emission limitations and other control measures to attain and maintain the NAAQS. See CAA § 110. Each SIP is also required to include a preconstruction review program for the construction and modification of any stationary source of air pollution to assure the maintenance of the NAAQS. The December 2, 2010, SIP submittal revises South Carolina’s PSD and NNSR programs.

### C. Implementation of NSR Requirements for PM<sub>2.5</sub>

After EPA promulgated the NAAQS for PM<sub>2.5</sub> in 1997, the Agency issued a guidance document entitled “Interim Implementation of New Source Review Requirements for PM<sub>2.5</sub>.” John S. Seitz, EPA, October 23, 1997 (the “Seitz memo”). The Seitz memo was designed to help states implement NSR requirements pertaining to the new

PM<sub>2.5</sub> NAAQS in light of technical difficulties posed by PM<sub>2.5</sub> at that time. Specifically, the Seitz memo stated: “PM-10 may properly be used as a surrogate for PM-2.5 in meeting NSR requirements until these difficulties are resolved.”

EPA also issued a guidance document entitled “Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas” (the “2005 PM<sub>2.5</sub> Nonattainment NSR Guidance”), on April 5, 2005, the date that EPA’s PM<sub>2.5</sub> nonattainment area designations became effective for the 1997 NAAQS. This memorandum provided guidance on the implementation of the nonattainment major NSR provisions in PM<sub>2.5</sub> nonattainment areas in the interim period between the effective date of the PM<sub>2.5</sub> nonattainment area designations (April 5, 2005) and EPA’s promulgation of final PM<sub>2.5</sub> NNSR regulations. Besides re-affirming the continuation of the PM<sub>10</sub> Surrogate Policy for PM<sub>2.5</sub> attainment areas set forth in the Seitz memo, the 2005 PM<sub>2.5</sub> NNSR Guidance recommended that until EPA promulgated the PM<sub>2.5</sub> major NSR regulations, “States should use a PM<sub>10</sub> nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the PM<sub>2.5</sub> NAAQS.”

On May 16, 2008, EPA finalized a rule to implement the 1997 PM<sub>2.5</sub> NAAQS, including changes to the NSR program. 73 FR 28321. The 2008 NSR PM<sub>2.5</sub> Rule revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the PM<sub>2.5</sub> NAAQS in both attainment and nonattainment areas. The 2008 NSR PM<sub>2.5</sub> Rule requires that major stationary sources seeking permits must begin directly satisfying the PM<sub>2.5</sub> requirements, as of the effective date of the rule, rather than relying on PM<sub>10</sub> as a surrogate, with two exceptions. The first exception is a “grandfathering” provision in the Federal PSD program at 40 CFR 52.21(i)(1)(xi). This grandfathering provision applied to sources that had applied for, but had not yet received, a final and effective PSD permit before the July 15, 2008, effective date of the May 2008 final rule. The second exception was that states with SIP-approved PSD programs could continue to implement the Seitz Memo’s PM<sub>10</sub> Surrogate Policy for up to three years (until May 2011) or until the individual revised state PSD programs for PM<sub>2.5</sub> are approved by EPA, whichever comes first. For additional

information on the NSR PM<sub>2.5</sub> Rule, see 73 FR 28321.<sup>2</sup>

On February 11, 2010, EPA proposed to repeal the grandfathering provision for PM<sub>2.5</sub> contained in the federal PSD program at 40 CFR 52.21(i)(1)(xi) and to end early the PM<sub>10</sub> Surrogate Policy applicable in states that have a SIP-approved PSD program. 75 FR 6827. In support of this proposal, EPA explained that the PM<sub>2.5</sub> implementation issues that led to the adoption of the PM<sub>10</sub> Surrogate Policy in 1997 have been largely resolved to a degree sufficient for sources and permitting authorities to conduct meaningful permit-related PM<sub>2.5</sub> analyses. EPA has not yet taken final action on this proposal. Though EPA has not finalized a repeal of the PM<sub>2.5</sub> grandfathering provision at 40 CFR 52.21(i)(1)(xi), South Carolina elected not to include this provision in its SIP submittal.

The NSR PM<sub>2.5</sub> Rule also established the following NSR requirements to implement the PM<sub>2.5</sub> NAAQS: (1) Require NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) establish significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and NO<sub>x</sub>); (3) establish PM<sub>2.5</sub> emission offsets; and (4) require states to account for gases that condense to form particles (“condensables”) in PM<sub>2.5</sub> emission limits. In addition, the NSR PM<sub>2.5</sub> Rule gives states the option of allowing interpollutant trading for the purpose of offsets under the PM<sub>2.5</sub> NNSR program. South Carolina’s December 2, 2010, proposed submittal addresses the PSD and NNSR requirements related to EPA’s May 16, 2008, NSR PM<sub>2.5</sub> Rule.

### III. What is the background for the action proposed by EPA in today’s notice regarding the Phase II Rule for NO<sub>x</sub> as an ozone precursor?

Today’s proposed action on the South Carolina SIP also relates to EPA’s Phase II Rule. 70 FR 71612 (November 29, 2005). In the Phase II Rule, EPA finalized regulations to address permit requirements for the 1997 8-hour ozone NAAQS to implement the NSR program by specifically identifying NO<sub>x</sub> as an ozone precursor.

On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS of 0.08 parts per million—also referred to as the 1997 8-hour ozone NAAQS. On April 30, 2004, EPA designated areas as attainment, nonattainment and

unclassifiable for the 1997 8-hour ozone NAAQS. As part of the 2004 designations, EPA also promulgated an implementation rule for the 1997 8-hour ozone NAAQS in two phases. Phase I of EPA’s 1997 8-hour ozone implementation rule (Phase I Rule), published on April 30, 2004, effective on June 15, 2004, provided the implementation requirements for designating areas under subpart 1 and subpart 2 of the CAA (69 FR 23951).

On November 29, 2005, EPA promulgated the second phase for implementation provisions related to the 1997 8-hour ozone NAAQS—also known as the Phase II Rule (70 FR 71612). The Phase II Rule addressed control and planning requirements as they applied to areas designated nonattainment for the 1997 8-hour ozone NAAQS such as reasonably available control technology, reasonably available control measures, reasonable further progress, modeling and attainment demonstrations and NSR, and the impact to reformulated gas for the 1997 8-hour ozone NAAQS transition. The Phase II Rule requirements include, among other changes, a provision stating that NO<sub>x</sub> is an ozone precursor. 70 FR 71612, 71679. In the Phase II Rule, EPA stated as follows:

“The EPA has recognized NO<sub>x</sub> as an ozone precursor in several national rules because of its contribution to ozone transport and the ozone nonattainment problem. The EPA’s recognition of NO<sub>x</sub> as an ozone precursor is supported by scientific studies, which have long recognized the role of NO<sub>x</sub> in ozone formation and transport. Such formation and transport is not limited to nonattainment areas. Therefore, we believe NO<sub>x</sub> should be treated consistently as an ozone precursor in both our PSD and nonattainment NSR regulations. For these reasons, we have promulgated final regulations providing that NO<sub>x</sub> is an ozone precursor in attainment areas.”

Specific to this rulemaking, the Phase II Rule made changes to federal regulations 40 CFR 51.165 and 51.166 (which governs the NNSR and PSD permitting programs respectively).

Pursuant to these requirements, states were required to submit SIP revisions adopting the federal requirements of the Phase II Rule (at 40 CFR 51.165 and 51.166) into their SIP no later than June 15, 2007. On July 1, 2005, South Carolina submitted a SIP revision to adopt the PSD and NNSR provisions amended in the 2002 NSR Reform rules.<sup>3</sup> The SIP revision became state-

effective on June 24, 2005, and adopted PSD and applicable NNSR provisions at 40 CFR 51.165 and 51.166, respectively. Also in the July 1, 2005 submittal, South Carolina recognized NO<sub>x</sub> as an ozone precursor for NSR permitting purposes by adopting provisions into its SIP. At the time of South Carolina’s NSR Reform SIP submittal, the Phase II Rule had not been finalized by EPA. However, the South Carolina NSR program had recognized NO<sub>x</sub> emissions as an ozone precursor in their PSD permitting practice. EPA took final action to approve South Carolina’s NSR Reform SIP revision as well as NO<sub>x</sub> as a precursor provisions into the South Carolina SIP on June 2, 2008. 73 FR 31368. The December 2, 2010, proposed SIP revision (the subject of this action), incorporates a NO<sub>x</sub> as ozone precursor PSD requirement that was not included in the South Carolina’s July 1, 2005, SIP submittal to be consistent with Federal regulations for NSR permitting purposes. Together, South Carolina’s July 1, 2005 (73 FR 31368) and December 2, 2010, SIP revisions incorporate the Phase II Rule permitting requirements pertaining to NO<sub>x</sub> as an ozone precursor into the South Carolina SIP.

### IV. What is EPA’s analysis of South Carolina’s SIP revisions?

South Carolina currently has a SIP-approved NSR program for new and modified stationary sources. South Carolina’s Regulation 61–62.5, Standard Number 7, contains the PSD preconstruction review program and Regulation 61–62.5, Standard Number 7.1 contains the permitting requirements for major sources in or impacting nonattainment areas (NNSR program). Today, EPA is proposing to approve changes to South Carolina’s Regulation 61–62.5 to update South Carolina’s existing NSR program to be consistent with current federal NSR regulations, including adopting regulations amended in the NSR PM<sub>2.5</sub> Rule and the Phase II Rule (at 40 CFR 51.165 and 51.166). More detail is provided below regarding EPA’s analysis of the changes to South Carolina’s SIP as provided in the December 2, 2010, SIP revision.

#### A. EPA’s Analysis of South Carolina’s NSR Rule Revision To Adopt the NSR PM<sub>2.5</sub> Requirements

South Carolina’s Regulation 61–62.5, Standards Number 7 and 7.1 adopt the

published a notice of final action on the reconsideration of the December 31, 2002, final rule changes. The December 31, 2002, and the November 7, 2003, final actions are collectively referred to as the “2002 NSR Reform Rules.”

<sup>2</sup> Additional information on this issue can also be found in an August 12, 2009, final order on a title V petition describing the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>. In the Matter of *Louisville Gas & Electric Company*, Petition No. IV–2008–3, Order on Petition (August 12, 2009).

<sup>3</sup> On December 31, 2002 (67 FR 80186), EPA published final rule changes to 40 CFR parts 51 and 52, regarding the CAA’s PSD and NNSR programs. On November 7, 2003 (68 FR 63021), EPA

provisions at 40 CFR 51.165 and 51.166, respectively, as amended by the promulgation of the NSR PM<sub>2.5</sub> Rule for PSD and NNSR. Specifically, South Carolina's December 2, 2010, proposed SIP revision addresses the following NSR PM<sub>2.5</sub> provisions: (1) Requirement for NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (SO<sub>2</sub> and NO<sub>x</sub>); and (3) requirement of states to address condensable PM in establishing enforceable emission limits for PM<sub>10</sub> or PM<sub>2.5</sub>. In light of EPA's February 11, 2010, proposed rulemaking to repeal the PM<sub>10</sub> "grandfathering" provision, as noted in Section II.C above, South Carolina's December 2, 2010, SIP revision does not address 40 CFR 52.21(i)(1)(ix) promulgated in the NSR PM<sub>2.5</sub> Rule. Even if EPA's proposed repeal of the PM<sub>10</sub> "grandfathering" provision is not finalized before today's action, South Carolina's SIP revision is approvable because it is at least as stringent as current federal law, and is consistent with section 110 of the CAA.

In addition, South Carolina's SIP revision does not incorporate optional provisions set forth at 40 CFR 51.165(a)(11) authorizing the use of interpollutant trading for the purpose of offsets under the PM<sub>2.5</sub> NNSR program. Because the NSR PM<sub>2.5</sub> Rule gives states discretion regarding whether to include interpollutant trading provisions in their PM<sub>2.5</sub> NNSR programs, South Carolina's decision not to adopt such provisions does not affect the approvability of South Carolina's December 2, 2010, draft SIP revision. EPA has preliminarily determined that South Carolina's December 2, 2010, draft SIP revision is consistent with the NSR PM<sub>2.5</sub> Rule for PSD and NNSR and with section 110 of the CAA. *See, e.g.*, NSR PM<sub>2.5</sub> Rule, 75 FR 31514.

#### *B. EPA's Analysis of South Carolina's NSR Rule Revision To Adopt the Phase II Rule Requirement for NO<sub>x</sub> as an Ozone Precursor*

South Carolina's December 2, 2010, proposed SIP revision also updates its PSD permitting regulations at 61–62–5 Standard No. 7. The submittal adds the requirement related to NO<sub>x</sub> as an ozone precursor provision as amended in the Phase II Rule. Specifically, the change addresses the inclusion of "nitrogen oxides" in the footnote at 61–62.5(i)(5)(i) (as amended at 40 CFR 51.166(i)(5)(i)(e)) to recognize NO<sub>x</sub> as an ozone precursor. The provision at 40 CFR 51.166(i)(5)(i)(e) requires sources with a net increase of 100 tons per year or more of NO<sub>x</sub> to perform an ambient impact analysis.

As mentioned above in Section III, South Carolina submitted a SIP revision on July 1, 2005, to update its PSD and NNSR Regulations (at Regulation 61–62.5, Standards No. 7 and 7.1) to adopt the 2002 NSR Reform permitting requirements as well as incorporate provisions recognizing NO<sub>x</sub> as an ozone precursor. The SIP revision became state-effective on June 24, 2005 and EPA took final action to approve the SIP revision on June 2, 2008. 73 FR 31368. Together, South Carolina's July 1, 2005, SIP revision (73 FR 31368, June 2, 2008) and the December 2, 2010, SIP revision (the subject of today's action), incorporate into South Carolina's SIP (at Regulation 61–62.5, Standards No. 7 and 7.1) all of the requirements for permitting pertaining to NO<sub>x</sub> as an ozone precursor as required by the Phase II Rule, 70 FR 71612 (November 29, 2005). EPA is proposing to determine that South Carolina's December 2, 2010, SIP revision is consistent with the federal requirements of the Phase II Rule and the CAA.

#### **V. Proposed Action**

EPA is proposing to approve South Carolina's December 2, 2010, SIP revision adopting federal regulations amended in the NSR PM<sub>2.5</sub> Rule and the Phase II Rule (recognizing NO<sub>x</sub> as an ozone precursor) into the South Carolina SIP. EPA has made the preliminary determination that this SIP revision is approvable because it is in accordance with the CAA and EPA regulations regarding NSR permitting.

#### **VI. 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 proposed 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 proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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 proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: March 7, 2011

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2011–6009 Filed 3–14–11; 8:45 am]

**BILLING CODE 6560–50–P**

## **FEDERAL COMMUNICATIONS COMMISSION**

### **47 CFR Part 73**

[MB Docket No. 11–33, RM–11623; DA 11–406]

### **Television Broadcasting Services; Topeka, KS**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.



**SUMMARY:** The Commission has before it a petition for rulemaking filed by KSQA, LLC, permittee of station KSQA(TV), channel 12, Topeka, Kansas, requesting the substitution of channel 22 for channel 12 at Topeka.

**DATES:** Comments must be filed on or before April 14, 2011, and reply comments on or before April 29, 2011.

**ADDRESSES:** Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: James L. Winston, Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP, 1201 Connecticut Avenue, NW., Suite 200, Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Adrienne Denysyk, [adrienne.denysyk@fcc.gov](mailto:adrienne.denysyk@fcc.gov), Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 11-33, adopted February 22, 2011, and released March 2, 2011. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents

will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-478-3160 or via e-mail <http://www.BCPIWEB.com>. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts (other than *ex parte* presentations exempt under 47

CFR 1.1204(a)) are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1208 for rules governing restricted proceedings.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Television, Television broadcasting.  
Federal Communications Commission.

**Barbara A. Kreisman,**  
*Chief, Video Division, Media Bureau.*

#### Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

#### PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336, and 339.

##### § 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Kansas, is amended by adding channel 22 and removing channel 12 at Topeka.

[FR Doc. 2011-6007 Filed 3-14-11; 8:45 am]

**BILLING CODE 6712-01-P**

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

### Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0124]

#### Notice of Request for Extension of Approval of an Information Collection; Pine Shoot Beetle; Host Material From Canada

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of pine nursery stock and various pine products from Canada to prevent the spread of pine shoot beetle into noninfested areas of the United States.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0124> to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS-2010-0124, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2010-0124.

*Reading Room:* You may read any comments that we receive on this

docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information on regulations for the importation of pine nursery stock and various pine products from Canada, contact Mr. David Lamb, Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737-1236; (301) 734-4312. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

#### SUPPLEMENTARY INFORMATION:

*Title:* Pine Shoot Beetle; Host Material from Canada.

*OMB Number:* 0579-0257.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* As authorized by the Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA.

APHIS regulations in 7 CFR part 319 prohibit or restrict the importation of certain plants and plant products into the United States to prevent the introduction of plant pests. Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products (7 CFR 319.37 through 319.37-14) restricts, among other things, the importation of living plants, plant parts, and seeds for

propagation; and Subpart—Logs, Lumber, and Other Unmanufactured Wood Articles (7 CFR 319.40-1 through 319.40-11) governs the importation of various logs, lumber, and other unmanufactured wood products into the United States. The regulations in both subparts help prevent the introduction and spread of pine shoot beetle, a pest of pine trees, into noninfested areas of the United States and contain several information collection requirements, including permits, additional declarations on certificates and phytosanitary certificates, statements of origin and movement, compliance agreements, and information on designation of products.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.0401709 hours per response.

*Respondents:* Christmas tree and nursery industry.

*Estimated annual number of respondents:* 2,340.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 2,340.

*Estimated total annual burden on respondents:* 94 hours. (Due to averaging, the total annual burden hours

may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011-5957 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. APHIS-2011-0001]

#### Notice of Request for Approval of an Information Collection; National Animal Health Monitoring System; Needs Assessments

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** New information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act, this notice announces the Animal and Plant Health Inspection Service's intention to initiate an information collection to support the research and development phase of surveys entitled National Animal Health Monitoring System needs assessments.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2011-0001> to submit or view comments and to view supporting and related materials available electronically.

- **Postal Mail/Commercial Delivery:** Please send one copy of your comment to Docket No. APHIS-2011-0001, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2011-0001.

**Reading Room:** You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room

hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

**Other Information:** Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information on the Needs Assessment study, contact Mr. Chris Quatrano, Industry Analyst, Centers for Epidemiology and Animal Health, VS, APHIS, 2150 Centre Avenue, Building B MS 2E7, Fort Collins, CO 80526; (970) 494-7207. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

**SUPPLEMENTARY INFORMATION:** *Title:* National Animal Health Monitoring System; Needs Assessments.

*OMB Number:* 0579-xxxx.

*Type of Request:* Approval of a new information collection.

*Abstract:* Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) is authorized, among other things, to protect the health of our Nation's livestock and poultry populations by preventing the introduction and interstate spread of serious diseases and pests of livestock and for eradicating such diseases from the United States when feasible. In connection with this mission, APHIS operates the National Animal Health Monitoring System (NAHMS), which collects nationally representative, statistically valid, and scientifically sound data on the prevalence and economic importance of livestock diseases and associated risk factors. These data will be used by the NAHMS program to:

- Identify the highest priority issues to examine during subsequent commodity surveys;
- Understand current knowledge gaps in the industry;
- Determine the proper scope of future NAHMS studies for each commodity;
- Set objectives for upcoming NAHMS studies;
- Increase response rates through the inclusion of important and timely issues; and
- Improve final report quality and relevance to industry/respondent needs.

Collection and dissemination of animal and poultry health data is mandated by 7 U.S.C. 391, the Animal Industry Act of 1884, which established

the precursor of APHIS. In connection with the mission, APHIS, Veterinary Services is requesting approval to perform multiple needs assessments to help plan upcoming studies.

The purpose of administering needs assessments prior to the design phase of NAHMS studies is to gather producer, veterinary, and industry representatives' opinions, which help determine the focus and scope of NAHMS' studies. This will help strengthen the NAHMS program through collection of timely and relevant information. Needs assessments ensure that the NAHMS program is driven by producer and industry interests and that the studies and reports produced by NAHMS are meeting the needs of the public. No other entity/source is collecting and analyzing data to identify important information needs to be addressed by NAHMS studies.

Needs assessments may be administered to focus groups, industry groups, veterinary associations, or special interest groups. Assessments may be done in person (focus groups), via U.S. mail or via the Internet. Depending on the specific circumstances of the industry being surveyed and the best method to contact respondents, one or more of these methods may be used.

NAHMS will use the information collected during these needs assessment studies to focus on the objectives of its national studies. Producer, veterinary, and industry representatives' summarized opinions may be published in information sheets announcing the upcoming study and objectives of the study. Participation in all NAHMS studies is voluntary.

We are asking the Office of Management and Budget (OMB) to approve the use of these needs assessment surveys for three years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic,

mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.740909 hours per response.

*Respondents:* Focus groups, industry groups, veterinary associations, or special interest groups involved with the swine and dairy industries.

*Estimated annual number of respondents:* 2,200.

*Estimated annual number of responses per respondent:* 0.12136.

*Estimated annual number of responses:* 2,200.

*Estimated total annual burden on respondents:* 163 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011-5955 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0123]

#### Notice of Request for Extension of Approval of an Information Collection; Black Stem Rust; Identification Requirements for Addition of Rust-Resistant Varieties

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the black stem rust quarantine and regulations.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/>

*component/main?main=DocketDetail&d=APHIS-2010-0123* to submit or view comments and to view supporting and related materials available electronically.

• *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS-2010-0123, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2010-0123.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information regarding the black stem rust quarantine and regulations, contact Dr. Prakash Hebbar, National Program Manager, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road, Unit 160, Riverdale, MD 20737-1231; (301) 734-5717. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

#### SUPPLEMENTARY INFORMATION:

*Title:* Black Stem Rust; Identification Requirements for Addition of Rust-Resistant Varieties.

*OMB Number:* 0579-0186.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to prohibit or restrict the importation, entry, or interstate movement of plants and plant products to prevent the introduction of plant pests into the United States or their dissemination within the United States.

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of

alternate host plants that are species of the genera *Berberis*, *Mahoberberis*, and *Mahonia*. The fungus is spread from host to host by wind-borne spores.

The black stem rust quarantine and regulations, contained in 7 CFR 301.38 through 301.38-8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia and govern the interstate movement of certain plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks.

Persons who request the Animal and Plant Health Inspection Service to add a variety to the list of rust-resistant barberry varieties in the regulations must provide the Agency with a description of the variety, including a written description and color pictures that can be used by State nursery inspectors to clearly identify the variety and distinguish it from other varieties. This requirement helps to ensure that State plant inspectors can clearly determine whether plants moving into or through their States are rust-resistant varieties listed in 7 CFR 301.38-2.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 4 hours per response.

*Respondents:* Nurseries.

*Estimated annual number of respondents: 4.*

*Estimated annual number of responses per respondent: 2.*

*Estimated annual number of responses: 8.*

*Estimated total annual burden on respondents: 32 hours.* (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011-5958 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0120]

#### Notice of Request for Extension of Approval of an Information Collection; Importation of Fruits and Vegetables

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of fruits and vegetables.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0120> to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS-2010-0120, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your

comment refers to Docket No. APHIS-2010-0120.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information on regulations associated with the importation of fruits and vegetables, contact Ms. Vanessa Dellis, Trade Director, Phytosanitary Issues Management, PPQ, APHIS, 4700 River Road, Unit 60, Riverdale, MD 20737-1231; (301) 734-3818. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

#### SUPPLEMENTARY INFORMATION:

*Title:* Importation of Fruits and Vegetables.

*OMB Number:* 0579-0128.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* As authorized by the Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA.

The regulations in Subpart—Fruits and Vegetables (7 CFR 319.56-1 through 319.56-50) allow a number of fruits and vegetables to be imported into the United States, under specified conditions, from certain parts of the world. Importation of papayas from certain regions of Brazil, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama into the continental United States, Alaska, Puerto Rico, and the U.S. Virgin Islands requires the use of certain information

collection activities, including phytosanitary certificates, maintaining fruit fly monitoring records, and labeling of boxes.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.2222222 hours per response.

*Respondents:* Importers and exporters of fruits and vegetables, Federal foreign officials.

*Estimated annual number of respondents:* 135.

*Estimated annual number of responses per respondent:* 6.6666666.

*Estimated annual number of responses:* 900.

*Estimated total annual burden on respondents:* 200 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011-5959 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-34-P**

**DEPARTMENT OF AGRICULTURE****Animal and Plant Health Inspection Service**

[Docket No. APHIS-2011-0013]

**Notice of Availability of a Pest Risk Analysis for the Importation of Fresh Papaya Fruit From Malaysia Into the Continental United States****AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Notice.

**SUMMARY:** We are advising the public that we have prepared a pest risk analysis for the purpose of evaluating the pest risks associated with the importation of fresh papaya (*Carica papaya*) fruit from Malaysia into the continental United States. Based on our analysis, we have concluded that the application of one or more designated phytosanitary measures will be sufficient to mitigate the pest risk. We are making the pest risk analysis available to the public for review and comment.

**DATES:** We will consider all comments that we receive on or before May 16, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2011-0013> to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS-2011-0013, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2011-0013.

*Reading Room:* You may read any comments that we receive on the risk analysis in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Phillip B. Grove, Regulatory

Coordinator, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 156, Riverdale, MD 20737; (301) 734-6280.

**SUPPLEMENTARY INFORMATION:****Background**

Under the regulations in “Subpart—Fruits and Vegetables” (7 CFR 319.56-1 through 319.56-50, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56-4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. These measures are:

- The fruits or vegetables are subject to inspection upon arrival in the United States and comply with all applicable provisions of § 319.56-3;
- The fruits or vegetables are imported from a pest-free area in the country of origin that meets the requirements of § 319.56-5 for freedom from that pest and are accompanied by a phytosanitary certificate stating that the fruits or vegetables originated in a pest-free area in the country of origin;
- The fruits or vegetables are treated in accordance with 7 CFR part 305;
- The fruits or vegetables are inspected in the country of origin by an inspector or an official of the national plant protection organization of the exporting country, and have been found free of one or more specific quarantine pests identified by the risk analysis as likely to follow the import pathway; and/or
- The fruits or vegetables are a commercial consignment.

APHIS received a request from the Government of Malaysia to allow the importation of edible fresh fruit of papaya (*Carica papaya*) into the continental United States. Currently, fresh papaya fruit are not authorized for entry from Malaysia. APHIS completed a pest risk analysis for the purpose of evaluating the pest risks associated with the importation of fresh papaya fruit from Malaysia into the continental United States. The analysis consists of a pest list identifying pests of quarantine significance that are present in Malaysia and could follow the pathway of importation into the United

States and a risk management document identifying phytosanitary measures that could be applied to the commodity to mitigate the pest risk.

We have concluded that fresh papaya fruit can safely be imported into the continental United States from Malaysia using one or more of the five designated phytosanitary measures listed in § 319.56-4(b). Therefore, in accordance with § 319.56-4(c), we are announcing the availability of our pest risk analysis for public review and comment. The pest risk analysis may be viewed on the Regulations.gov Web site or in our reading room (*see ADDRESSES* above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the analysis by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the subject of the analysis that you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh papaya fruit from Malaysia in a subsequent notice. If the overall conclusions of the analysis and the Administrator’s determination of risk remain unchanged following our consideration of the comments, then we will begin issuing permits for the importation of fresh papaya fruit from Malaysia into the continental United States subject to the requirements specified in the risk management document.

**Authority:** 7 U.S.C. 450, 7701-7772, and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 9th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011-5961 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-34-P**

**DEPARTMENT OF AGRICULTURE****Farm Service Agency****United States Warehouse Act; Export Food Aid Commodities Licensing Agreement****AGENCY:** Farm Service Agency, USDA.**ACTION:** Notice and request for comments.

**SUMMARY:** The Farm Service Agency (FSA) proposes adding export food aid commodities (EFAC) to the agricultural products for which warehouse licenses may be issued under the United States

Warehouse Act (USWA). Through this notice, FSA is providing an opportunity for anyone to provide comments on this proposal to offer a license for EFAC. EFAC might include corn soy blend, vegetable oil, or pulses such as peas, beans and lentils. Current USWA licenses for agricultural products include grain, cotton, nuts, cottonseed, and dry beans. Warehouse operators that apply voluntarily agree to be licensed, observe the rules for licensing, and pay associated user fees.

**DATES:** We will consider comments that we receive by April 14, 2011.

**ADDRESSES:** We invite you to submit comments on this notice. In your comment, include volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

*E-mail address:* Send comments to: [FSA-USWA@wdc.usda.gov](mailto:FSA-USWA@wdc.usda.gov).

*Mail:* Patricia Barrett, Warehouse Operations Program Manager, FSA, United States Department of Agriculture, STOP 0553, 1400 Independence Avenue, SW., Washington, DC 20250-0553.

*Fax:* (202) 690-3123.

Persons with disabilities who require alternative means for communication of information for this notice (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

**FOR FURTHER INFORMATION CONTACT:** Patricia Barrett, (202) 720-3877.

**SUPPLEMENTARY INFORMATION:**

USWA (7 U.S.C. 241-256) authorizes the Secretary of Agriculture to license warehouse operators who store agricultural products; FSA administers this authority.

USWA provides for licensing and inspection of warehouses used to store agricultural products, issuance of warehouse receipts, including electronic warehouse receipts for all agricultural products, and for other purposes.

USWA licensing program is a voluntary program that is intended to protect depositors of agricultural products in licensed warehouses (7 CFR part 735). The licensing program is based on a written agreement outlining terms and conditions for a warehouse operator to qualify for licensing and requirements to operate the warehouse in compliance with USWA and the regulations.

USWA requires FSA to notify the public and provide the opportunity to comment on agricultural products that are under consideration for a warehouse license. FSA is proposing to create a USWA licensing program for port and transload facility operators storing

EFAC. This proposal is in response to the concerns of export food aid providers regarding the sanitation and security of agricultural commodities temporarily stored and handled in preparation for export under various federal and charitable organization export food aid programs. In many USWA warehouses, commodities are stored in bulk form and commingled. EFAC are typically packaged and "identity preserved," which means that the commodity is stored and handled separate from all other commodities. In other words, the actual commodity deposited in the warehouse is what will be delivered.

The warehouse examination program is designed to ensure the warehouse operator's initial qualification for licensing and continuing compliance with the standards of approval and operation. FSA will conduct examinations of licensed facilities to determine their suitability for proper storage and handling of commodities. The examination will include review of warehouse records, pest management and control, housekeeping, safety, and security of goods in the care and custody of the licensee. The personnel conducting the examinations will verify that all commodities are properly marked and recorded in the warehouse records, and that commodities are stored in licensed space. Facilities must be kept and maintained in sound physical condition. In addition, 7 CFR 735.6 provides regulations for suspension and revocation of a license for those warehouse operators who do not comply with USWA, the regulations, or any licensing or provider agreement.

FSA will review and report on the comments received on this notice. The notice and summary of the comments received will be posted to the USWA Web site at <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=coop&topic=was-ua>.

FSA is inviting you to provide comments to FSA on adding EFAC to the list of products for which FSA issues USWA licenses. In particular, FSA requests comments on EFAC in response to the following questions:

- Should FSA offer a license under the authority of the USWA, for export food aid commodity facility storage and handling?
- What general warehousing and transload facility specifications should be used in the approval and continued licensing of such storage facilities?
- What operational procedures (*i.e.* records, sanitation, security, insurance, and examinations) should be addressed

in a written agreement with the warehouse operator?

- What level and type of financial assurance (bond, letter of credit) should be required to provide security and protection to depositors?
- What fee structure (annual flat rate, hourly, graduated rates based on the size of the facility) should be adopted to fund the administration of this program?
- Should the scope of the license cover all commodities stored in licensed space?

In addition to this notice, general information about FSA's administration of its responsibilities from USWA is available on the FSA Web site. Among other things, the information includes a list of licensed warehouses.

Signed at Washington, DC, on March 9, 2011.

**Val Dolcini,**

*Acting Administrator, Farm Service Agency.*

[FR Doc. 2011-5975 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-05-P**

## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### United States Warehouse Act; Processed Agricultural Products Licensing Agreement

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Farm Service Agency (FSA) proposes adding processed agricultural products to the agricultural products for which warehouse licenses may be issued under the United States Warehouse Act (USWA). Through this notice, FSA is providing an opportunity for anyone to provide comments on this proposal to offer a license for the processed agricultural products that are stored in climate controlled, cooler, and freezer warehouses. An example of a processed agricultural product is apple juice concentrate. In the past, USDA has issued USWA licenses for syrup or sirup, dried fruit, canned foods, cold-pack fruit, seeds, and cherries-in-brine. Current USWA licenses for agricultural products include grain, cotton, nuts, cottonseed, and dry beans. Warehouse operators voluntarily agree to be licensed, observe the rules for licensing, and pay associated user fees.

**DATES:** We will consider comments that we receive by April 14, 2011.

**ADDRESSES:** We invite you to submit comments on this notice. In your comment, include volume, date, and page number of this issue of the **Federal**

**Register.** You may submit comments by any of the following methods:

- *E-mail address:* Send comments to: [FSA-USWA@wdc.usda.gov](mailto:FSA-USWA@wdc.usda.gov).

- *Mail:* Patricia Barrett, Warehouse Operations Program Manager, FSA, United States Department of Agriculture, Mail Stop 0553, 1400 Independence Ave, SW., Washington, DC 20250-0553.

- *Fax:* (202) 690-3123.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) for this information should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

**FOR FURTHER INFORMATION CONTACT:** Patricia Barrett, (202) 720-3877.

**SUPPLEMENTARY INFORMATION:**

USWA (7 U.S.C. 241-256) authorizes the Secretary of Agriculture to license warehouse operators who store agricultural products; FSA administers this authority.

USWA provides for licensing and inspection of warehouses used to store agricultural products, issuance of warehouse receipts, including electronic warehouse receipts for all agricultural products, and for other purposes.

The USWA licensing program is a voluntary program that is intended to protect depositors of agricultural products in licensed warehouses (7 CFR part 735). The licensing program is based on a written agreement outlining the terms and conditions for a warehouse operator to qualify for licensing, and requirements to operate the warehouse in compliance with USWA and the regulations.

USWA requires FSA to notify the public and provide the opportunity to comment on agricultural products that are under consideration for a warehouse license. FSA is proposing to create a voluntary USWA licensing program for processed agricultural products that are stored in climate controlled, cooler, and freezer warehouses. This proposal covers specific processed agricultural products such as apple juice concentrate and other similar products. This proposal is in response to an industry request, which is based on their need for the use of negotiable warehouse receipts in their business processes.

The warehouse examination program is designed to ensure the warehouse operator's initial qualification for licensing and continuing compliance with the standards of approval and operation. FSA will conduct examinations of licensed facilities to determine their suitability for proper storage and handling of commodities. The examination will include review of

warehouse records, pest management and control, housekeeping, safety, and security of goods in the care and custody of the licensee. The personnel conducting the examinations will verify that all commodities are properly marked and recorded in the warehouse records, and that commodities are stored in licensed space. Facilities must be kept and maintained in sound physical condition. In addition, 7 CFR 735.6 provides regulations for suspension and revocation of a license for those warehouse operators who do not comply with USWA, the regulations, or any licensing or provider agreement.

FSA will review and report on the comments received on this notice. The notice and summary of the comments received will be posted to the USWA Web site at <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=coop&topic=was-ua>.

FSA is inviting you to submit comments to FSA on adding processed agricultural products to the list of products for which FSA issues USWA licenses. In particular, FSA requests comments on processed agricultural products in response to the following questions:

- Should FSA offer a license for processed agricultural products such as apple juice concentrate?
- What types of storage facilities should such a license include: climate controlled warehouses, refrigerated warehouses, and freezer warehouses?
- What operational procedures (for examples, sanitation, security, records, insurance, examinations) should be addressed in a written agreement with the warehouse operator?
- What level and type of financial assurance (bond, letter of credit) should be required to provide security and protection to depositors?
- USWA specifies that user fees are to cover the costs to administer this program. Therefore, what fee structure (annual flat rate, hourly, graduated rates based on the size of the facility) should be applied to fund the administration of this program?
- Should the scope of the license cover all or only certain agricultural processed products stored in licensed space?

In addition to this notice, general information about FSA's administration of its responsibilities from USWA is available on the FSA Web site. Among other things, the information includes a list of licensed warehouses.

Signed at Washington, DC, on March 9, 2011.

**Val Dolcini,**

*Acting Administrator, Farm Service Agency.*

[FR Doc. 2011-5973 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-05-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Information Collection; Small Business Timber Sale Set-Aside Program; Appeal Procedures on Recomputation of Shares

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension with no revision of a currently approved information collection, Small Business Timber Sale Set-Aside Program: Appeal Procedures on Recomputation of Shares.

**DATES:** Comments must be received in writing on or before May 16, 2011 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Comments concerning this notice should be addressed to Sharon Nygaard-Scott, Forest Management Staff, Mail Stop 1103, Forest Service, USDA, 1400 Independence Avenue, SW., Washington, DC 20250.

Comments also may be submitted via facsimile to 202-205-1045 or by e-mail to: [wosbaprocess@fs.fed.us](mailto:wosbaprocess@fs.fed.us). In addition, comments may be submitted via the World Wide Web/Internet at: <http://www.regulations.gov>.

The public may inspect comments received at the Forest Service, USDA, Forest Management Staff Office, Third Floor SW, 201 14th Street, SW., Washington, DC, during normal business hours. Visitors are encouraged to call ahead to 202-205-1766 to facilitate entrance into the building. Additionally, comments may be viewed on the World Wide Web/Internet at <https://fsplaces.fs.fed.us/fsfiles/unit/wosbaprocess.nsf>.

**FOR FURTHER INFORMATION CONTACT:** Sharon Nygaard Scott, Forest Management Staff, at 202-205-1766. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339, twenty-four hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:**



*Title:* Small Business Timber Sale Set-Aside Program; Appeal Procedures on Recomputation of Shares.

*OMB Number:* 0596-0141.

*Expiration Date of Approval:* October 31, 2010.

*Type of Request:* Extension with no Revision.

*Abstract:* The Forest Service adopted the Small Business Timber Sale Set-Aside Program on July 26, 1990 (55 FR 30485). The Agency administers the program in cooperation with the Small Business Administration (SBA) under the authorities of the Small Business Act (15 U.S.C. 631), the National Forest Management Act of 1976, and SBA regulations in 13 CFR part 121. The program is designed to ensure that small business timber purchasers have the opportunity to purchase a fair proportion of National Forest System timber offered for sale.

Under the program, the Forest Service must recompute the shares of timber sales to be set aside for qualifying small businesses every 5 years based on the actual volume of sawtimber that has been purchased by small businesses. Shares must be recomputed if there is a change in manufacturing capability, if the purchaser size class changes, or if certain purchasers discontinue operations.

In 1992, the Agency adopted new administrative appeal procedures (36 CFR part 215), which excluded the Small Business Timber Sale Set-Aside Program. Prior to adoption of 36 CFR part 215, the Agency had accepted appeals of recomputations decisions under 36 CFR part 217; and therefore decided to establish procedures for providing notice to affected purchasers offering an opportunity to comment on the recomputation of shares (61 FR 7468). The Conference Report accompanying the 1997 Omnibus Appropriation Act (Pub. L. 104-208) directed the Forest Service to reinstate an appeals process for decisions concerning recomputation of Small Business Set-Aside shares, structural recomputations of SBA shares, or changes in policies impacting the Small Business Timber Set-Aside Program prior to December 31, 1996. The Small Business Timber Sale Set-Aside Program: Appeal Procedures on Recomputation of Shares (36 CFR 223.118; 64 FR 411, January 5, 1999) outlines the types of decisions that are subject to appeal, who may appeal decisions, the procedures for appeal decisions, the timelines for appeal, and the contents of the notice of appeal.

The Forest Service provides qualifying timber sale purchasers 30-days for predecisional review and

comment on draft decisions to reallocate shares, including the data used in making the proposed recomputation decision. Within 15 days after the close of the 30-day predecisional review period, an Agency official makes a decision on the shares to be set aside for small businesses and gives written notice of the decision to all parties on the national forest timber sale bidders list for the affected area. The written notice provides the date by which the appeal may be filed and how to obtain information on appeal procedures.

Only those timber sale purchasers, or their representatives, affected by small business share timber sale set-aside recomputation decisions and who have submitted predecisional comments may appeal recomputation decisions. The appellant must file a notice of appeal with the appropriate Forest Service official within 20 days of the date of the notice of decision. The notice of appeal must include:

1. The appellant's name, mailing address, and day time telephone number;
2. The title and date of the decision;
3. The name of the responsible Forest Service official;
4. A brief description and date of the decision being appealed;
5. A statement of how the appellant is adversely affected by the decision being appealed;
6. A statement of facts in dispute regarding the issue(s) raised by the appeal;
7. Specific references to law, regulation, or policy that the appellant believes have been violated (if any) and the basis for such an allegation;
8. A statement as to whether and how the appellant has tried to resolve the appeal issues with the appropriate Forest Service official, including evidence of submission of written comments at the predecisional stage; and
9. A statement of the relief the appellant seeks.

The data gathered in this information collection is not available from other sources.

*Estimate of Annual Burden:* 4 hours.

*Type of Respondents:* Timber sale purchasers, or their representatives, who are affected by recomputations of the small business share of timber sales.

*Estimated Annual Number of Respondents:* 40.

*Estimated Annual Number of Responses per Respondent:* 2.

*Estimated Total Annual Burden on Respondents:* 320.

#### **Comment Is Invited**

Comment is invited on: (1) Whether this collection of information is

necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: March 9, 2011.

**James M. Pena,**

*Associate Deputy Chief, National Forest System.*

[FR Doc. 2011-5884 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-11-P**

## **DEPARTMENT OF AGRICULTURE**

### **Forest Service**

#### **Bridger-Teton National Forest Resource Advisory Committee**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Bridger-Teton Resource Advisory Committee will meet in Kemmerer, Wyoming. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110-343) and in compliance with the Federal Advisory Committee Act. The purpose is to listen to proposed project presentations.

**DATES:** The meeting will be held on March 21, 2011, and will begin at 5 p.m.

**ADDRESSES:** The meeting will be held at the South Lincoln Training and Event Center, 215 Wyoming Highway 233, Kemmerer, WY. Written comments should be sent to Tracy Hollingshead, Bridger-Teton National Forest, 308 Hwy 189 North, Kemmerer, WY 83101. Comments may also be sent via e-mail to [thollingshead@fs.fed.us](mailto:thollingshead@fs.fed.us), or via facsimile to 307-828-5135.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may

inspect comments received at Bridger-Teton National Forest, Hwy 189 North, Kemmerer, WY 83101. Visitors are encouraged to call ahead to 307-877-4415 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:**

Tracy Hollingshead, DFO, USDA, Bridger-Teton National Forest, Hwy 189 North, Kemmerer, WY 83101; (307) 877-4415; *E-mail:*

*thollingshead@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. The following business will be conducted: (1) Approve minutes from November 29, 2010, February 14, 2011 and February 28, 2011 meetings; (2) Discuss proposed project presentations; (3) Vote on proposed projects; and (4) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: March 4, 2011.

**Tracy Hollingshead,**

*Designated Federal Officer.*

[FR Doc. 2011-6029 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-11-P**

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**Tri-County Advisory Committee Meeting**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92-463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106-393) the Beaverhead-Deerlodge National Forest's Tri-County Resource Advisory Committee will meet on Thursday April 7, 2011, from 5 p.m. until 8 p.m., in Deer Lodge, Montana. The purpose of the meeting is to review funding proposals for Title II funding.

**DATES:** Thursday, April 7, 2011, from 5 p.m. until 8 p.m.

**ADDRESSES:** The meeting will be held at the USDA building located 1002 Hollenback Road, Deer Lodge, Montana (MT 59722).

**FOR FURTHER INFORMATION CONTACT:**

Patty Bates, Committee Coordinator, Beaverhead-Deerlodge National Forest,

420 Barrett Road, Dillon, MT 59725 (406) 683-3979; e-mail *pbates@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** Agenda for this meeting include discussion about (1) accomplishments; (2) election of a new chairperson; and (3) budget, priorities and funding for new project proposals. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: March 7, 2011.

**David R. Myers,**

*Designated Federal Official.*

[FR Doc. 2011-5787 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-11-M**

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**Eastern Idaho Resource Advisory Committee; Caribou-Targhee National Forest, Idaho Falls, ID**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92-463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106-393) the Caribou-Targhee National Forests' Eastern Idaho Resource Advisory Committee will meet Friday, March 25, 2011 in Idaho Falls, Idaho for a business meeting. The meeting is open to the public.

**DATES:** The business meeting will be held on March 25, 2011, from 9 a.m. until finished.

**ADDRESSES:** The meeting location is the Caribou-Targhee National Forest Headquarters Office, 1405 Hollipark Drive, Idaho Falls, Idaho 83401.

**FOR FURTHER INFORMATION CONTACT:** Brent Larson, Caribou-Targhee National Forest Supervisor and Designated Federal Officer, at (208) 524-7500.

**SUPPLEMENTARY INFORMATION:** The business meeting on March 25, 2011, begins at 9 a.m., at the Caribou-Targhee National Forest Headquarters Office, 1405 Hollipark Drive, Idaho Falls, Idaho. Agenda topics will include approving projects for 2010-3rd year and 2011-4th year funding.

Dated: March 1, 2011.

**Brent L. Larson,**

*Caribou-Targhee Forest Supervisor.*

[FR Doc. 2011-5809 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-11-M**

**DEPARTMENT OF AGRICULTURE**

**Rural Housing Service**

**Rural Business-Cooperative Service**

**Rural Utilities Service**

**Notice of Request for Revision of a Currently Approved Information Collection**

**AGENCIES:** Rural Housing Service, Business-Cooperative Service, and Rural Utilities Service, USDA.

**ACTION:** Proposed collection; comments requested.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces Rural Development's intention to request a revision for a currently approved information collection in support of loan programs administered by the Rural Housing Service, Business-Cooperative Service, and Rural Utilities Service.

**DATES:** Comments on this notice must be received by May 16, 2011 to be assured of consideration.

**FOR FURTHER INFORMATION CONTACT:**

Karen Warr, Staff Accountant, Office of the Deputy Chief Financial Officer, Policy and Internal Review Division, U.S. Department of Agriculture, STOP 33, 4300 Goodfellow Blvd., Bldg. 104, St. Louis, MO 63120, Telephone: (314) 457-4291.

**SUPPLEMENTARY INFORMATION:**

*Title:* Form RD 1951-65, Customer Initiated Payments (CIP) Enrollment Form; Form RD 1951-66, FedWire Worksheet, and Form RD 3550-28, Authorization Agreement for Preauthorized Payments.

*OMB Number:* 0575-0184.

*Expiration Date of Approval:* August 31, 2011.

*Type of Request:* Revision of a currently approved information collection.

*Abstract:* Rural Development uses electronic methods (Customer Initiated Payments [CIP], FedWire, and Preauthorized Debits [PAD]) for receiving and processing loan payments and collections. These electronic collection methods provide a means for Rural Development borrowers to transmit loan payments from their financial institution (FI) accounts to Rural Development's Treasury Account and receive credit for their payments.

To administer these electronic loan collection methods, Rural Development collects the borrower's FI routing information (routing information includes the FI routing number and the borrower's account number). Rural

Development uses Agency approved forms for collecting bank routing information for CIP, FedWire, and PAD.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .5 hours per response. Each Rural Development borrower who elects to participate in electronic loan payments will only prepare one response for the life of their loan unless they change financial institutions or accounts.

*Respondents:* Business or other for-profit; Not-for-profit institutions; and State, Local, or Tribal Government.

*Estimated Number of Respondents:* 4,991.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Number of Responses:* 4,991.

*Estimated Total Annual Burden on Respondents:* 2,291 hours.

Copies of this information collection can be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, at (202) 692-0043.

*Comments are invited on:* (1) The need for the information including whether the information has practical utility; (2) the accuracy of the reporting burden estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents.

Comments should be submitted to Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, Rural Development, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250-0742. All responses to this notice will be summarized, included in the request for Office of Management and Budget (OMB) approval, and will become a matter of public record.

Dated: March 3, 2011.

**Tammye Treviño,**

*Administrator, Rural Housing Service.*

[FR Doc. 2011-5952 Filed 3-14-11; 8:45 am]

**BILLING CODE 3410-XV-P**

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## DEPARTMENT OF COMMERCE

### Office of the Secretary

#### **Proposed Information Collection; Comment Request; Complaint of Discrimination Against the U.S. Department of Commerce**

**AGENCY:** Office of the Secretary, Office of Civil Rights.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before May 16, 2011.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Kathryn Anderson, 202-482-3680, or [KAnderson@doc.gov](mailto:KAnderson@doc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Abstract**

The Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR 1614.106 require that a Federal employee or applicant for Federal employment alleging discrimination based on race, color, sex, national origin, religion, age, disability, or reprisal for protected activity must submit a signed statement that is sufficiently precise to identify the actions or practices that form the bases of the complaint. Although complainants are not required to use the proposed form to file their complaints, the Office of Civil Rights strongly encourages its use to ensure efficient case processing and trend analyses of complaint activity. The proposed form is an update of a previously approved collection. The revisions update the room and fax numbers for the submission of complaints, make collection of the complainant's Social Security Number optional, clarify the information requested about the organizational and geographic location where the complaint arose, and provide space for complainants and representatives to supply e-mail addresses.

##### **II. Method of Collection**

A paper form, signed by the complainant or his or her designated representative, must be submitted by mail or delivery service, in person, or by facsimile transmission.

##### **III. Data**

*OMB Control Number:* 0690-0015.  
*Form Number:* CD-498.

*Type of Review:* Regular submission.  
*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 400.

*Estimated Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 200.

*Estimated Total Annual Cost to Public:* \$156.

#### **IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 10, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011-5935 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-BP-P**

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## DEPARTMENT OF COMMERCE

### Office of the Secretary/Office of the Chief Information Officer

#### **Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery**

**AGENCY:** Office of the Secretary/Office of the Chief Information Officer, Commerce.

**ACTION:** 30-Day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

**SUMMARY:** As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, U.S. Department of Commerce has submitted a Generic Information Collection

Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*).

**DATES:** Comments must be submitted April 14, 2011.

**ADDRESSES:** Written comments may be submitted Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)) or Nicholas Fraser, OMB Desk Officer, FAX number (202) 395-7285, or via the Internet at [Nicholas\\_F.\\_Fraser@omb.eop.gov](mailto:Nicholas_F._Fraser@omb.eop.gov).

**FOR FURTHER INFORMATION CONTACT:**

Requests for additional information or copies of the information collection instrument and instructions should be directed to Gwellnar Banks, Department of Commerce, Office of the Chief Information Officer, (202) 482-3781 or via the Internet at [gbanks@doc.gov](mailto:gbanks@doc.gov).

**SUPPLEMENTARY INFORMATION:**

*Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

*Abstract:* The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program

performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide Department of Commerce projected average estimates for the next three years: <sup>1</sup>

*Current Actions:* New collection of information.

*Type of Review:* New Collection.

*Affected Public:* Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

*Average Expected Annual Number of Activities:* 400.

*Respondents:* 153,140.

*Annual responses:* 153,140,

*Frequency of Response:* Once per request.

*Average minutes per response:* 30.

*Burden hours:* 28,840.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Dated: March 10, 2011.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011-5979 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-17-P**

<sup>1</sup> The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance Federal-wide:

*Average Expected Annual Number of activities:* 25,000.

*Average number of Respondents per Activity:* 200.

*Annual responses:* 5,000,000.

*Frequency of Response:* Once per request.

*Average minutes per response:* 30.

*Burden hours:* 2,500,000.

**DEPARTMENT OF COMMERCE**

**U.S. Census Bureau**

**Proposed Information Collection; Comment Request; 2012 Economic Census Covering the Manufacturing Sector**

**AGENCY:** U.S. Census Bureau.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** To ensure consideration, written comments must be submitted on or before May 16, 2011.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:**

Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Julius Smith, Jr., U.S. Census Bureau, Manufacturing and Construction Division, Room 7K055, 4600 Silver Hill Road, Washington, DC 20233, telephone (301) 763-7662, (or via the Internet at [julius.smith.jr@census.gov](mailto:julius.smith.jr@census.gov)).

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The Census Bureau is the preeminent collector and provider of timely, relevant and quality data about the people and economy of the United States. Economic data are the Census Bureau's primary program commitment during non-decennial census years. The economic census, conducted under authority of Title 13 United States Code, is the primary source of facts about the structure and functioning of the Nation's economy and features unique industry and geographic detail. Economic census statistics serve as part of the framework for the national accounts and provide essential information for government, business and the general public. The 2012 Economic Census covering the Manufacturing Sector will measure the economic activity for more than 291,000 manufacturing establishments.

The information collected from companies in the manufacturing sector of the economic census will produce basic statistics by industry for number of establishments, payroll, employment, value of shipments, value added, capital expenditures, depreciation, materials consumed, selected purchased services, electric energy used and inventories held.

Primary strategies for reducing burden in Census Bureau economic data collections are to increase electronic reporting through broader use of computerized self-administered census questionnaires, electronic data interchange, and other electronic data collection methods.

**II. Method of Collection**

Establishments included in this collection will be selected from a frame given by the Census Bureau's Business Register. To be eligible for selection, an establishment will be required to satisfy the following conditions: (i) It must be classified in the manufacturing sector; (ii) it must be an active operating establishment of a multi-establishment company, or it must be an operating single-establishment company with payroll; and (iii) it must be located in one of the 50 states or the District of Columbia. Most establishments will be included in the mail portion of the collection. Forms tailored for the particular kind of business will be mailed to the establishment to be filled out and returned. Establishments not meeting certain cutoffs for payroll will be included in the non-mail portion of the collection. We will use administrative data in lieu of collecting data directly from these establishments.

Mail selection procedures will distinguish several groups of establishments. Establishment selection to a particular group is based on a number of factors. The more important considerations are the size of the company and whether it is included in the intercensal Annual Survey of Manufacturers (ASM) sample panel. The ASM panel is representative of both large and small establishments from the mail component of the manufacturing census. The ASM sample panel includes approximately 51,000 establishments. The various groups of establishments that will constitute the 2012 Economic Census are outlined below.

*A. Establishments of Multi-Establishment Companies*

Selection procedures will assign eligible establishments of multi-

establishment companies to the mail components of the universe.

We estimate that the census mail canvass for 2012 will include the following:

- 1. ASM sample establishments: 33,000.
- 2. Non-ASM: 25,000.

*B. Single-Establishment Companies Engaged in Manufacturing Activity With Payroll*

As an initial step in the selection process, we will analyze the potential universe for manufacturing. This analysis will produce a set of industry-specific payroll cutoffs that we will use to distinguish large versus small-establishment companies within each industry. This payroll size distinction will affect selection as follows:

**1. Large Single-Establishment Companies**

Single-establishment companies having annualized payroll (from Federal administrative records) that equals or exceeds the cutoff for their industry will be assigned to the mail component of the universe.

We estimate that the census mail canvass for 2012 will include the following:

- a. ASM sample establishments: 18,000.
- b. Non-ASM: 58,000.

**2. Small Single-Establishment Companies**

In selected industries, small single-establishment companies that satisfy a particular criteria (administrative record payroll cutoff) will receive a manufacturing short form, which will collect a reduced amount of basic statistics and other essential information that is not available from administrative records.

We estimate that the census mail canvass for 2012 will include approximately 34,000 companies in this category. This category does not contain ASM establishments.

3. All remaining single-establishment companies with payroll will be represented in the census by data estimated from Federal administrative records. Generally, we do not include these small employers in the census mail canvass.

We estimate that this category for 2012 will include approximately 123,000 manufacturing companies.

**III. Data**

*OMB Control Number: 0607-0938.*

*Form Number:* The forms used to collect information from businesses in this sector of the economic census are tailored to specific business practices and are too numerous to list separately in this notice. You can obtain information on the proposed content at this Web site: <http://www.census.gov/mcd/clearance>.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for profit, not-for-profit institutions, and small business or organizations.

*Estimated Number of Respondents:*

ASM .....	51,000
Non-ASM (Long Form) .....	83,000
Non-ASM (Short Form) .....	34,000
<b>Total .....</b>	<b>168,000</b>

*Estimated Time per Response:*

	Hours
ASM .....	6.2
Non-ASM (Long Form) .....	4.0
Non-ASM (Short Form) .....	2.5

*Estimated Total Annual Burden Hours:* 733,200.

*Estimated Total Annual Cost:* \$23,770,344.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Sections 131 and 224.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 10, 2011.

**Glenna Mickelson,**  
*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011-5990 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-07-P**

**DEPARTMENT OF COMMERCE****Census Bureau****Proposed Information Collection; Comment Request; 2012 Economic Census Covering the Information, etc.**

**AGENCY:** U.S. Census Bureau, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** To ensure consideration, written comments must be submitted on or before May 16, 2011.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Jack R. Drago, U.S. Census Bureau, Service Sector Statistics Division, HQ-8K059, 4600 Silver Hill Road, Washington, DC 20233-0001 (301-763-7190 or via the Internet at [scb@census.gov](mailto:scb@census.gov)).

**SUPPLEMENTARY INFORMATION:****I. Abstract**

The economic census, conducted under authority of Title 13, United States Code (U.S.C.), is the primary source of facts about the structure and functioning of the Nation's economy. Economic statistics serve as part of the framework for the national accounts and provide essential information for government, business, and the general public. Economic data are the Census Bureau's primary program commitment during nondecennial census years. The 2012 Economic Census covering the Information; Professional, Scientific, and Technical Services; Management of Companies and Enterprises; Administrative and Support and Waste Management and Remediation Services; Educational Services; Health Care and Social Assistance; Arts, Entertainment, and Recreation; and Other Services (Except Public Administration) sectors

(as defined by the North American Industry Classification System (NAICS)) will measure the economic activity of approximately 3.0 million establishments. The information collected will produce basic statistics by kind of business on the number of establishments, receipts/revenue, expenses, payroll, and employment. It will also yield a variety of subject statistics, including receipts/revenue by product line, receipts/revenue by class of customer, and other industry-specific measures. Primary strategies for reducing burden in Census Bureau economic data collections are to increase reporting through standardized questionnaires and broader electronic data collection methods.

**II. Method of Collection***Mail Selection Procedures*

Establishments for the mail canvass will be selected from the Census Bureau's Business Register. To be eligible for selection, an establishment will be required to satisfy the following conditions: (i) It must be classified in the Information; Professional, Scientific, and Technical Services; Management of Companies and Enterprises; Administrative and Support and Waste Management and Remediation Services; Educational Services; Health Care and Social Assistance; Arts, Entertainment, and Recreation; or Other Services (except Public Administration) sector; (ii) it must be an active operating establishment of a multi-establishment firm (*i.e.*, a firm that operates at more than one physical location), or it must be a single-establishment firm with payroll (*i.e.*, a firm that operates at only one physical location); and (iii) it must be located in one of the 50 States or the District of Columbia. Mail selection procedures will distinguish the following groups of establishments:

1. Establishments of Multi-Establishment Firms

All active operating establishments of multi-establishment firms will be included in the mail component of the potential respondent universe. We estimate that the 2012 Economic Census mail canvasses will include approximately 598,698 establishments of multi-establishment firms.

2. Single-Establishment Firms With Payroll

As an initial step in the selection process, we will conduct a study of the potential respondent universe. This study will produce a set of industry-specific payroll cutoffs that we will use to distinguish large versus small single-

establishment firms within each industry or kind of business. This payroll size distinction will affect selection as follows:

a. Large Single-Establishment Firms

All single-establishment firms having annualized payroll (from Federal administrative records) that equals or exceeds the cutoff for their industry will be included in the mail component of the potential respondent universe. We estimate that the 2012 Economic Census mail canvasses will include approximately 595,742 large single-establishment firms.

b. Small Single-Establishment Firms

A sample of single-establishment firms having annualized payroll below the cutoff for their industry will be included in the mail component of the potential respondent universe. Sampling strata and corresponding probabilities of selection will be determined by a study of the potential respondent universe conducted shortly before the mail selection operations begin. We estimate that the 2012 Economic Census mail canvasses will include approximately 195,662 small single-establishment firms selected in this sample.

All remaining single-establishment firms with payroll will be represented in the census by data from Federal administrative records. Generally, we will not include these small employers in the census mail canvasses. However, administrative records sometimes have fundamental industry classification deficiencies that make them unsuitable for use in producing detailed industry statistics by geographic area. When we find such a deficiency, we will mail the firm a census classification form. We estimate that the 2012 Economic Census mail canvasses will include approximately 348,402 small single-establishment firms that receive these forms.

**III. Data**

*OMB Control Number:* 0607-0934.

*Form Number:* The 85 standard forms, 22 classification forms, and six ownership or control fliers used to collect information from businesses in these sectors of the Economic Census are tailored to specific business practices and are too numerous to list separately in this notice.

*Type of Review:* Regular submission.

*Affected Public:* State or local governments, businesses, or other for-profit or non-profit institutions or organizations.

*Estimated Number of Respondents:* 1,542,829.

*Estimated Time per Response:* .95 hours.

*Estimated Total Annual Burden Hours:* 1,462,751 hours.

*Estimated Total Annual Cost:* \$42,434,751.

*Respondent's Obligation:* Mandatory.

**Legal Authority:** Title 13 U.S.C. Section 131 and 224.

#### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 10, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011-5980 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-07-P**

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#### DEPARTMENT OF COMMERCE

##### Census Bureau

#### Proposed Information Collection; Comment Request; 2012 Economic Census Covering the Construction Sector

**AGENCY:** U.S. Census Bureau.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** To ensure consideration, written comments must be submitted on or before May 16, 2011.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Julius Smith, Jr., U.S. Census Bureau, Manufacturing and Construction Division, Room 7K055, 4600 Silver Hill Road, Washington, DC 20233, telephone (301) 763-7662 (or via the Internet at [julius.smith.jr@census.gov](mailto:julius.smith.jr@census.gov)).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The Census Bureau is the preeminent collector and provider of timely, relevant and quality data about the people and economy of the United States. Economic data are the Census Bureau's primary program commitment during non-decennial census years. The economic census, conducted under authority of Title 13, United States Code, is the primary source of facts about the structure and functioning of the Nation's economy and features unique industry and geographic detail. Economic census statistics serve as part of the framework for the national accounts and provide essential information for government, business and the general public. The 2012 Economic Census covering the Construction Sector (as defined by the North American Industry Classification System (NAICS)) is a sample survey that will measure the economic activity of almost 650,000 establishments engaged in building construction and land subdivision and land development, heavy construction (except buildings), such as highways, power plants, pipelines; and construction activity by special trade contractors.

The information collected from businesses in this sector of the economic census will produce basic statistics by industry for number of establishments, value of construction work, payroll, employment, selected costs, depreciable assets, inventories, and capital expenditures. It also will yield a variety of subject statistics, including estimates of type of construction work done, kind of business activity, size of establishments and other industry-specific measures.

Primary strategies for reducing burden in Census Bureau economic data collections are to increase electronic reporting through broader use of

computerized self-administered census questionnaires, on-line questionnaires and other electronic data collection methods.

##### II. Method of Collection

The construction industry sector of the economic census will select establishments for its mail canvass from a sample frame extracted from the Census Bureau's Business Register. To be eligible for selection, an establishment will be required to satisfy the following conditions: (i) It must be classified in the construction industry sector; (ii) it must be an active operating establishment of a multi-establishment firm, or it must be a single-establishment firm with payroll for at least one quarter of calendar year 2012; and (iii) it must be located in one of the 50 States or the District of Columbia. Mail selection procedures will distinguish the following groups of establishments:

##### A. Establishments of Multi-Establishment Firms

Selection procedures will assign all active construction establishments of multi-establishment firms to the mail component of the potential respondent universe. We estimate that the mail canvass for the 2012 construction sector will include approximately 18,000 establishments of multi-establishment firms.

##### B. Single-Establishment Firms With Payroll

In the fall of 2011, the Census Bureau will conduct a limited classification refile operation (*see Federal Register* Notice issued December 2010, 2012 Economic Census Classification Report for Construction, Manufacturing, and Mining Sectors). Within the construction sector, this refile will be directed to single-establishment firms in the Business Register with a NAICS industry code within the 236 subsector. This specific subsector was problematic in the 2007 Economic Census. The goal of the refile is to obtain accurate 6-digit NAICS industry codes for these single-establishment firms prior to the sampling operation. We are not aware of other systematic coding issues that need to be addressed via this refile.

The primary goal is to produce reliable State level estimates for each NAICS industry. We will use a stratified probability-proportionate-to-size (PPS) sample strategy for selecting the sample of single-establishment firms. The population of eligible single-establishment firms will be partitioned into State by NAICS strata. Within each stratum, each establishment will be

assigned a probability of selection that is a function of its relative size within the stratum (payroll) and a stratum-specific reliability constraint. The larger establishments in a stratum may have probabilities equal to 1.00. Within each stratum, an independent sample will be selected. We will use a fixed sample size selection method for selecting the sample. This technique considerably improves the reliability of the resulting survey estimates by eliminating the variability associated with a variable sample size. The impact of the multi-establishment firms within each stratum will be taken into account in deriving the target sample size from the single-establishment firm population. We estimate that the mail canvass for the 2012 construction sector will include approximately 112,000 establishments of single-establishment firms.

### III. Data

*OMB Control Number:* 0607-0935.  
*Form Number:* CC-23601, CC-23701, CC-23801-4. You can obtain information on the proposed content at this Web site: <http://www.census.gov/mcd/clearance>.

*Type of Review:* Regular submission.  
*Affected Public:* Businesses or other for profit, non-profit institutions or organizations, and State or Local Governments.

*Estimated Number of Respondents:* 130,000.

*Estimated Time per Response:* 2.9 hours.

*Estimated Total Annual Burden Hours:* 377,000.

*Estimated Total Annual Cost:* \$12,222,340.

*Respondent's Obligation:* Mandatory.

**Legal Authority:** Title 13, United States Code, Sections 131 and 224.

### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection;

they also will become a matter of public record.

Dated: March 10, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011-5981 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-07-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-583-841]

#### Antidumping Duty Order: Polyvinyl Alcohol From Taiwan

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC), the Department is issuing an antidumping duty order on polyvinyl alcohol (PVA) from Taiwan.

**DATES:** *Effective Date:* March 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** Thomas Schauer at (202) 482-0410, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

#### SUPPLEMENTARY INFORMATION:

##### Background

On February 1, 2011, the Department published its affirmative final determination of sales at less than fair value in the antidumping duty investigation of PVA from Taiwan. *See Polyvinyl Alcohol From Taiwan: Final Determination of Sales at Less Than Fair Value*, 76 FR 5562 (February 1, 2011).

On March 9, 2011, the ITC notified the Department of its final determination, pursuant to section 735(d) of the Tariff Act of 1930, as amended (the Act), that an industry in the United States is materially injured by reason of less-than-fair-value imports of PVA from Taiwan within the meaning of section 735(b)(1)(A)(i) of the Act. *See Polyvinyl Alcohol from Taiwan* (Investigation No. 731-TA-1088 (Final), USITC Publication 4218, March 2011).

##### Scope of the Order

The merchandise covered by this antidumping duty order is PVA. This product consists of all PVA hydrolyzed in excess of 80 percent, whether or not mixed or diluted with commercial levels of defoamer or boric acid. PVA in

fiber form and PVB-grade low-ash PVA are not included in the scope of this order. PVB-grade low-ash PVA is defined to be PVA that meets the following specifications: Hydrolysis, Mole % of 98.40 +/- 0.40, 4% Solution Viscosity 30.00 +/- 2.50 centipois, and ash—ISE, wt% less than 0.60, 4% solution color 20mm cell, 10.0 maximum APHA units, haze index, 20mm cell, 5.0, maximum. The merchandise subject to this order is currently classifiable under subheading 3905.30.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise subject to this order is dispositive.

##### Provisional Measures

Section 733(d) of the Act states that suspension-of-liquidation instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to no more than six months. At the request of the exporter that accounted for a significant proportion of exports of the subject merchandise in the investigations of PVA from Taiwan, we extended the four-month period to no more than six months. *See Polyvinyl Alcohol From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 5552 (September 13, 2010) (*Preliminary Results*).

In the investigation, the six-month period beginning on the date of the publication of the preliminary determination (*i.e.*, September 13, 2010) will end on March 12, 2011. Furthermore, section 737 of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination. Therefore, in accordance with section 733(d) of the Act, we will instruct U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of PVA from Taiwan entered, or withdrawn from warehouse, for consumption after March 12, 2011, through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will resume for entries entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's final



injury determination in the **Federal Register**.

### Antidumping Duty Order

On March 9, 2011, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of less-than-fair-value imports of PVA from Taiwan.

In accordance with section 736(a)(1) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds U.S. price of the merchandise for all relevant entries of PVA from Taiwan. These antidumping duties will be assessed on all unliquidated entries of PVA from Taiwan entered, or withdrawn from warehouse, for consumption on or after September 13, 2010, the date on which the Department published its notice of preliminary determination in the **Federal Register**, excluding those entries entered, or withdrawn from warehouse, for consumption between March 13, 2011 (the day following the end of the provisional-measures period), and the day preceding the publication date of the ITC's final injury determination in the **Federal Register**. See *Preliminary Results*, 75 FR at 55552.

Effective on the date of publication of the ITC's notice of final determination in the **Federal Register**, CBP will require, pursuant to section 736(a)(3) of the Act and at the same time as importers would normally deposit estimated duties on subject merchandise, a cash deposit equal to the estimated weighted-average antidumping margins listed below. Upon further instruction by the Department and in accordance with section 736(a)(1) of the Act, the Department will instruct CBP to assess antidumping duties equal to the amount by which the normal value of the merchandise exceeds U.S. price of the merchandise for all relevant entries of PVA from Taiwan. These antidumping duties will be assessed on all unliquidated entries of PVA entered from Taiwan, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register**.

Producer or exporter	Weighted-average margin
Chang Chun Petrochemical Co., Ltd .....	3.08
All Others .....	3.08

This notice constitutes the antidumping duty order with respect to PVA from Taiwan pursuant to section 736(a) of the Act. Interested parties may contact the Central Records Unit of the main Department of Commerce building, Room 7046, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: March 9, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2011-6004 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-570-831]

#### Fresh Garlic from the People's Republic of China: Court Decision Not in Harmony With Final Results and Amended Final Results of Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On March 1, 2011, the United States Court of International Trade ("CIT") sustained in an unpublished judgment the Department of Commerce's ("the Department") final results of redetermination as applied to respondent Shenzhen Greening Trading Co., Ltd. ("Greening") pursuant to the CIT's order granting the Department's voluntary remand request in *Shandong Chenhe International Trading Co., Ltd. and Shenzhen Greening Trading Co., Ltd. v. United States*, Court No. 09-00246 (Ct. Int'l Trade April 22, 2010). See Final Results of Redetermination Pursuant to Voluntary Remand, Court No. 09-00246, dated July 30, 2010, available at <http://ia.ita.doc.gov/remands> ("Remand Results"); *Shandong Chenhe International Trading Co., Ltd. and Shenzhen Greening Trading Co., Ltd. v. United States*, Court No. 09-00246 (Ct. Int'l Trade March 1, 2011) ("Judgment"). Consistent with the decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990)

("Timken"), as clarified by *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) ("*Diamond Sawblades*"), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results and is amending the final results of the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC") covering the period of review ("POR") of November 1, 2006, through October 31, 2007 with respect to Greening. See *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 29174 (June 19, 2009) ("*Final Results*"), and accompanying Issues and Decision Memorandum at Comment 11. **DATES: Effective Date:** March 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Scott Lindsay or David Lindgren, AD/CVD Operations, Office 6, Import Administration—International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC, 20230; telephone (202) 482-0780 or (202) 482-3870.

#### SUPPLEMENTARY INFORMATION:

##### Background

On June 19, 2009, the Department issued its *Final Results*, where it determined that neither Shandong Chenhe International Trading Co., Ltd. ("Chenhe") nor Greening submitted a separate rate application or certification, and neither company informed the Department that they had no shipments of subject merchandise during the POR within the deadlines provided in the separate rate applications and certifications. See *Final Results* and accompanying Issues and Decision Memorandum at Comment 11. Accordingly, for the six months of the POR not covered by the concurrently conducted new shipper review ("NSR"), we determined that Chenhe and Greening had not established that they were each entitled to a separate rate, and without timely filed no-shipment certifications, Chenhe and Greening should be deemed to be part of the PRC-wide entity. *Id.* See also *Fresh Garlic from the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 72 FR 38057 (July 12, 2007).

Chenhe and Greening timely challenged the Department's determination not to rescind the administrative review with respect to both companies to the CIT. On April 22,

2009, the CIT granted the United States' motion for voluntary remand to reconsider whether the separate rate application or other relevant judicial or administrative precedent support a finding that Chenhe and Greening were on notice that they were required to submit, within a set deadline, a certification that they had no shipments during the POR in order for the Department to consider rescinding the administrative review as to both companies.

On July 30, 2010, the Department issued its final results of redetermination. *See* Remand Results. In the redetermination, the Department reconsidered the specific circumstances surrounding Chenhe's and Greening's no-shipment certifications and rescinded the administrative review for both Chenhe and Greening, pending affirmance by the CIT. *Id.* On February 16, 2011, Chenhe moved to dismiss, with prejudice, its complaint and the CIT granted the motion on February 18, 2011. Subsequently, on March 1, 2011, the CIT sustained the Department's remand redetermination with respect to Greening. *See* Judgment.

#### Timken Notice

In its decision in *Timken*, 893 F.2d at 341, as clarified by *Diamond Sawblades*, the CAFC has held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("Act"), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's March 1, 2011 Judgment sustaining the Department's Remand Results with respect to Greening constitutes a final decision of that court that is not in harmony with the Department's *Final Results*. This notice is published in fulfillment of the publication requirements of *Timken*. The cash deposit rate will remain the company-specific rate established for the subsequent and most recent period during which Greening was reviewed. *See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review*, 75 FR 34976 (June 21, 2010). However, because Greening had no shipments during the POR not covered by the NSR, there are no entries to suspend during the administrative review POR and, therefore, the Department does not find it necessary to instruct United States Customs and Border Protection to continue to suspend the liquidation of entries pending a "conclusive" court decision.

#### Amended Final Results

Because there is now a final court decision with respect to Greening, the Department amends its *Final Results*, and is rescinding its review of Greening for the administrative review POR. *See* Judgment; Remand Results.

This notice is issued and published in accordance with sections 516A(e)(1), 751(a)(1), and 777(i)(1) of the Act.

Dated: March 9, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2011-5918 Filed 3-11-11; 4:15 pm]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

#### Cloud Computing Forum & Workshop III

**AGENCY:** National Institute of Standards and Technology (NIST), Commerce.

**ACTION:** Notice of public workshop.

**SUMMARY:** NIST announces the Cloud Computing Forum & Workshop III to be held on April 7 and 8, 2011. The event will include keynotes from the U.S. Chief Information Officer, NIST Under Secretary of Commerce for Standards and Technology, and other key federal officials. This workshop will provide information on the NIST strategic and tactical Cloud Computing program, including progress on the NIST efforts to advance open standards in interoperability, portability and security in cloud computing. The goals of this workshop are to present updates on: The NIST U.S. Government (USG) Cloud Computing Technology Roadmap; a series of high-value target U.S. Government Agency Cloud Computing Business Use Cases; a first version of a neutral cloud computing reference architecture and taxonomy; the NIST Standards Roadmap and the Standards Acceleration to Jumpstart the Adoption of Cloud Computing (SAJACC) process; and progress by the NIST Cloud Computing Security working group. The event will also include panels focusing on Cloud Computing across the Federal landscape as well as broad private sector topics.

**DATES:** The Cloud Computing Forum & Workshop III will be held April 7 and 8, 2011.

**ADDRESSES:** The event will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, MD 20899 in the Red

Auditorium of the Administration Building, Building 101. All visitors to the NIST site are required to pre-register to be admitted and have appropriate government-issued photo ID to gain entry to NIST. Anyone wishing to attend this meeting must register at <http://www.nist.gov/itl/cloud/cloudworkshopiii.cfm> by close of business Monday, March 28, 2011, in order to attend.

**FOR FURTHER INFORMATION CONTACT:** For further information contact Robert Bohn by e-mail at [robert.bohn@nist.gov](mailto:robert.bohn@nist.gov) or by phone at (301) 975-4500.

**SUPPLEMENTARY INFORMATION:** On May 20, 2010, NIST hosted the first Cloud Computing Forum & Workshop. The purpose of that initial workshop was to respond to the request of the Federal Chief Information Officer to NIST to lead Federal efforts on standards for data portability, cloud interoperability, and security. The workshop's goals were to initiate engagement with industry to accelerate the development of cloud standards for interoperability, portability, and security; introduce NIST Cloud Computing efforts; and discuss the Federal Government's experience with cloud computing.

The purpose of the second Cloud Computing Forum & Workshop II, on November 4 and 5, 2010, was to report on the status of the efforts and to socialize the NIST strategy to collaboratively develop a Cloud Computing Roadmap among multiple Federal and industrial stakeholders, and to advance a dialogue between these groups. Panel discussions considered the roles of standard organizations and ad-hoc standards in the cloud; need and use of a reference architecture to support cloud adoption; key cloud computing issues and proposed solutions; security in the cloud; and international aspects of cloud computing. Breakout sessions on the following day, November 5, actively engaged stakeholders, discussed these issues, and developed a series of next steps for the effort in cloud computing standards. NIST led and stakeholder driven working groups in Standards, Security, Reference Architecture and Taxonomy, Target USG Agency Business Use Cases and SAJACC were formed.

The purpose of the Cloud Computing Forum & Workshop III is to elaborate on the progress of the NIST USG Cloud Computing Technology Roadmap through the activities of the NIST led, stakeholder driven working groups that were formed during the November 2010 event. The progress of these groups will be presented over a two-day span. Panel

discussions relating to their applicability to the USG need, strategy and next steps will be held.

Dated: March 8, 2011.

**Charles H. Romine,**

*Acting Associate Director for Laboratory Programs.*

[FR Doc. 2011-6034 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-13-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XA222**

#### Gulf Spill Restoration Planning; Public Scoping Meetings for the Programmatic Environmental Impact Statement for the Deepwater Horizon Oil Spill; Correction

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce.

**ACTION:** Notice of public scoping meetings; correction.

**SUMMARY:** In a March 2, 2011, **Federal Register** notice, the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) announced the public scoping meeting dates, times, and locations for the Programmatic Environmental Impact Statement for the Deepwater Horizon Oil Spill. There is a date change for the meeting in Washington, DC.

**DATES:** The public scoping meeting in Washington, DC will begin at 7:30 p.m. (local time) and doors will open at 6:30 p.m.

**FOR FURTHER INFORMATION CONTACT:**

NOAA—Brian Hostetter at (888) 547-0174 or by e-mail at

[gulfspillcomments@noaa.gov](mailto:gulfspillcomments@noaa.gov);

DOI—Robin Renn by e-mail at

[Robin\\_Renn@fws.gov](mailto:Robin_Renn@fws.gov);

AL—Will Gunter by e-mail at

[William.Gunter@dcnr.alabama.gov](mailto:William.Gunter@dcnr.alabama.gov);

FL—Lee Edmiston or Gil McRae by e-mail at

[Lee.Edmiston@dep.state.fl.us](mailto:Lee.Edmiston@dep.state.fl.us) or [Gil.McRae@myfwc.com](mailto:Gil.McRae@myfwc.com);

LA—Karolien Debusschere by e-mail at

[karolien.debusschere@la.gov](mailto:karolien.debusschere@la.gov);

MS—Richard Harrell by e-mail at

[Richard\\_Harrell@deq.state.ms.us](mailto:Richard_Harrell@deq.state.ms.us);

TX—Don Pitts by e-mail at

[Don.Pitts@tpwd.state.tx.us](mailto:Don.Pitts@tpwd.state.tx.us).

To be added to the Oil Spill PEIS mailing list, please visit: <http://www.gulfspillrestoration.noaa.gov>.

## Correction

The information in **Federal Register** notice 2011-4540, on page 11427, in the first column, under the heading Scoping Meetings, for meeting scheduled in 11. Washington, DC is corrected to read as follows:

11. Wednesday, April 6, 2011: U.S. Department of Commerce, Herbert Hoover Bldg, Auditorium, 1401 Constitution Ave., NW., Washington, DC.

Dated: March 9, 2011.

**Patricia A. Montanio,**

*Director, Office of Habitat Conservation, National Marine Fisheries Service.*

[FR Doc. 2011-5996 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XA287**

#### Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meetings

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

**ACTION:** Notice of SEDAR Review Workshop for Highly Migratory Species (HMS) sandbar, dusky, and blacknose sharks.

**SUMMARY:** The SEDAR assessments of the HMS stocks of sandbar, dusky, and blacknose sharks consists of a series of workshops and webinars: A Data Workshop, a series of Assessment webinars, and a Review Workshop.

**DATES:** The Review Workshop will take place April 18-22, 2011. See

**SUPPLEMENTARY INFORMATION** for specific dates and times.

**ADDRESSES:** The Review Workshop will be held at Loews Annapolis Hotel, 126 West Street, Annapolis, MD 21401.

*Council Address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

**FOR FURTHER INFORMATION CONTACT:** Julie Neer, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571-4366; e-mail: [Julie.neer@safmc.net](mailto:Julie.neer@safmc.net).

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf

States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop, (2) Assessment Process utilizing webinars and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGOs; International experts; and staff of Councils, Commissions, and state and federal agencies.

*SEDAR 21 Review Workshop Schedule:*

#### April 18-22, 2011; SEDAR 21 Review Workshop

*April 18, 2011: 1 p.m.-8 p.m.; April 19-21, 2011: 8 a.m.-8 p.m.; April 22, 2011: 8 a.m.-12 p.m.*

The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from, or completed prior to the time established by this notice.

The Review Workshop is an independent peer review of the assessment developed during the Data and Assessment Workshops. Workshop Panelists will review the assessment and document their comments and recommendations in a Consensus Summary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will

be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### *Special Accommodations*

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see ADDRESSES) at least 10 business days prior to each workshop.

Dated: March 10, 2011.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011-6001 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XA250

#### Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meetings

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

**ACTION:** Notice of SEDAR Data and Assessment Workshops for South Atlantic black sea bass (*Centropristis striata*) and golden tilefish (*Lopholatilus chamaeleonticeps*).

**SUMMARY:** The SEDAR assessments of the South Atlantic stock of black sea bass and golden tilefish will consist of a series of three workshops: A Data Workshop, an Assessment Workshop, and a Review Workshop. The Review Workshop date, time, and location will publish in a subsequent issue in the **Federal Register**.

**DATES:** The Data Workshop will take place April 26–28, 2011; the Assessment Workshop will take place June 21–23, 2011.

**ADDRESSES:** The Data Workshop will be held at the Marriott Lockwood, 170 Lockwood Boulevard, Charleston, SC 29403; telephone: (800) 968-3569. The Assessment Workshop will be held in the auditorium at the NOAA Center for Coastal Fisheries and Habitat Research,

101 Pivers Island Rd, Beaufort, NC 28516; telephone: (252) 728-8607.

*Council address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

**FOR FURTHER INFORMATION CONTACT:** Kari Fenske, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571-4366; e-mail: [kari.fenske@safmc.net](mailto:kari.fenske@safmc.net).

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes three workshops: (1) Data Workshop, (2) Stock Assessment Workshop and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Stock Assessment Workshop is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and State and Federal agencies.

#### **SEDAR 25 Workshop Schedule**

##### **April 26–28, 2011; SEDAR 25 Data Workshop**

*April 26, 2011: 9 a.m.–8 p.m.; April 27, 2011: 8 a.m.–8 p.m.; April 28, 2011: 8 a.m.–1 p.m.*

An assessment data set and associated documentation will be developed

during the Data Workshop. Participants will evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance, as specified in the Terms of Reference for the workshop.

#### **June 21–23, 2011; SEDAR 25 Assessment Workshop**

*June 21, 2011: 9 a.m.–8 p.m.; June 22, 2011: 8 a.m.–8 p.m.; June 23, 2011: 8 a.m.–1 p.m.*

Using datasets provided by the Data Workshop, participants will develop population models to evaluate stock status, estimate population benchmarks and Sustainable Fisheries Act criteria, and project future conditions, as specified in the Terms of Reference. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters. Participants will prepare a workshop report, compare and contrast various assessment approaches, and determine whether the assessments are adequate for submission to the review panel.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### *Special Accommodations*

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see ADDRESSES) at least 10 business days prior to each workshop.

Dated: March 10, 2011.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011-6000 Filed 3-14-11; 8:45 am]

**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE****Patent and Trademark Office****Submissions Regarding Correspondence and Regarding Attorney Representation (Trademarks)**

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the revision of a currently approved collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before May 16, 2011.

**ADDRESSES:** You may submit comments by any of the following methods:

- *E-mail:*

*InformationCollection@uspto.gov*. Include "0651-0056 Submissions" in the subject line of the message.

- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Requests for additional information should be directed to the attention of Catherine Cain, Attorney Advisor, Office of the Commissioner for Trademarks, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450; by telephone at 571-272-8946; or by e-mail at *catherine.cain@uspto.gov* with "Paperwork" in the subject line.

**SUPPLEMENTARY INFORMATION****I. Abstract**

The United States Patent and Trademark Office (USPTO) administers the Trademark Act, 15 U.S.C. 1051 *et seq.*, which provides for the Federal registration of trademarks, service marks, collective trademarks and service marks, collective membership marks, and certification marks. Individuals and businesses that use, or intend to use such marks in commerce may file an application to register their marks with the USPTO. Registered marks remain on the register indefinitely so long as the owner of the registration files the necessary maintenance documents.

Such individuals and businesses may also submit various communications to the USPTO regarding their pending applications or registered trademarks, including providing additional information needed to process a pending application, filing amendments to the applications, or filing the papers necessary to keep a trademark in force. In the majority of circumstances, individuals and businesses retain attorneys to handle these matters. As such, these parties may also submit communications to the USPTO regarding the appointment of attorneys of record to represent applicants in the application process or, in the case of applicants or registrants who are not domiciled in the United States, the appointment of domestic representatives on whom may be served notices or process in proceedings affecting the mark, the revocation of an attorney's or domestic representative's appointment, and requests for permission to withdraw from representation. Applicants and registrants may also submit change of owner's address forms requesting that the USPTO amend the record of an application or registration by entering a new address for the applicant or registrant.

The rules implementing the Trademark Act are set forth in 37 CFR part 2. In addition to governing the registration of trademarks, the Act and rules also govern the appointments and revocations of attorneys and domestic representatives. The trademark rules provide the specifics for filing requests for permission to withdraw as the attorney of record. The requirements for changes of the owner's address are not governed by the trademark rules, but are outlined in the USPTO's procedures. The information in this collection is available to the public.

The information in this collection can be submitted in paper format or electronically through the Trademark Electronic Application System (TEAS). The USPTO has developed a new TEAS Global Form format that permits the agency to collect information electronically when a TEAS form having dedicated data fields is not yet available. With the introduction of the TEAS Global Forms, the information in this collection can be collected in three different formats: Paper format, electronically using the original TEAS forms, or electronically using the TEAS Global Forms.

This collection currently has three TEAS forms with dedicated data fields. As part of this renewal, the USPTO

proposes to add three TEAS Global Forms: For changing the domestic representative's address, replacing the attorney of record with another already-appointed attorney, and requesting the withdrawal of a domestic representative—into the collection. The paper equivalents will be added as well.

Although this collection does have electronic forms, there are no official paper forms for these items. Individuals and businesses can submit their own paper forms, following USPTO rules and guidelines to ensure that all necessary information is provided.

**II. Method of Collection**

Electronically if applicants submit the information using the original TEAS forms or the new TEAS Global Forms. By mail or hand delivery if applicants choose to submit the information in paper format.

**III. Data**

*OMB Number:* 0651-0056.

*Form Number(s):* PTO Forms 2196, 2197, and 2201. *TEAS Global Forms:* Change of Domestic Representative's Address, Replacement of Attorney of Record with Another Already-Appointed Attorney, and Request to Withdraw as Domestic Representative.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 123,010 responses per year. Of this total, the USPTO estimates that 117,151 responses will be submitted through TEAS.

*Estimated Time Per Response:* The USPTO estimates that it takes the public approximately 5 to 15 minutes (0.08 to 0.25 hours) to complete this information, depending on the application. This includes the time to gather the necessary information, prepare the requests, and submit them to the USPTO. The time estimates shown for the electronic forms in this collection are based on the average amount of time needed to complete and electronically file the associated form.

*Estimated Total Annual Respondent Burden Hours:* 10,927 hours.

*Estimated Total Annual Respondent Cost Burden:* \$3,551,275. The USPTO expects that attorneys will complete these submissions. Using the professional hourly rate of \$325 for attorneys in private firms, the USPTO estimates \$3,551,275 per year for salary costs associated with respondents.

Item	Estimated time for response (in minutes)	Estimated annual responses	Estimated annual burden hours
Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative (Paper) .....	10	4,000	680
TEAS Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative (PTO Form 2196) .....	5	80,000	6,400
Request for Permission to Withdraw as Attorney of Record (Paper) .....	15	225	56
TEAS Request for Permission to Withdraw as Attorney of Record (PTO Form 2201) .....	12	4,500	900
Change of Owner's Address (Paper) .....	10	1,600	272
TEAS Change of Owner's Address (PTO Form 2197) .....	5	32,000	2,560
Change of Domestic Representative's Address (Paper) .....	10	13	2
TEAS Change of Domestic Representative's Address (TEAS Global) .....	5	250	20
Replacement of Attorney of Record with Another Already-Appointed Attorney (Paper) .....	10	1	1
TEAS Replacement of Attorney of Record with Another Already-Appointed Attorney (TEAS Global) .....	5	1	1
Request to Withdraw as Domestic Representative (Paper) .....	10	20	3
TEAS Request to Withdraw as Domestic Representative (TEAS Global) .....	5	400	32
<b>Totals</b> .....		<b>123,010</b>	<b>10,927</b>

*Estimated Total Annual Non-Hour Respondent Cost Burden:* \$2,526. This information collection has postage costs associated with it. It does not have any operation or maintenance costs, nor does it have filing fees.

Customers incur postage costs when submitting the information in paper format. The USPTO estimates that the majority (98%) of paper submissions are submitted via United States Postal Service first-class mail. The USPTO estimates these submissions will weigh

approximately one ounce with a first-class postage rate of 44 cents. Out of 5,859 paper submissions, the USPTO estimates that 5,741 will be mailed, for a total non-hour respondent cost burden of \$2,526 in postage costs.

Item	Responses (a)	Postage costs (\$) (b)	Total non-hour cost burden (a x b) (c)
Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative .....	3,920	\$0.44	\$1,725.00
Request for Permission to Withdraw As Attorney of Record .....	221	0.44	97.00
Change of Owner's Address Form .....	1,568	0.44	690.00
Change of Domestic Representative's Address .....	12	0.44	5.00
Replacement of Attorney of Record with Another Already-Appointed Attorney .....	1	0.44	1.00
Request to Withdraw as Domestic Representative .....	19	0.44	8.00
<b>Totals</b> .....	<b>5,741</b>		<b>2,526.00</b>

**IV. Request for Comments**

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, e.g., the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: March 10, 2011.  
**Susan K. Fawcett,**  
*Records Officer, USPTO, Office of the Chief Information Officer.*  
 [FR Doc. 2011-5902 Filed 3-14-11; 8:45 am]  
**BILLING CODE 3510-16-P**

**CONSUMER PRODUCT SAFETY COMMISSION**

**Notice of Meeting of Chronic Hazard Advisory Panel on Phthalates and Phthalate Substitutes**

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** The U.S. Consumer Product Safety Commission ("CPSC" or "Commission") announces the fourth meeting of the Chronic Hazard Advisory Panel (CHAP) on phthalates and phthalate substitutes. The Commission

appointed this CHAP to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles, pursuant to section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) (Pub. L. 110-314).

**DATES:** The meeting will be held on Wednesday, March 30, 2011, and Thursday, March 31, 2011. The meeting will begin at approximately 8 a.m. on both days. It will end at approximately 5 p.m. on Wednesday and at approximately 3 p.m. on Thursday.

**ADDRESSES:** The meeting will be held in Room 410 at the Commission's offices at 4330 East West Highway, Bethesda, MD 20814.

*Registration and Webcast:* Members of the public who wish to attend the meeting may register on the day of the meeting. There will not be any opportunity for public participation at this meeting. A live Webcast will not be

available. However, the meeting will be recorded and posted on the CPSC's Web site.

**FOR FURTHER INFORMATION CONTACT:** Michael Babich, Directorate for Health Sciences, U.S. Consumer Product Safety Commission, Bethesda, MD 20814; telephone (301) 504-7253; e-mail [mbabich@cpsc.gov](mailto:mbabich@cpsc.gov).

**SUPPLEMENTARY INFORMATION:** Section 108 of the CPSIA permanently prohibits the sale of any "children's toy or child care article" containing more than 0.1 percent of each of three specified phthalates—di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP). Section 108 of the CPSIA also prohibits, on an interim basis, the sale of any "children's toy that can be placed in a child's mouth" or "child care article" containing more than 0.1 percent of each of three additional phthalates—diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DNOP).

Moreover, section 108 of the CPSIA requires the Commission to convene a CHAP "to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles." The CPSIA requires the CHAP to complete an examination of the full range of phthalates that are used in products for children and:

- Examine all of the potential health effects (including endocrine disrupting effects) of the full range of phthalates;
- Consider the potential health effects of each of these phthalates, both in isolation and in combination with other phthalates;
- Examine the likely levels of children's, pregnant women's, and others' exposure to phthalates, based upon a reasonable estimation of normal and foreseeable use and abuse of such products;
- Consider the cumulative effect of total exposure to phthalates, from children's products and from other sources, such as personal care products;
- Review all relevant data, including the most recent, best available, peer-reviewed, scientific studies of these phthalates and phthalate alternatives that employ objective data-collection practices or employ other objective methods;
- Consider the health effects of phthalates not only from ingestion but also as a result of dermal, hand-to-mouth, or other exposure;
- Consider the level at which there is a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals and their

offspring, reviewing the best available science, and using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women, and other potentially susceptible individuals; and

- Consider possible similar health effects of phthalate alternatives used in children's toys and child care articles.

The CPSIA contemplates completion of the CHAP's examination within 18 months of the panel's appointment. The CHAP must review prior work on phthalates by the Commission, but the prior work is not to be considered determinative, as the CHAP's examination must be conducted *de novo*.

The CHAP must make recommendations to the Commission which phthalates (or combinations of phthalates) in addition to those identified in section 108 of the CPSIA or phthalate alternatives that the panel determines should be prohibited from use in children's toys or child care articles or otherwise restricted. The CHAP members were selected by the Commission from scientists nominated by the National Academy of Sciences. See 15 U.S.C. 2077, 2030(b).

The CHAP met previously in April, July, and December 2010. The CHAP heard testimony from interested parties at the July meeting. The March 2011 meeting will include discussion of the CHAP's progress toward its analysis of potential risks from phthalates and phthalate substitutes. There will not be any opportunity for public comment at the March 30-31 meeting.

Dated: March 10, 2011.

**Todd A. Stevenson,**  
Secretary.

[FR Doc. 2011-6020 Filed 3-14-11; 8:45 am]

**BILLING CODE 6355-01-P**

## **CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**

### **Information Collection; Submission for OMB Review, Comment Request**

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted a public information collection request (ICR) entitled the Senior Corps Grant Application to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. chapter

35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Ms. Angela Roberts, at (202) 606-6822, ([aroberts@cns.gov](mailto:aroberts@cns.gov)). Individuals who use a telecommunications device for the deaf (TTY-TDD) may call (202) 606-3472 between 8:30 a.m. and 5 p.m. Eastern time, Monday through Friday.

**ADDRESSES:** Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, *Attn:* Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in the **Federal Register**:

- (1) *By fax to:* (202) 395-6974, *Attention:* Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service; and
- (2) *Electronically by e-mail to:* [smar@omb.eop.gov](mailto:smar@omb.eop.gov).

**SUPPLEMENTARY INFORMATION:** The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

### **Comments**

A 60-day public comment Notice was published in the **Federal Register** on December 14, 2010. This comment period ended February 14, 2011. The following summarizes the public comments received from the Notice summary:

(a) Two commenters supported the change and noted that an Executive Summary would add minimal burden to the application process. (b) Five commenters requested more details about the Executive Summary, asking what an Executive Summary is and

what information will be required in it. The Executive Summary will ask respondents to summarize the application's contents. The Corporation will provide more details about the Executive Summary at the appropriate time. (c) One commenter indicated that the Corporation underestimated the additional time burden added by the executive summary. The Corporation agrees and has adjusted the estimated time accordingly. (d) One commenter suggested that the Corporation eliminate another part of the application to account for the addition of an Executive Summary. The Corporation believes that the additional burden of an Executive Summary will be minimal, and that the addition will increase the effectiveness and efficiency of the grant review process. Therefore, we do not intend to remove another portion of the application.

*Description:* The Corporation seeks to renew the current application with one modification. The Corporation will ask applicants to include an Executive Summary to improve the efficiency and effectiveness of the peer review process.

The information collection will otherwise be used in the same manner as the existing application. The Corporation also seeks to continue using the current application until the revised application is approved by OMB. The current application is due to expire on May 31, 2011.

The Senior Corps Grant Application is completed by applicant organizations interested in sponsoring a Senior Corps project. The application is completed electronically using the Corporation's web-based grants management system, eGrants.

*Type of Review:* Renewal.

*Agency:* Corporation for National and Community Service.

*Title:* National Senior Service Corps Grant Application.

*OMB Number:* 3045-0035.

*Agency Number:* SF 424-NSSC.

*Affected Public:* Current and prospective sponsors of National Senior Service Corps Grants.

*Total Respondents:* 1,350.

*Frequency:* Annually, with exceptions.

*Average Time per Response:*

Estimated at 17 hours each for 180 first-time respondents; 15.5 hours each for 900 continuation sponsors; 5.5 hours each for 270 revisions.

*Estimated Total Burden Hours:* 18,495 hours.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* \$4,609.50.

Dated: March 9, 2011.

**Erwin Tan,**

*Director, National Senior Service Corps.*

[FR Doc. 2011-6032 Filed 3-14-11; 8:45 am]

**BILLING CODE 6050-SS-P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD-2011-HA-0033]

### Proposed Collection; Comment Request

**AGENCY:** Office of the Assistant Secretary of Defense for Health Affairs, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the Office of the Assistant Secretary of Defense for Health Affairs announces a proposed new public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by May 16, 2011.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Naval Health Research Center, DoD Center for Deployment Health Research, Department 164, ATTN: Tyler C. Smith, MS, PhD, 140 Sylvester Rd., San Diego, CA 92106-3521, or call (619) 553-7593.

*Title; Associated Form; and OMB Number:* ACAM2000® Myopericarditis Registry; OMB Control Number 0720-TBD.

*Needs and Uses:* The Food and Drug Administration required the establishment of several Phase IV post-licensure studies to evaluate the long-term safety of ACAM2000® smallpox vaccine. Among the required post-licensure studies is the establishment of a myopericarditis registry. The ACAM2000® Myopericarditis Registry is designed to study the natural history of myopericarditis following receipt of the ACAM2000® vaccine, including evaluating factors that may influence disease prognosis, thus addressing the FDA post-licensure requirement and ensuring the continued licensing of this vaccine.

*Affected Public:* Civilians, former Active Duty or active Guard/Reserve in the U.S. Military, who received the ACAM2000® smallpox vaccine while in the military and subsequently developed signs or symptoms of myopericarditis.

*Annual Burden Hours:* 20.

*Number of Respondents:* 20.

*Responses per Respondent:* 2.

*Average Burden per Response:* 30 minutes.

*Frequency:* Semi-annually.

### SUPPLEMENTARY INFORMATION:

#### Summary of Information Collection

Eligible respondents are civilians who are former Active Duty or active Guard/Reserve in the U.S. Military that received the ACAM2000® smallpox vaccine while in the military and subsequently developed signs or symptoms of myopericarditis. The information collected will illuminate the natural history of post-vaccine myopericarditis and evaluate factors that may influence disease prognosis. Inclusion of civilians who were formerly in the military in addition to current military members is imperative in order to obtain information on those who may have separated from the military due to their medical condition. Conducting this Registry will ensure the continued licensure of this military relevant vaccine.



Dated: March 8, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

[FR Doc. 2011-5910 Filed 3-14-11; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Meeting of the Department of Defense Wage Committee

**AGENCY:** Department of Defense.

**ACTION:** Notice of closed meetings.

**SUMMARY:** Pursuant to the provisions of section 10 of Public Law 92-463, the Federal Advisory Committee Act, notice is hereby given that closed meetings of the Department of Defense Wage Committee.

**DATES:** Tuesday, April 5, 2011, and Tuesday, April 19, 2011, at 10 a.m.

**ADDRESSES:** 1400 Key Boulevard, Level A, Room A101, Rosslyn, Virginia 22209.

**FOR FURTHER INFORMATION CONTACT:** Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301-4000.

**SUPPLEMENTARY INFORMATION:** Under the provisions of section 10(d) of Public Law 92-463, the Department of Defense has determined that the meetings meet the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301-4000.

Dated: March 8, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

[FR Doc. 2011-5907 Filed 3-14-11; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD-2011-OS-0034]

#### Privacy Act of 1974; System of Records

**AGENCY:** Defense Logistics Agency, DoD.

**ACTION:** Notice to amend a system of records.

**SUMMARY:** The Defense Logistics Agency is proposing to amend a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** The proposed action will be effective without further notice on April 14, 2011 unless comments are received which would result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and/Regulatory Information Number (RIN) and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jody Sinkler at (703) 767-5045, or the Privacy Act Officer, Headquarters Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060-6221.

**SUPPLEMENTARY INFORMATION:** The Defense Logistics Agency's system of record notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above. The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended,

which requires the submission of new or altered systems reports.

Dated: March 10, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

**S190.32**

**SYSTEM NAME:**

Public Affairs Subscription Mailing Lists (May 26, 2009, 74 FR 24831).

**CHANGES:**

\* \* \* \* \*

**SYSTEM LOCATION:**

Delete entry and replace with "Headquarters, Defense Logistics Agency (DLA), Public Affairs Office, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060-6221, and the Public Affairs Offices of the DLA Primary Level Field Activities. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices."

\* \* \* \* \*

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with "Director, DLA Public Affairs Office, Headquarters, Defense Logistics Agency, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060-6221, and the Heads of the Public Affairs Offices within each DLA Primary Level Field Activity. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices."

**NOTIFICATION PROCEDURE:**

Delete entry and replace with "Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060-6221.

Written inquiry must contain the subject individual's full name and current mailing address to permit locating the record."

**RECORD ACCESS PROCEDURE:**

Delete entry and replace with "Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060-6221.

Written inquiry must contain the subject individual's full name and

current mailing address to permit locating the record.”

**CONTESTING RECORD PROCEDURES:**

Delete entry and replace with “The DLA rules for accessing records, for contesting contents and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.”

\* \* \* \* \*

**S190.32**

**SYSTEM NAME:**

Public Affairs Subscription Mailing Lists.

**SYSTEM LOCATION:**

Headquarters, Defense Logistics Agency (DLA), Public Affairs Office, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060–6221, and the Public Affairs Offices of the DLA Primary Level Field Activities. Official mailing addresses are published as an appendix to DLA’s compilation of systems of records notices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals and organizations who have registered with DLA Public Affairs Offices to automatically receive magazines, newsletters, periodicals and other professional publications.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records maintained include individual’s name, home or business telephone number, e-mail and mailing addresses, customer number, and publication(s) of interest.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations, and 10 U.S.C. 133, Under Secretary of Defense for Acquisition, Technology, and Logistics.

**PURPOSE(S):**

The system is used to produce subscription mailing lists for distribution of DLA publications, and to perform statistical analyses of reader interest and opinion.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DOD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD “Blanket Routine Uses” apply to this system of records.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are maintained on electronic storage media.

**RETRIEVABILITY:**

Records are retrieved by individual’s name and address.

**SAFEGUARDS:**

Access is limited to those individuals who require the records for the performance of their official duties. Electronic records are maintained in buildings with controlled or monitored access. During non-duty hours, records are secured in locked or guarded buildings, locked offices, or guarded cabinets. The electronic records systems employ user identification and password or smart card technology protocols.

**RETENTION AND DISPOSAL:**

Records are destroyed when superseded or obsolete whichever comes first.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, DLA Public Affairs Office, Headquarters, Defense Logistics Agency, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060–6221, and the Heads of the Public Affairs Offices within each DLA Primary Level Field Activity. Official mailing addresses are published as an appendix to DLA’s compilation of systems of records notices.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written inquiry must contain the subject individual’s full name and current mailing address to permit locating the record.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written inquiry must contain the subject individual’s full name and

current mailing address to permit locating the record.

**CONTESTING RECORD PROCEDURES:**

The DLA rules for accessing records, for contesting contents and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

**RECORD SOURCE CATEGORIES:**

From the subject individual or the DLA organization publishing the document.

**EXEMPTIONS CLAIMED FOR SYSTEM:**

None.

[FR Doc. 2011–5914 Filed 3–14–11; 8:45 am]

**BILLING CODE 5001–06–P**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

[Docket ID DOD–2011–OS–0032]

**Privacy Act of 1974; System of Records**

**AGENCY:** Office of the Secretary, DoD.

**ACTION:** Notice to Alter a System of Records.

**SUMMARY:** The Office of the Secretary of Defense proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This proposed action would be effective without further notice on April 14, 2011 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and/Regulatory Information Number (RIN) and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are

received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cindy Allard at (703) 588-6830, or the Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301-1155.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on March 8, 2011, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: March 9, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

#### DMDC 05

##### SYSTEM NAME:

Joint Duty Assignment Management Information System (JDAMIS) (October 2, 2007, 72 FR 56069).

##### CHANGES:

\* \* \* \* \*

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "All military officers who are serving or have served in billets designated as joint duty assignment positions; are attending or have completed joint professional military education schools; have earned approved joint experience or discretionary points; are designated as joint qualified at various levels of qualification; or are eligible to be nominated and designated at various joint qualification levels."

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Information on individuals includes name, Social Security Number (SSN), date of birth, gender, date of rank, military branch, occupation, duty station, joint professional military education status, joint qualification level, and departure reason. The

information on billets includes service, unit identification code, tour length, rank, job title, skill, and critical billet code."

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 38, Joint Officer Management; and E.O. 9397 (SSN), as amended."

##### PURPOSE(S):

Delete entry and replace with "To track military officers in joint duty assignments and document a Joint Qualified Officer (JQO) level. Records are also used as a management tool for statistical analysis, tracking, reporting to Congress, evaluating program effectiveness, and conducting research."

\* \* \* \* \*

##### RETRIEVABILITY:

Delete entry and replace with "Records are retrieved by name and/or SSN."

\* \* \* \* \*

##### SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Deputy Director, Defense Manpower Data Center, 1600 Wilson Boulevard, Suite 400, Arlington, VA 22209-2593."

##### NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Deputy Director, Defense Manpower Data Center, 1600 Wilson Boulevard, Suite 400, Arlington, VA 22209-2593."

Written requests should contain the individual's full name, SSN, date of birth, and current address and telephone number."

\* \* \* \* \*

#### DMDC 05

##### SYSTEM NAME:

Joint Duty Assignment Management Information System (JDAMIS).

##### SYSTEM LOCATION:

Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955-6771.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All military officers who are serving or have served in billets designated as joint duty assignment positions; are attending or have completed joint professional military education schools; have earned approved joint experience or discretionary points; are designated

as joint qualified at various levels of qualification; or are eligible to be nominated and designated at various joint qualification levels.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Information on individuals includes name, Social Security Number (SSN), date of birth, gender, date of rank, military branch, occupation, duty station, joint professional military education status, joint qualification level, and departure reason. The information on billets includes service, unit identification code, tour length, rank, job title, skill, and critical billet code.

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 38, Joint Officer Management; and E.O. 9397 (SSN), as amended.

##### PURPOSE(S):

To track military officers in joint duty assignments and document a Joint Qualified Officer (JQO) level. Records are also used as a management tool for statistical analysis, tracking, reporting to Congress, evaluating program effectiveness, and conducting research.

##### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices apply to this system.

##### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

##### STORAGE:

Electronic storage media.

##### RETRIEVABILITY:

Records are retrieved by name and/or SSN.

##### SAFEGUARDS:

Electronic records are maintained in a controlled area accessible only to authorized personnel. Entry to these areas is restricted by the use of locks, guards, and administrative procedures. Access to personal information is limited to those who require the records in the performance of their official duties. Access to personal information is further restricted by the use of

passwords which are changed periodically.

**RETENTION AND DISPOSAL:**

Delete when 5 years old or when no longer needed for operational purposes, whichever is later.

**SYSTEM MANAGER(S) AND ADDRESS:**

Deputy Director, Defense Manpower Data Center, 1600 Wilson Boulevard, Suite 400, Arlington, VA 22209-2593.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Deputy Director, Defense Manpower Data Center, 1600 Wilson Boulevard, Suite 400, Arlington, VA 22209-2593.

Written requests should contain the individual's full name, SSN, date of birth, and current address and telephone number.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff, Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301-1155.

Written requests should contain the individual's full name, SSN, date of birth, and current address and telephone number.

**CONTESTING RECORD PROCEDURES:**

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

The military services and the Joint Staff.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 2011-5909 Filed 3-14-11; 8:45 am]

**BILLING CODE 5001-06-P**

**DEPARTMENT OF DEFENSE****Office of the Secretary**

[Docket ID DOD-2011-OS-0031]

**Privacy Act of 1974; System of Records**

**AGENCY:** Defense Information Systems Agency, DoD.

**ACTION:** Notice to delete a system of records.

**SUMMARY:** The Defense Information Systems Agency is deleting a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on April 14, 2011 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by dock number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jeanette M. Weathers-Jenkins at (703) 681-2103, or Defense Information Systems Agency, 5600 Columbia Pike, Room 933-I, Falls Church, VA 22041-2705.

**SUPPLEMENTARY INFORMATION:** The Defense Information Systems Agency systems of records notice subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The Defense Information Systems Agency proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: March 2, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**DELETION:****K700.03**

Manpower and Personnel System (MAPS) (February 22, 1993, 58 FR 10562).

**REASON:**

Manpower and Personnel System (MAPS) has been replaced with Open Source Corporate Management Information System (OS-CMIS), which is covered by OPM/GOVT-1 General Personnel Records (June 19, 2006, 71 FR 35356).

[FR Doc. 2011-5906 Filed 3-14-11; 8:45 am]

**BILLING CODE 5001-06-P**

**DEPARTMENT OF DEFENSE****Office of the Secretary****Termination of Department of Defense Federal Advisory Committees**

**AGENCY:** DoD.

**ACTION:** Termination of Federal Advisory Committee.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix), 41 CFR 102-3.55(a)(1), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and the Sunset provisions of Section 506 of Public Law 111-84, effective March 5, 2011 the Department of Defense gives notice that it is terminating the Independent Panel Review of Judge Advocate Requirements of the Department of the Navy.

**FOR FURTHER INFORMATION CONTACT:** Contact Jim Freeman, Deputy Advisory Committee Management Officer for the Department of Defense, 703-601-6128.

Dated: March 4, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2011-5905 Filed 3-14-11; 8:45 am]

**BILLING CODE 5001-08-P**

**DEPARTMENT OF DEFENSE****Department of the Air Force**

[Docket ID: USAF-2011-0010]

**Proposed Collection; Comment Request**

**AGENCY:** Department of the Air Force, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the United States Air Force announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by May 16, 2011.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal**

**Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to HQ USAF/A1SZ, Air Force Warrior and Survivor Care, 1040 Air Force Pentagon, Washington, DC 20330-1040 or call (703) 697-1089, Monday through Friday, 9 a.m. to 5 p.m., Eastern Time.

*Title; Associated Form; and OMB Number:* Warrior and Survivor Care; OMB Control Number 0701-TBD.

*Needs and Uses:* The information collection requirement is necessary to obtain information on the reintegration needs of combat-injured Airmen from the perspectives of their primary supporters, the family members and friends whom the Airmen nominate as their most frequent provider of help to deal with problems. Anecdotal reports from Air Force program case managers suggest that these individuals represent an important source of support to combat-injured Airmen as they reintegrate into civilian life and offer

unique information on the challenges encountered by these Airmen during the process of reintegration. This information collection will be the first large-scale, systematic effort to assess primary supporters' perspectives on combat-injured Airmen's reintegration needs. It will also assess primary supporters' perceptions of the effectiveness of the two key Air Force programs that serve combat-injured Airmen, the Air Force Wounded Warrior Program and Air Force Recovery Care Coordinator Program, in addressing the needs of combat-injured Airmen. This information collection will provide a valuable window into the social support provided to the Airmen, yield insights into how existing sources of support can be strengthened and leveraged to facilitate the Airmen's reintegration into civilian life, and inform Air Force program improvements to address combat-injured Airmen's reintegration needs.

*Affected Public:* Individuals or households.

*Total Burden Hours Over 3 Years:* 728.

*Number of Respondents Over 3 Years (Unduplicated):* 557.

*Maximum Responses per Respondent:* 5.

*Average Burden per Response (hours):* 25/60.

*Frequency:* Semi-annually.

TABLE—ESTIMATED BURDEN OVER 3-YEAR PERIOD

	Number of responses per respondent over 3 years	Number of respondents						Burden hours over 3 years
		Year 1		Year 2		Year 3		
		Wave 1	Wave 2	Wave 3	Wave 4	Wave 5	3-year Total	
Cohort 1 .....	5	287	253	222	196	172	1,131	471
Cohort 2 .....	4	N/A	81	71	63	55	270	112
Cohort 3 .....	3	N/A	N/A	63	55	49	167	70
Cohort 4 .....	2	N/A	N/A	N/A	63	55	118	49
Cohort 5 .....	1	N/A	N/A	N/A	N/A	63	63	26
3-Year total ...	.....	.....	.....	.....	.....	.....	1,748	728

N/A = Not Applicable. The decrease in the number of respondents within each cohort from one wave to the next reflects an expected retention rate of 88%.

**SUPPLEMENTARY INFORMATION:**

**Summary of Information Collection**

This project is being funded by the U.S. Air Force and conducted by the RAND Corporation. Respondents will be primary supporters of combat-injured Airmen served by the Air Force Wounded Warrior Program. These individuals are nominated by combat-injured Airmen as the family member or friend to whom the Airman most often

turns for help with problems. All primary supporters nominated by combat-injured Airmen will be invited to participate in the information collection (*i.e.*, survey administration), which will occur no more than semi-annually in each year over a three-year period. Primary supporters who choose to participate will be presented with the option of completing the information collection on the telephone or on the Web. The collection instrument assesses

primary supporters' perceptions of Airmen's well-being, primary supporters' own well-being, provision of social support to the Airmen, and perceptions of the effectiveness of existing Air Force programs at meeting the needs of combat-injured Airmen.

The proposed project will utilize a cohort-sequential design. Thus, we will recruit the first cohort of primary supporters and follow up with them at each subsequent survey administration

until the end of the three-year period. At each subsequent survey administration, we will also recruit a new cohort of primary supporters nominated by combat-injured Airmen who have become eligible for services from the Air Force Wounded Warrior Program since the nomination of the previous cohort of primary supporters. We plan on a total of five waves of the information collection and thus five cohorts of primary supporters over the three-year period. Based on previous research, we expect a response rate of 86% among the primary supporters nominated by combat-injured Airmen and a retention rate of 88% from each wave of the information collection to the next.

We expect the nomination of 334 primary supporters for the first information collection and, assuming a response rate of 86%, we anticipate 287 completed primary supporter surveys for the first (baseline) information collection. At the time of the second information collection, we will administer the survey again to the first cohort of primary supporters and survey a second, new cohort of primary supporters nominated by combat-injured Airmen who have recently been accessed into the Air Force Wounded Warrior Program. We anticipate the retention of 88% of the 287 primary supporters who completed the first information collection, for a total of 253 primary supporters from Cohort 1 to be followed up at the second wave of the information collection. We also expect the nomination of 94 additional primary supporters during the interval in between the first and second information collections and thus, assuming a response rate of 86%, 81 new primary supporters in the second cohort completing the second information collection. At each of the three subsequent waves of the information collection, we expect 73 primary supporters to be nominated by combat-injured Airmen and, again assuming a response rate of 86%, the recruitment of 63 new primary supporter respondents into the information collection in the third, fourth, and fifth cohorts.

Assuming these recruitment levels for new cohorts at each wave of the information collection and a retention rate of 88% from one wave to the next, we estimate a total of 557 unduplicated respondents over the three-year period (*i.e.*, counting each respondent only once, regardless of how many waves of information collection they complete). This total is the sum of the numbers of respondents in each cohort at the first wave of the information collection completed by that cohort, *i.e.*, the 287

respondents in Cohort 1 plus the 81 respondents in Cohort 2 plus the 63 respondents in Cohort 3, etc. The information collection is estimated to take 25 minutes or 25/60 hours per response to complete. Assuming this burden per response and a total of 1,748 responses over the three-year period (sum of the number of responses anticipated for each cohort, including multiple responses from respondents) results in a total estimated respondent burden of 728 hours over the three-year period. The estimated respondent burden for the three-year period is detailed in the above table.

If this information is not collected from primary supporters of combat-injured Airmen, key needs of combat-injured Airmen may go ignored, and critical leverage points for facilitating Airmen's adjustment may be overlooked. This information collection will inform Air Force program improvements to bolster existing supports and expand the array of supports needed to promote combat-injured Airmen's adjustment.

Dated: March 3, 2011.

**Morgan F. Park,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2011-5915 Filed 3-14-11; 8:45 am]

**BILLING CODE 5001-06-P**

## DEPARTMENT OF DEFENSE

### Department of the Army

#### Advisory Committee Meeting Notice

**AGENCY:** Department of the Army, DOD.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (U.S.C. 552b, as amended) and 41 Code of the Federal Regulations (CFR 102-3, 140 through 160), the Department of the Army announces the following committee meeting:

*Name of Committee:* U.S. Army Command & General Staff College Subcommittee.

*Date:* April 5-6, 2011.

*Place:* U.S. Army Command and General Staff College, Ft. Leavenworth, KS, Lewis & Clark Center 66027.

*Time:* 8:30 a.m. to 4 p.m. (April 5, 2010).

8:30 a.m. to 12 p.m. (April 6, 2010).

*Proposed Agenda:* Starting point of the meeting will be an update overview of the CGSC, as well as its constituent schools, especially the Command and General Staff School and the School of

Advanced Military Studies.

Subcommittee members will gather information from students, staff and faculty. General deliberations leading to provisional findings for referral to the Army Education Advisory Committee will follow on 6 April beginning at about 0900.

**FOR FURTHER INFORMATION CONTACT:** For information, please contact Dr. Robert Baumann at [robert.f.baumann@us.army.mil](mailto:robert.f.baumann@us.army.mil). Written submissions are to be submitted to the following address: U.S. Army Command and General Staff College Subcommittee, ATTN: Alternate Designated Federal Officer (Baumann), Lewis & Clark Center, U.S. Army Command and General Staff College, Ft. Leavenworth, KS 66027.

**SUPPLEMENTARY INFORMATION:** Meeting of the Advisory subcommittee is open to the public. Attendance will be limited to those persons who have notified the Advisory Subcommittee Management Office at least 10 calendar days prior to the meeting of their intention to attend.

*Filing Written Statement:* Pursuant to 41 CFR 102-3.140d, the Committee is not obligated to allow the public to speak, however, interested persons may submit a written statement for consideration by the Subcommittees. Individuals submitting a written statement must submit their statement to the Alternate Designated Federal Officer (ADFO) at the address listed (*see FOR FURTHER INFORMATION CONTACT*). Written statements not received at least 10 calendar days prior to the meeting, may not be provided to or considered by the subcommittees until its next meeting.

The ADFO will review all timely submissions with the Chairperson, and ensure they are provided to the members of the respective subcommittee before the meeting. After reviewing written comments, the Chairperson and the ADFO may choose to invite the submitter of the comments to orally present their issue during open portion of this meeting or at a future meeting.

The ADFO, in consultation with the Chairperson, may allot a specific amount of time for the members of the public to present their issues for review and discussion.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. 2011-5978 Filed 3-14-11; 8:45 am]

**BILLING CODE 3710-08-P**

**DEPARTMENT OF DEFENSE****Department of the Army****[Docket ID: USA-2011-0003]****Privacy Act of 1974; System of Records****AGENCY:** Department of the Army, DoD**ACTION:** Notice to alter a system of records.

**SUMMARY:** Department of the Army is altering a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on April 14, 2011 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

\* *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

\* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Mailroom 3C843, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mr. Leroy Jones at (703) 428-6185, or the Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325-3905.

**SUPPLEMENTARY INFORMATION:**

Department of the Army notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on March 8, 2011 to the House Committee on Government Reform, the Senate Committee on

Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals," February 20, 1996, 61 FR 6427.

Dated: March 9, 2011.

**Morgan F. Park,***Alternate OSD Federal Register Liaison Officer, Department of Defense.***A0027-1k DAJA****SYSTEM NAME:**

Judge Advocate General Professional Conduct Files (January 20, 2000, 65 FR 3215).

\* \* \* \* \*

**CHANGES:****SYSTEM LOCATION:**

Delete entry and replace with "Primary location: United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310-2200.

Secondary locations: Offices of The Judge Advocate General at Army Commands, Army Service Component Commands, Direct Reporting Units, field operating agencies, installations and activities Army-wide. Official mailing addresses are published as an appendix to the Army's compilation of systems of records notices."

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Delete entry and replace with "Records include subject's name, current mailing address, complaints with substantiating documents, tasking memoranda, preliminary screening inquiry (PSI) reports and mismanagement inquiry reports (containing sensitive personal information pertaining to the underlying allegations of personal and professional misconduct in witness statements and other documents, and inquiry officer's findings and recommendations), supervisory Judge Advocate recommendations and actions, staff memoranda to Judge Advocate General's Corps leadership, Professional Responsibility Committee opinions, memoranda related to disciplinary actions, responses from subjects, and correspondence with Governmental agencies and professional licensing authorities."

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Delete entry and replace with "10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 3037, Judge Advocate General, Deputy Judge Advocate General, and

general officers of Judge Advocate General's Corps: appointment; duties; Rules for Courts-Martial (RCM) Rule 109, Manual for Courts-Martial United States (2008 Edition); Army Regulation 690-300, Civilian Personnel Employment; Army Regulation 27-1, Legal Services, Judge Advocate Legal Services; Army Regulation 27-26, Rules of Professional Conduct for Lawyers."

**PURPOSE(S):**

Delete entry and replace with "To protect the integrity of the Army and government legal profession; to assist The Judge Advocate General in the evaluation, management, administration, and regulation of, and inquiry into, the delivery of legal services by offices and personnel under his jurisdiction; to document founded violations of the rules of professional responsibility and mismanagement; to take adverse action and appropriate disciplinary action against those found to have violated the rules of professional responsibility or committed mismanagement; to record disposition of professional responsibility and mismanagement complaints; and to report founded violations of the rules of professional responsibility to professional licensing authorities and to current and prospective government employers."

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Delete entry and replace with "In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, records contained within this system may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To professional licensing authorities (e.g., state and federal disciplinary agencies); and to current and prospective government employers.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices shall also apply to this system."

\* \* \* \* \*

**STORAGE:**

Delete entry and replace with "Paper records in file folders and electronic computer records."

\* \* \* \* \*

**RETENTION AND DISPOSAL:**

Delete entry and replace with "Professional conduct inquiry founded files maintained at the United States Army Office of The Judge Advocate General, Professional Responsibility

Branch are destroyed by shredding paper copies and erasure off computers in the local office 5 years after the Judge Advocate Legal Service (JALS) member leaves the JALS or when the case is closed for non-JALS members, unless the non-JALS member is the subject of another monitoring, open, or founded file, then when the file is closed.

Legal office mismanagement inquiry founded files maintained at the United States Army Office of The Judge Advocate General, Professional Responsibility Branch are destroyed by shredding paper copies and erasure off computers 5 years after the Judge Advocate Legal Service (JALS) member leaves the JALS or when the case is closed unless the JALS member is the subject of another monitoring, open, or founded file, then when the file is closed, whichever is applicable.

Professional conduct inquiry and legal office mismanagement inquiry unfounded files or inquiry-not-warranted files maintained at the United States Army Office of The Judge Advocate General, Professional Responsibility Branch are destroyed 3 years after the case is closed.

Professional conduct inquiry founded, and unfounded or inquiry-not-warranted files and legal office mismanagement inquiry founded, and unfounded or inquiry-not-warranted files, maintained in other Judge Advocates General (JAG) offices are destroyed by shredding paper copies and erasure off computers in those offices 3 years after the case is closed.”

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with “United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310–2200.”

**NOTIFICATION PROCEDURE:**

Delete entry and replace with “Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310–2200.

All written inquiries should provide the full name and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in

accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ‘I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)’.

If executed within the United States, its territories, possessions, or commonwealths: ‘I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)’.”

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with “Individuals seeking access to records about themselves should address written inquiries to the United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310–2200.

All written inquiries should provide the full name, and current mailing address and any details which may assist in locating record, and their signature.

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**RECORDS SOURCES CATEGORIES:**

Delete entry and replace with “Information is received from individuals, from federal, state, and local authorities; preliminary screening inquiry report, other Army records, state bar records, law enforcement records, and educational institution records.”

**A0027–1k DAJA**

**SYSTEM NAME:**

Judge Advocate General Professional Conduct Files.

**SYSTEM LOCATION:**

United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310–2200.

Secondary locations: Offices of The Judge Advocate General at Army

Commands, Army Service Component Commands, Direct Reporting Units, field operating agencies, installations and activities Army-wide. Official mailing addresses are published as an appendix to the Army’s compilation of systems of records notices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Judge Advocates, civilian attorneys of the Judge Advocate Legal Service, and civilian attorneys subject to the disciplinary authority of the Judge Advocate General who have been the subject of a complaint related to their impairment, professional conduct or mismanagement or when a court has convicted, diverted, or sanctioned the attorney, or has found contempt or an ethics violation, or the attorney has been disciplined elsewhere.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records include, subject’s name, current mailing address, complaints with substantiating documents, tasking memoranda, preliminary screening inquiry (PSI) reports and mismanagement inquiry reports (containing sensitive personal information pertaining to the underlying allegations of personal and professional misconduct in witness statements and other documents, and inquiry officer’s findings and recommendations), supervisory Judge Advocate recommendations and actions, staff memoranda to Judge Advocate General’s Corps leadership, Professional Responsibility Committee opinions, memoranda related to disciplinary actions, responses from subjects, and correspondence with Governmental agencies and professional licensing authorities.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 3037, Judge Advocate General, Deputy Judge Advocate General, and general officers of Judge Advocate General’s Corps: Appointment; duties; Rules for Courts-Martial (RCM) Rule 109, Manual for Courts-Martial United States (2008 Edition); Army Regulation 690–300, Civilian Personnel Employment; Army Regulation 27–1, Legal Services, Judge Advocate Legal Services; Army Regulation 27–26, Rules of Professional Conduct for Lawyers.

**PURPOSE(S):**

To protect the integrity of the Army and government legal profession; to assist The Judge Advocate General in the evaluation, management, administration, and regulation of, and inquiry into, the delivery of legal services by offices and personnel under



his jurisdiction; to document founded violations of the rules of professional responsibility and mismanagement; to take adverse action and appropriate disciplinary action against those found to have violated the rules of professional responsibility or committed mismanagement; to record disposition of professional responsibility and mismanagement complaints; and to report founded violations of the rules of professional responsibility to professional licensing authorities and to current and prospective government employers.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, records contained within this system may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To professional licensing authorities (e.g., State and Federal disciplinary agencies); and to current and prospective government employers.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices shall also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records in file folders and electronic computer records.

**RETRIEVABILITY:**

By subject's name.

**SAFEGUARDS:**

Records are maintained in locked offices and/or in locked file cabinets in secured building or on military installations protected by police patrols. All information is maintained in secured areas accessible only to designated individuals having official need therefore in the performance of official duties. Computer stored information is password protected.

**RETENTION AND DISPOSAL:**

Professional conduct inquiry founded files maintained at the United States Army Office of The Judge Advocate General, Professional Responsibility Branch are destroyed by shredding paper copies and erasure off computers in the local office 5 years after the Judge Advocate Legal Service (JALS) member leaves the JALS or when the case is closed for non-JALS members, unless the non-JALS member is the subject of

another monitoring, open, or founded file, then when the file is closed.

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**SYSTEM MANAGER(S) AND ADDRESS:**

United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310-2200.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310-2200.

All written inquiries should provide the full name and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or

commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to records about themselves should address written inquiries to the United States Army Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Room 2B514, Washington, DC 20310-2200.

All written inquiries should provide the full name and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

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If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

**CONTESTING RECORD PROCEDURES:**

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340-21; 32 CFR part 505; or may be obtained from the system manager.

**RECORDS SOURCES CATEGORIES:**

Information is received from individuals, from federal, state, and local authorities; preliminary screening inquiry report, other Army records, state bar records, law enforcement records, and educational institution records.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 2011-5908 Filed 3-14-11; 8:45 am]

BILLING CODE 5001-06-P

**DEPARTMENT OF DEFENSE**

**Department of the Navy**

**Meeting of the Ocean Research and Resources Advisory Panel**

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Ocean Research and Resources Advisory Panel (ORRAP) will

hold a meeting. The meeting will be open to the public.

**DATES:** The meeting will be held on Wednesday, April 6, 2011, from 3 p.m. to 5 p.m. Members of the public should submit their comments in advance of the meeting to the meeting Point of Contact.

**ADDRESSES:** The meeting will be held at the Consortium for Ocean Leadership, 1201 New York Avenue, NW., 4th Floor, Washington, DC 2005.

**FOR FURTHER INFORMATION CONTACT:** Dr. Charles L. Vincent, Office of Naval Research, 875 North Randolph Street, Suite 1425, Arlington, VA 22203-1995, telephone 703-696-4118.

**SUPPLEMENTARY INFORMATION:** This notice of open meeting is provided in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The meeting will include discussions on ocean research, resource management, and other current issues in the ocean science and management communities; including, the review and development of Strategic Action Plans for the National Ocean Council.

Dated: March 8, 2011.

**D.J. Werner,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2011-5936 Filed 3-14-11; 8:45 am]

**BILLING CODE 3810-FF-P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

**DATES:** Interested persons are invited to submit comments on or before April 14, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395-5806 or e-mailed to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) with a cc: to [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov). Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (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 agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: March 9, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

### Office of Postsecondary Education

*Type of Review:* Extension.

*Title of Collection:* Teacher Quality Enhancement Grants Program (TQE) Scholarship Contract and Teaching Verification Forms on Scholarship Recipients.

*OMB Control Number:* 1840-0753.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* On Occasion; Semi-Annually; Annually.

*Affected Public:* Individuals or household; Not-for-profit institutions; State, Local, or Tribal Government, State Educational Agencies, Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 410.

*Total Estimated Annual Burden Hours:* 350.

*Abstract:* Students receiving scholarships under section 204 of the Higher Education Act of 1965, as amended, Public Law 105-244, incur a service obligation to teach in a high-need school in a high-need local educational agency. This information collection consists of a contract to be executed when funds are awarded, subsequent addenda for students receiving funds beyond one semester/quarter/term, and a separate teaching verification form to be used by students and high-need school districts, to

document the students' compliance with the contract's conditions.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or from the Department's Web site at <http://edicsweb.ed.gov>, by selecting the "Browse Pending Collections" link and by clicking on link number 4465. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202-4537. Requests may also be electronically mailed to the Internet address [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov) or faxed to 202-401-0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 2011-5985 Filed 3-14-11; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 16, 2011.

**ADDRESSES:** Comments regarding burden and/or the collection activity requirements should be electronically

mailed to [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov) or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202-4537. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 9, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

### Federal Student Aid

*Type of Review:* Revision.

*Title of Collection:* Federal Direct Stafford/Ford Loan and Federal Direct Unsubsidized Stafford/Ford Loan Master Promissory Note.

*OMB Control Number:* 1845-0007.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* On Occasion.

*Affected Public:*

Individuals or household.

*Total Estimated Number of Annual Responses:* 5,239,078.

*Total Estimated Number of Annual Burden Hours:* 2,619,539.

*Abstract:* The Federal Direct Stafford/Ford Loan (Direct Subsidized Loan) and Federal Direct Unsubsidized Stafford/Ford Loan (Direct Unsubsidized Loan) Master Promissory Note (MPN) serves as the means by which an individual agrees to repay a Direct Subsidized Loan and/or Direct Unsubsidized Loan. An MPN is a promissory note under which a borrower may receive loans for a single academic year or multiple academic years.

Copies of the proposed information collection request may be accessed from <http://edicsweb.ed.gov>, by selecting the "Browse Pending Collections" link and by clicking on link number 4533. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202-4537. Requests may also be electronically mailed to [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov) or faxed to 202-401-0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 2011-5987 Filed 3-14-11; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF EDUCATION

### Office of Safe and Drug-Free Schools Discretionary Grant Programs

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.184A, 84.184J, 84.184L, 84.215H, 84.215M, 84.215E.

Office of Safe and Drug-Free Schools—Discretionary Grant Programs

**AGENCY:** Office of Safe and Drug-Free Schools, Department of Education.

**ACTION:** Notice of proposed priority.

**SUMMARY:** The Assistant Deputy Secretary for Safe and Drug-Free Schools proposes a competitive preference priority for the following discretionary grant programs administered by the Office of Safe and Drug-Free Schools (OSDFS Discretionary Grant Programs): Grants to Reduce Alcohol Abuse (CFDA No. 84.184A). Grants for the Integration of Schools and Mental Health Systems (CFDA No. 84.215M). Safe Schools/Healthy Students (CFDA Nos. 84.184J, 84.184L). Foundations for Learning (CFDA No. 84.215H). Elementary and Secondary School Counseling (CFDA No. 84.215E).

The Department may use the proposed competitive preference priority for competitions under the OSDFS Discretionary Grant Programs in fiscal year (FY) 2011 and subsequent years. The Department takes this action to align the OSDFS Discretionary Grant Programs with identified needs of American Indian and Alaska Native (AI/AN) youths who are members of

federally recognized tribes. The Department intends this competitive preference priority to enhance the ability of applicants serving tribal communities to address the substance abuse and mental health crises that affect AI/AN students.

**DATES:** We must receive your comments on or before April 14, 2011.

**ADDRESSES:** Address all comments about the proposed priority to Donald Yu, U.S. Department of Education, 400 Maryland Avenue, SW., room 6E308, Washington, DC 20202-6450. If you prefer to send your comments by e-mail, use the following address: [Donald.Yu@ed.gov](mailto:Donald.Yu@ed.gov).

You must include the phrase "Office of Safe and Drug-Free Schools—Comments on Proposed Priority" in the subject line of your electronic message.

**FOR FURTHER INFORMATION CONTACT:** Donald Yu. (202) 205-4499.

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

### SUPPLEMENTARY INFORMATION:

*Invitation to Comment:* We invite you to submit comments regarding the proposed priority. We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from this proposed priority. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the OSDFS Discretionary Grant Programs.

During and after the comment period, you may inspect all public comments about this proposed priority, in room 6E308, 400 Maryland Avenue, SW., Washington DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

*Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record:*

On request, we will supply an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

*Program Authority:* 20 U.S.C. 1221e-3; 20 U.S.C. 7139; 20 U.S.C. 7269; 20 U.S.C. 7131; 20 U.S.C. 7269a; 20 U.S.C. 7245.

*Proposed Priority:* This notice contains one proposed priority.

*Background:* On November 5, 2009, President Obama signed a memorandum requiring Federal agencies to conduct consultations with tribal officials when developing policies that have tribal implications. In response to the President's memorandum, the Department conducted six consultations with tribal officials during FY 2010. During these consultations, the Department received numerous comments regarding the social and mental well-being of AI/AN youth. Specifically, the Department heard that emotional, behavioral, and psychological problems were significantly and adversely affecting the ability of AI/AN youth to succeed in school.

Reports indicate that tribal communities experience high rates of crime, substance abuse, mental health distress, and suicide. Although data on crime are limited, the incarceration rate for AI/ANs in 2008 was approximately 21 percent higher than the national incarceration rate for persons other than American Indians or Alaska Natives.<sup>1</sup> Federal statistics indicated AI/ANs were, in 1999–2002 (the most recent year for which these data are available), the victims of violent crime at more than twice the national rate, with incidence of homicide and domestic violence much higher than the national average.<sup>2</sup>

In addition, compared with other racial groups in the United States, AI/ANs suffer disproportionately from substance use disorders.<sup>3</sup> The 2009 National Survey on Drug Use and Health (NSDUH), administered by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, found that AI/AN adolescents ages 12 to 17 reported using illicit drugs at nearly twice the rate of other youth in that age group nationally.<sup>4</sup> The NSDUH also

reported an increase from 2008 to 2009 in the rate of drug use among AI/AN youth aged 12 and older—from 9.8 percent to 18.3 percent.<sup>5</sup>

Studies by the Centers for Disease Control and Prevention also underscore the mental health crisis affecting AI/AN youth. From 1997–1998 through 2005–2006, the percentage of AI/AN youth experiencing serious psychological distress was the highest among all racial or ethnic groups, and in 2008 the suicide rate for such youth ages 15 to 19 was more than twice the rate of other youth in the same age range.<sup>6,7</sup> Importantly, most mental, emotional, and behavioral (MEB) disorders have their roots in early childhood. Among adults reporting a MEB disorder during their lifetime, more than half traced the onset to childhood or adolescence.<sup>8</sup>

These challenges—crime, early drug and alcohol abuse, anxiety, aggressive or antisocial behavior, and the suicide crisis in tribal communities—have serious and lasting consequences for AI/AN children and adolescents, and interfere with their ability to succeed in and graduate from school.<sup>9,10,11</sup>

The OSDFS Discretionary Grant Programs listed in this notice are currently the Department's principal levers for addressing the problems identified above. Through the Department's alignment of the OSDFS Discretionary Grant Programs with these

*Substances, by Age Groups 12–17 and 18–25 Years, Native American Compared to Other Race/Ethnicity*, available online at: <http://oas.samhsa.gov/NSDUH/2k9NSDUH/2k9Results.htm>, 2009.

<sup>5</sup> *Id.*

<sup>6</sup> Centers for Disease Control (CDC), Health United States, 2008. Table 61, available online at: <http://www.cdc.gov/nchs/data/hus/08.pdf>, 2009.

<sup>7</sup> CDC, National Center for Injury Prevention and Control. *Web-based Injury Statistics Query and Reporting System (WISQARS)*. <http://www.cdc.gov/injury/wisqars/index.html>, 2006.

<sup>8</sup> Kessler, RC, Berglund, P, Demler, O, et al. *Lifetime prevalence and age-of-onset disturbances of DSM-IV disorders in the national comorbidity survey replication*. *Archives of General Psychiatry*. 2005; 62(6) 593–602.

<sup>9</sup> U.S. Department of Education, Institute of Education Sciences, *Status and Trends in the Education of American Indians and Alaska Natives*, 2008.

<sup>10</sup> U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, *National Indian Education Study 2009, Part I: Performance of American Indian and Alaska Native Students at Grades 4 and 8 on NAEP 2009 Reading and Mathematics Assessments*, available online at <http://nces.ed.gov/nationsreportcard/pdf/studies/2010462.pdf>, 2009.

<sup>11</sup> Faircloth, Susan C., & Tippecanoe, III, John W. (2010). *The Dropout/Graduation Rate Crisis Among American Indian and Alaska Native Students: Failure to Respond Places the Future of Native Peoples at Risk*. Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA; <http://www.civilrightsproject.ucla.edu>.

identified needs, applicants serving tribal communities would likely have greater access to the resources needed to address the substance abuse and mental health issues their students face.

To increase tribal communities' access to the OSDFS Discretionary Grant Programs, the Department proposes a competitive preference priority for five discretionary grant programs administered by the Department's Office of Safe and Drug-Free Schools: (1) Grants to Reduce Alcohol Abuse (CFDA No. 84.184A), which helps local educational agencies (LEAs) develop and implement innovative and effective alcohol abuse prevention programs for secondary school students; (2) Grants for the Integration of Schools and Mental Health Systems (CFDA No. 84.215M), which helps grantees increase student access to quality mental health care by developing policies, protocols, and infrastructure linking schools and mental health systems; (3) Safe Schools/Healthy Students CFDA Nos. 84.184J and 84.184L), which supports the development of community-wide approaches to promoting healthy childhood development, preventing violence and the illegal use of drugs, and promoting safety and discipline; (4) Foundations for Learning (CFDA No. 84.215H), which seeks to help eligible children prepare for school by delivering and coordinating services that foster emotional, behavioral, and social development, as well as supporting community partnerships for that purpose; and (5) Elementary and Secondary School Counseling (CFDA No. 84.215E), which supports efforts by LEAs to establish or expand elementary school and secondary school counseling programs.

Each of these programs can address the root causes of many problems AI/AN youth face and help enable the systems that serve them to be more integrated, comprehensive, and responsive.

*Proposed Competitive Preference Priority:* Projects that are proposed by any eligible entity serving students residing on "Indian lands" as that term is defined by section 8013 of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 7713(7)). The eligible entity must be the only applicant or the lead applicant in a consortium of eligible entities.

**Note:** The Department will announce the final priority in a notice in the **Federal Register**. The Department will determine the final priority after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing or using

<sup>1</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. *Jails in Indian Country, 2008*, available online at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/jic08.pdf>, 2009.

<sup>2</sup> U.S. Department of Justice, Office of Justice Programs. *Bureau of Justice Statistics American Indians and Crime Report*, available online at: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=386>, 2004.

<sup>3</sup> Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *The NSDUH Report, "Substance Use and Substance Use Disorders among American Indians and Alaska Natives,"* available online at: <http://www.oas.samhsa.gov/2k7/AmIndians/AmIndians.pdf>, 2007.

<sup>4</sup> U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration. *National Survey on Drug Use and Health (NSDUH): Use of Tobacco, Illegal*

additional priorities subject to meeting applicable rulemaking requirements.

**Note:** This notice does not solicit applications. In any year in which we choose to use this priority, we will announce the priority in the **Federal Register** notice governing the applicable grant competition.

**Executive Order 12866:** This notice of proposed priority has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with this notice of proposed priority are those we have determined as necessary for administering the OSDFS Discretionary Grant Programs effectively and efficiently. The benefit of this proposed priority is to increase federally recognized tribal communities' access to a set of programs that address the unique social, emotional, and academic needs of AI/AN youth.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of proposed priority, we have determined that the benefits of the proposed priority justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

**Intergovernmental Review:** This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive Order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

**Executive Order 13175:** Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments") provides that each Federal agency must have an accountable process to ensure regular and meaningful consultation and collaboration with Indian tribal governments or their representative organizations in the development of regulatory policies that have tribal implications. As part of this process, before publishing this notice of proposed priority, we have conducted official tribal consultations with tribal leaders who represent federally recognized tribes across the country. We are specifically inviting input from Indian tribal officials concerning this

proposed priority as part of the process of consultation required by the Executive order.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**Electronic Access to This Document:** You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

Dated: March 9, 2011.

**Kevin Jennings,**

*Assistant Deputy Secretary for Safe and Drug-Free Schools.*

[FR Doc. 2011-5998 Filed 3-14-11; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF ENERGY

### International Energy Agency Meetings

**AGENCY:** Department of Energy.

**ACTION:** Notice of meetings.

**SUMMARY:** The Industry Advisory Board (IAB) to the International Energy Agency (IEA) will meet on March 22, 2011, at the headquarters of the IEA in Paris, France, in connection with a joint meeting of the IEA's Standing Group on Emergency Questions (SEQ) and the IEA's Standing Group on the Oil Market (SOM) on March 22; and on March 23 and March 24 in connection with a meeting of the SEQ on March 23 and March 24.

**DATES:** March 22–24, 2011.

**ADDRESSES:** 9, rue de la Fédération, Paris, France.

**FOR FURTHER INFORMATION CONTACT:**

Diana D. Clark, Assistant General for International and National Security Programs, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, 202-586-3417.

**SUPPLEMENTARY INFORMATION:** In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)) (EPCA),

the following notice of meeting is provided:

Meetings of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held at the headquarters of the IEA, 9, rue de la Fédération, Paris, France, on March 22, 2011, beginning at 9 a.m.; and on March 23 commencing at 9:30 a.m., and continuing on March 24, 2011, at 9:30 a.m. The purpose of this notice is to permit attendance by representatives of U.S. company members of the IAB at a joint meeting of the IEA's Standing Group on Emergency Questions (SEQ) and the IEA's Standing Group on the Oil Market (SOM) on March 22, which is scheduled to be held at the headquarters of the IEA commencing at 9 a.m.; and at a meeting of the SEQ on March 23, commencing at 9:30 a.m. and continuing on March 24, 2011, at 9:30 a.m.. The IAB will also hold a preparatory meeting among company representatives at the same location at 8:30 a.m. on March 23. The agenda for this preparatory meeting is to review the agenda for the SEQ meeting, to be held on March 23–24.

The agenda of the joint SEQ/SOM meeting on March 22 is under the control of the SEQ and the SOM. It is expected that the SEQ and the SOM will adopt the following agenda:

1. Adoption of the Agenda
2. Approval of the Summary Record of the November 2010 Joint Session
3. Reports on Recent Oil Market and Policy Developments in IEA Countries
4. The Program of Work
  - Priority Setting Exercise 2013–2014
5. The Current Oil Market Situation
6. Update on the Gas Market
7. Reports on Recent IEA-IEF-OPEC Cooperation
  - Workshop: How the Physical and Financial Markets for Energy Interact (London, November 2010)
  - Forum: Energy Market Regulation (London, November 2010)
  - Symposium on Energy Outlooks (Riyadh, January 2011)
8. India's Refining Industry: Towards a Regional Export Hub?
9. Workshop Scene Setter
  - Commodity Derivatives Market and Recent Regulatory Trends
10. Other Business
  - Tentative Schedule of Next Meetings for 2011:
    - June 28: Joint SEQ/SOM Meeting on the Medium Term Oil and Gas Markets Review
    - June 29–30: 133rd Meeting of the SEQ
    - November 15–17: SOM and SEQ Meetings
11. Workshop: The Changing Structure of Energy Markets

- Session 1: The Impact of Financial Market Participants on Energy Futures Markets
  - 1. How do the investment strategies of financial market participants affect the structure and functioning of energy futures markets?
  - 2. How can we explain co-movement between commodities and other asset classes?
  - 3. How can we explain recent price volatility in oil markets—what data would help reduce uncertainty?
  - 4. How can we explain the changing relationship between financial and physical oil markets?
  - Session 2: The Impact of New Regulations on Energy Markets
  - 1. What impact will new regulations have on the structure and functioning of the futures market?
  - 2. Does more regulation mean more efficiency?
  - 3. Will a shift to more exchange-traded contracts affect overall market operation?
  - 4. What are the shortcomings of the current and proposed regulatory frameworks?
  - 5. What are the effects of new regulations on end-users in terms of hedging and financing?
- The agenda of the SEQ meeting on March 23 is under the control of the SEQ. It is expected that the SEQ will adopt the following agenda:
1. Adoption of the Agenda
  2. Approval of the Summary Record of the 131st Meeting
  3. Status of Compliance with IEP Stockholding Commitments
  4. Emergency Response Review Program
    - Schedule of Emergency Response Reviews
    - Proposal for Mid-term Reviews
    - Emergency Response Review of Poland
    - Emergency Response of Spain
    - Emergency Response of the Slovak Republic
    - Questionnaire Response of Australia
    - Questionnaire Response of Korea
    - Questionnaire Response of Chile
  5. Emergency Policy for Natural Gas
    - Main Findings on the Questionnaire on Gas Security
  6. Emergency Response Exercises
    - Evaluation of ERE5
  7. Cooperation with Non-Member Countries During Oil Supply Disruptions
    - Approval Written Procedure Draft Governing Board Document
    - Report on Discussion at Governing Board February 24, 2011
  8. Emergency Response Measures

- Authorization of Budget for Emergency Response Actions
- 9. Energy Security Model
  - Presentation of Draft Model
- 10. Policy and Other Developments in Member Countries
  - Italy
  - Sweden
  - United Kingdom
  - United States
- 11. Report from the Industry Advisory Board
- 12. Activities with International Organizations and Non-Member Countries
  - APEC/ASEAN Emergency Response Exercise
    - Thailand: Emergency Response Assessment
    - Report on Workshops in China
    - Chile
    - Indonesia
    - India
- 13. Documents for Information
  - Emergency Reserve Situation of IEA Member Countries on January 1, 2011
  - Base Period Final Consumption: 1Q 2010–4Q 2010
  - Updated Emergency Contacts List
- 13. Other Business
  - Tentative Schedule of Next Meetings for 2011:
    - June 28: Joint SEQ/SOM Meeting on the Medium Term Oil and Gas Markets Review
    - June 29–30: 133rd Meeting of the SEQ
    - November 15–17: SOM and SEQ Meetings

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(ii)), the meetings of the IAB are open to representatives of members of the IAB and their counsel; representatives of members of the IEA's Standing Group on Emergency Questions and the IEA's Standing Group on the Oil Markets; representatives of the Departments of Energy, Justice, and State, the Federal Trade Commission, the General Accounting Office, Committees of Congress, the IEA, and the European Commission; and invitees of the IAB, the SEQ, the SOM, or the IEA.

Issued in Washington, DC, March 7, 2011.

**Diana D. Clark,**  
Assistant General Counsel for International and National Security Programs.

[FR Doc. 2011-5785 Filed 3-14-11; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER01-2765-028; ER07-1358-015; ER00-2885-029; ER09-1141-008; ER05-1232-025; ER02-2102-028; EL10-73-000.

*Applicants:* J.P. Morgan Ventures Energy Corporation, BE Louisiana LLC, Cedar Brakes I, L.L.C., Utility Contract Funding, L.L.C., Cedar Brakes II, L.L.C., J.P. Morgan Commodities Canada Corporation.

*Description:* Response to Show-Cause Order of J.P. Morgan Ventures Energy Corporation, *et al.*

*Filed Date:* 02/28/2011.

*Accession Number:* 20110228-5001.

*Comment Date:* 5 p.m. Eastern Time on Monday, March 21, 2011.

*Docket Numbers:* ER10-1580-003.

*Applicants:* Saguaro Power Company LP.

*Description:* Saguaro Power Company LP submits tariff filing per 35: SPC—Amendment to Market-Based Rate Tariff 03072011 to be effective 9/8/2010.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308-5026.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 29, 2011.

*Docket Numbers:* ER10-2288-003.

*Applicants:* Optim Energy Marketing LLC.

*Description:* Optim Energy Marketing LLC submits tariff filing per 35: Optim MBR Tariff Compliance filing to be effective 8/20/2010.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308-5000.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 29, 2011.

*Docket Numbers:* ER11-2044-001.

*Applicants:* MidAmerican Energy Company.

*Description:* MidAmerican Energy Company submits tariff filing per 35: Capacity and Energy Sales Tariff Compliance Filing to be effective 9/30/2010.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308-5062.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 29, 2011.

*Docket Numbers:* ER11-2954-001.

*Applicants:* DTE Calvert City, LLC.

*Description:* DTE Calvert City, LLC submits tariff filing per 35.17(b): Amendment to Market-Based Rate Application to be effective 2/28/2011.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308–5051.  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 21, 2011.

*Docket Numbers:* ER11–3030–000.  
*Applicants:* Wisconsin Electric Power Company.

*Description:* Wisconsin Electric Power Company submit notice of termination for FERC Electric Tariff, Rate Schedule 118, Power Sales Agreement with Northern States Power Company.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110308–0200.  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11–3031–000.  
*Applicants:* Metro Energy, LLC.  
*Description:* Metro Energy, LLC submits tariff filing per 35.15: MBR Tariff Cancellation to be effective 3/9/2011.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308–5027.  
*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 29, 2011.

*Docket Numbers:* ER11–3032–000  
*Applicants:* PJM Interconnection, L.L.C.

*Description:* PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): R32 ISA Original Service Agreement No. 2785 to be effective 2/8/2011.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308–5061.  
*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 29, 2011.

*Docket Numbers:* ER11–3033–000.  
*Applicants:* Golden Spread Electric Cooperative, Inc.

*Description:* Golden Spread Electric Cooperative, Inc. submits tariff filing per 35.1: Baseline Tariff Filing to be effective 3/8/2011.

*Filed Date:* 03/08/2011.

*Accession Number:* 20110308–5070.  
*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on

or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 8, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–5895 Filed 3–14–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–1581–003.  
*Applicants:* Long Beach Peakers LLC.  
*Description:* Long Beach Peakers LLC submits tariff filing per 35: LBP—Amendment to Market-Based Rate Tariff 03072011 to be effective 9/8/2010.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307–5076.  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER10–2474–001; ER10–2475–001.

*Applicants:* Sierra Pacific Power Company, Nevada Power Company.

*Description:* Supplemental Information of Sierra Pacific Power Company, et al.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307–5175.  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11–3024–000.  
*Applicants:* Puget Sound Energy, Inc.  
*Description:* Puget Sound Energy, Inc. submits tariff filing per 35: Vantage LGIA 03/07/2011 to be effective 3/7/2011.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307–5077  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11–3025–000.  
*Applicants:* Southwest Power Pool, Inc.

*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii): Submission of Notice of Cancellation of LGIA 1677R2 Taloga Wind, LLC to be effective 1/31/2011.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307–5112.  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11–3026–000.  
*Applicants:* Aspen Merchant Energy, LP.

*Description:* Aspen Merchant Energy, LP submits tariff filing per 35.12: Aspen Merchant Energy, LP FERC Electric Market-Based Rate Tariff to be effective 3/8/2011.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307–5120.  
*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11–3027–000.  
*Applicants:* Virginia Electric and Power Company, Dominion Energy

Marketing, Inc., Dominion Nuclear Connecticut, Inc., Dominion Energy Kewaunee, Inc., Dominion Energy Brayton Point, LLC, Dominion Energy Manchester Street, Inc., Dominion Energy New England, Inc., Dominion Energy Salem Harbor, LLC, Dominion Retail, Inc., Elwood Energy, LLC, Fairless Energy, LLC, Kincaid Generation, L.L.C., NedPower Mount Storm, LLC, State Line Energy, L.L.C., Fowler Ridge Wind Farm LLC.

*Description:* Request of Virginia Electric And Power Company And Its Market-Regulated Power Sales Affiliates For Waivers Of Certain Affiliate Restrictions Requirements.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307-5138.

*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11-3028-000.

*Applicants:* BBPC, LLC.

*Description:* BBPC, LLC submits tariff filing per 35.12: BBPC LLC MBR Tariff to be effective 5/6/2011.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307-5166.

*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

*Docket Numbers:* ER11-3029-000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Southwest Power Pool, Inc.'s Submission of Notice of Cancellation of Large Generator Interconnection Agreement.

*Filed Date:* 03/07/2011.

*Accession Number:* 20110307-5174.

*Comment Date:* 5 p.m. Eastern Time on Monday, March 28, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make

protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: March 8, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011-5896 Filed 3-14-11; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**Sunshine Act Meeting Notice**

The following notice of meeting is published pursuant to section 3(a) of the Government in the Sunshine Act (Pub. L. 94-409), 5 U.S.C. 552b:

**AGENCY HOLDING MEETING:** Federal Energy Regulatory Commission.

**DATE AND TIME:** March 17, 2011; 10 a.m.

**PLACE:** Room 2C, 888 First Street, NE., Washington, DC 20426

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** Agenda.

\* **Note** —Items listed on the agenda may be deleted without further notice.

**CONTACT PERSON FOR MORE INFORMATION:** Kimberly D. Bose, Secretary, Telephone (202) 502-8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502-8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at <http://www.ferc.gov> using the eLibrary link, or may be examined in the Commission's Public Reference Room.

**968TH—MEETING**

Item No.	Docket No.	Company
<b>Administrative</b>		
A-1 .....	AD02-1-000 .....	Agency Business Matters.
A-2 .....	AD02-7-000 .....	Customer Matters, Reliability, Security and Market Operations.
<b>Electric</b>		
E-1 .....	ER03-563-066 .....	Devon Power LLC.
E-2 .....	OMITTED.	
E-3 .....	NP10-18-000 .....	North American Electric Reliability Corporation.



## 968TH—MEETING—Continued

Item No.	Docket No.	Company
E-4 .....	RM09-18-001 .....	Revision to Electric Reliability Organization Definition of Bulk Electric System.
E-5 .....	RM11-14-000 .....	Analysis of Horizontal Market Power under the Federal Power Act.
E-6 .....	RM10-16-000 .....	System Restoration Reliability Standards.
E-7 .....	RM10-10-000 .....	Planning Resource Adequacy Assessment Reliability Standard.
E-8 .....	RM10-15-000 .....	Mandatory Reliability Standards for Interconnection Reliability Operating Limits.
E-9 .....	RM09-19-000 .....	Western Electric Coordinating Council Qualified Transfer Path Unscheduled Flow Relief Regional Reliability Standard.
E-10 .....	RR09-6-003 .....	North American Electric Reliability Corporation.
E-11 .....	OMITTED.	
E-12 .....	ER11-2256-000 .....	California Independent System Operator Corporation.
E-13 .....	EL08-47-006 .....	PJM Interconnection, L.L.C.
E-14 .....	EL11-12-000 .....	Idaho Wind Partners 1, LLC.
E-15 .....	EL10-1-001 .....	Southern California Edison Company.
E-16 .....	EL10-84-002 .....	Californians for Renewable Energy, Inc. v. Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company and the California Public Utilities Commission.
<b>Gas</b>		
G-1 .....	OMITTED.	
G-2 .....	RP11-1495-002 .....	Ozark Gas Transmission, L.L.C.
G-3 .....	RP10-315-002 .....	Columbia Gulf Transmission Company.
G-4 .....	OR07-7-000 .....	Tesoro Refining and Marketing Company v. Calnev Pipe Line LLC.
	OR07-18-000 .....	America West Airlines, Inc. and US Airways, Inc., Chevron Products Company, Continental Airlines, Inc., Southwest Airlines Co. and Valero Marketing and Supply Company v. Calnev Pipe Line LLC.
	OR07-19-000 .....	ConocoPhillips Co. v. Calnev Pipe Line LLC.
	OR07-22-000 .....	BP West Coast Products, LLC v. Calnev Pipe Line LLC.
	OR09-15-000 .....	Tesoro Refining and Marketing Company v. Calnev Pipe Line LLC.
	OR09-20-000 .....	BP West Coast Products, LLC v. Calnev Pipe Line LLC.
<b>Hydro</b>		
H-1 .....	P-2539-061 .....	Erie Boulevard Hydropower, L.P.
H-2 .....	P-2195-025 .....	Portland General Electric Company.
H-3 .....	P-1390-063 .....	Southern California Edison Company.
<b>Certificates</b>		
C-1 .....	OMITTED.	
C-2 .....	CP10-492-000 .....	Columbia Gas Transmission, LLC.
C-3 .....	OMITTED.	
C-4 .....	CP10-22-000 .....	Magnum Gas Storage, LLC, Magnum Solutions, LLC.
C-5 .....	CP10-486-000 .....	Colorado Interstate Gas Company.

Issued: March 10, 2011.

**Kimberly D. Bose,**  
Secretary.

A free Webcast of this event is available through <http://www.ferc.gov>. Anyone with Internet access who desires to view this event can do so by navigating to <http://www.ferc.gov's> Calendar of Events and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the free Webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit <http://www.CapitolConnection.org> or contact Danelle Springer or David Reininger at 703-993-3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission

Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 2011-6067 Filed 3-11-11; 11:15 am]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2011-0199; FRL-9280-6]

### Notice of Receipt of Petition From the Government of Canada for Application of the Renewable Fuel Standard Aggregate Compliance Approach

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA is issuing notice of receipt of a petition for EPA to authorize the use of an aggregate approach for compliance with the Renewable Fuel Standard renewable biomass provisions. This petition was submitted by the Government of Canada. The petition requests that EPA determine that an aggregate compliance approach will provide reasonable assurance that

planted crops and crop residue from Canada meet the definition of renewable biomass. EPA has previously determined that the aggregate compliance approach is applicable in the United States. If the petition is approved, crops and crop residue from Canada would not be subject to individual recordkeeping and reporting requirements. This determination could change if EPA later determined, through its annual evaluation of the aggregate compliance approach, that the number of acres of agricultural land in Canada exceeded a baseline number of acres determined to be available under the Act for the production of crops and crop residue meeting the definition of renewable biomass. In this notice, EPA is soliciting comment on all aspects of the petition.

**DATES:** Comments must be received on or before May 16, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2011-0199, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).

- *Fax:* (202)566-1741.

- *Mail:* Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.

- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2011-0199. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly

to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** The complete petition and all supporting materials are available for public review in the docket. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, 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 and Radiation Docket is (202) 566-1741.

**FOR FURTHER INFORMATION CONTACT:** Meg McCarthy, Office of Transportation and Air Quality, Mailcode: 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202)343-9968; fax number: (202)343-2802; e-mail address: [mccarthy.meg@epa.gov](mailto:mccarthy.meg@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **(A) Request for Comments**

On January 31, 2011, the Government of Canada submitted a petition to the Administrator pursuant to 40 CFR 80.1457 requesting approval of an aggregate approach for compliance with the Renewable Fuel Standard renewable biomass provisions for planted crops and crop residue from Canada. This petition has been placed in the public docket.

The petition requests that EPA determine that an aggregate compliance approach will provide reasonable assurance that planted crops and crop residue from Canada meet the definition of renewable biomass and will continue to meet the definition of renewable biomass, and thus will not be subject to individual recordkeeping and reporting requirements unless EPA determines through an annual evaluation that more acres are planted to crops and crop residue than are permissible consistent with the definition of renewable biomass. EPA solicits comments and information to assist the Administrator in making a determination concerning the petition.

##### **(B) Background on the Petition Process**

Pursuant to 40 CFR 80.1457, EPA may approve a petition for application of the aggregate compliance approach in a foreign country if it finds that such an approach will provide reasonable assurance that planted crops and crop residue from the petitioning country meet the definition of renewable biomass, and will continue to meet the definition of renewable biomass, as demonstrated through the submission of credible, reliable, and verifiable data. As part of its evaluation of the petition, EPA will consider several factors, including:

- Whether there has been a reasonable identification of the "2007 baseline area of land," defined as the total amount of cropland, pastureland, and land that is equivalent to U.S. Conservation Reserve Program land in the country in question that was actively managed or fallow and nonforested on December 19, 2007, taking into account the definitions of terms such as "cropland," "pastureland," "planted crop," and "crop residue" included in the final RFS2 regulations.

- Whether information on the total amount of cropland, pastureland, and land that is equivalent to U.S. Conservation Reserve Program land in the country in question for years preceding and following calendar year 2007 shows that the 2007 baseline area of land is not likely to be exceeded in the future.

- Whether economic considerations, legal constraints, historical land use and agricultural practices and other factors show that it is likely that producers of planted crops and crop residue will continue to use agricultural land within the 2007 baseline area of land identified into the future, as opposed to clearing and cultivating land not included in the 2007 baseline area of land.

- Whether there is a reliable method to evaluate, on an annual basis, if the

2007 baseline area of land is being or has been exceeded.

- Whether a credible and reliable entity has been identified to conduct data gathering and analysis, including annual identification of the aggregate amount of cropland, pastureland, and land that is equivalent to U.S. Conservation Reserve Program land, that is needed for an annual EPA evaluation of the aggregate compliance approach, and whether the data, analyses, and methodologies are publicly available.
- Whether the petition submission requirements specified in 40 CFR 80.1457(b) have been satisfied, including the submission of a letter signed by a national government representative at the ministerial level or equivalent confirming that the petition and all supporting data have been reviewed and verified by the ministry (or ministries) or department(s) of the national government with primary expertise in agricultural land use patterns, practices, data, and statistics of the country in question, that the data support a finding that planted crops and crop residue from the specified country meet the definition of renewable biomass and will continue to meet the definition of renewable biomass, and that the responsible national government ministry (or ministries) or department(s) will review and verify the data submitted on an annual basis to facilitate EPA's annual assessment of the 2007 baseline area of land.

The public is specifically invited to comment on these factors, whether Canada has met all submission requirements specified in the regulations, and on any other issue that could inform EPA's evaluation of the petition.

Dated: March 10, 2011.

**Margo Tsirigotis Oge,**

*Director, Office of Transportation and Air Quality, Office of Air and Radiation.*

[FR Doc. 2011-6033 Filed 3-14-11; 8:45 am]

**BILLING CODE 6560-50-P**

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## EXPORT-IMPORT BANK OF THE U.S.

[Public Notice 2011-0051]

### Agency Information Collection Activities: Final Collection; Comment Request

**AGENCY:** Export-Import Bank of the U.S.

**ACTION:** Submission for OMB review and comments request.

*Form Title:* Report of Overdue Accounts Under Short-Term Policies EIB 92-27.

**SUMMARY:** The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The collection provides Ex-Im Bank staff with the information necessary to monitor the borrower's payments for exported goods covered under its short and medium-term export credit insurance policies. It also alerts Ex-Im Bank staff of defaults, so they can manage the portfolio in an informed manner.

Form can be viewed at [http://www.exim.gov/pub/pending/EIB92\\_27.pdf](http://www.exim.gov/pub/pending/EIB92_27.pdf).

**DATES:** Comments should be received on or before May 16, 2011 to be assured of consideration.

**ADDRESSES:** Comments maybe submitted electronically on <http://www.regulations.gov> or by mail to Michele Kuester, Export-Import Bank of the United States, 811 Vermont Ave., NW., Washington, DC 20571.

**SUPPLEMENTARY INFORMATION:**

*Titles and Form Number:* EIB 92-27. Report of Overdue Accounts Under Short-Term Policies.

*OMB Number:* 3048-0027.

*Type of Review:* Regular.

*Need and Use:* The collection provides Ex-Im Bank staff with the information necessary to monitor the borrower's payments for exported goods covered under its short- and medium-term export credit insurance policies. It also alerts Ex-Im Bank staff of defaults, so they can manage the portfolio in an informed manner.

*Affected Public:* This form affects entities involved in the export of U.S goods and services.

*Annual Number of Respondents:* 396.

*Estimated Time per Respondent:* 15 minutes.

*Government Annual Burden Hours:* 33 hours.

*Frequency of Reporting or Use:* Monthly.

**Sharon A. Whitt,**

*Agency Clearance Officer.*

[FR Doc. 2011-5941 Filed 3-14-11; 8:45 am]

**BILLING CODE 6690-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

[DA 11-453]

### Federal Advisory Committee Act; Technological Advisory Council

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Technological Advisory Council will hold a meeting on Wednesday, March 30, 2011 in the Commission Meeting Room, from 1 p.m. to 4 p.m. at the Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

**DATES:** March 30, 2011.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Walter Johnston, Chief, Electromagnetic Compatibility Division, 202-418-0807; [Walter.Johnston@FCC.gov](mailto:Walter.Johnston@FCC.gov).

**SUPPLEMENTARY INFORMATION:** Technical Advisory Council members have been prioritizing and further developing technology issues discussed at the initial meeting on November 4, 2011. The Technical Advisory Council members will discuss this work, outline progress to date and discuss possible further work. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. Meetings are also broadcast live with open captioning over the internet from the FCC Live Web page at <http://www.fcc.gov/live/>. The public may submit written comments before the meeting to: Walter Johnston, the FCC's Designated Federal Officer for Technological Advisory Council by e-mail: [Walter.Johnston@fcc.gov](mailto:Walter.Johnston@fcc.gov) or U.S. Postal Service Mail (Walter Johnston, Federal Communications Commission, Room 2-A665, 445 12th Street, SW., Washington, DC 20554). Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or by calling the Office of Engineering and Technology at 202-418-2470 (voice), (202) 418-1944 (fax). Such requests should include a detailed description of the accommodation needed. In addition, please include your contact information. Please allow at

least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Federal Communications Commission

**Julius P. Knapp,**

*Chief, Office of Engineering and Technology.*

[FR Doc. 2011-6005 Filed 3-14-11; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 2011-5166) published on page 12739 of the issue for Tuesday, March 8, 2011.

Under the Federal Reserve Bank of Dallas heading, the entry for Comerica, Inc., Dallas, Texas, is revised to read as follows:

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *Comerica, Inc.*, Dallas, Texas; to acquire through Comerica Bayou Acquisition Corporation, 100 percent of the voting shares of Sterling Bancshares, Inc., and thereby indirectly acquire Sterling Bank, both of Houston, Texas.

Comments on this application must be received by April 1, 2011.

Board of Governors of the Federal Reserve System, March 10, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2011-5991 Filed 3-14-11; 8:45 am]

**BILLING CODE 6210-01-P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments

must be received not later than March 30, 2011.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President), 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Gary W. Melvin, Alex J. Melvin, David W. Melvin and Laura A. Voyles*, all of Sullivan, Illinois; as a group acting in concert, to acquire voting shares of First Mid-Illinois Bancshares, Inc., and thereby indirectly acquire control of First Mid-Illinois Bank & Trust, National Association, both of Mattoon, Illinois.

Board of Governors of the Federal Reserve System, March 10, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2011-5992 Filed 3-14-11; 8:45 am]

**BILLING CODE 6210-01-P**

## FEDERAL TRADE COMMISSION

### Public Workshop: Debt Collection 2.0: Protecting Consumers as Technologies Change

**AGENCY:** Federal Trade Commission ("FTC" or the "Commission").

**ACTION:** Public Workshop and Request for Public Comments and Participation.

**SUMMARY:** The FTC announces that it will hold a public workshop on April 28, 2011, to address consumer protection issues that have arisen as debt collectors avail themselves of advances in technology. The workshop will explore developments in technology that debt collectors use to gather, store, and manage information about consumers; to comply with the law; to communicate with consumers; and to receive payment. The workshop will provide an opportunity for government regulators, industry members, technologists, consumer advocates, and researchers, to discuss the costs and benefits of these technologies for debt collectors and consumers. It will also address whether and how collectors may use such technologies consistent with applicable laws, including the Fair Debt Collection Practices Act and Section 5 of the FTC Act, what consumer protection concerns arise from use of these technologies, and what actions, if any, the Commission and other policymakers should take to respond to those concerns. This notice poses a series of questions on which the Commission seeks comment.

The event is open to the public, and there is no fee for attendance. For admittance to the workshop, all attendees will be required to show a valid form of government-issued photo identification, such as a driver's license.

Additional information about the workshop will be posted on the FTC's Web site at: <http://www.ftc.gov/bcp/workshops/debtcollectiontech/index.shtml>.

**Date and Location:** The workshop will be held on April 28, 2011, from 8:30 a.m. to 5:30 p.m., at the Federal Trade Commission's Satellite Building Conference Center, located at 601 New Jersey Avenue, NW., Washington, DC.

**Workshop Agenda:** Additional information, including an agenda and panelist biographies, will be posted on the FTC's Web site at <http://www.ftc.gov/bcp/workshops/debtcollectiontech/index.shtml>.

**Public Comments:** Interested parties are invited to submit written comments electronically or in paper form, by following the instructions in the Instructions For Filing Comments part of the **SUPPLEMENTARY INFORMATION** section below. Comments filed in electronic form should be submitted by using the following Web link: <https://ftcpublic.commentworks.com/ftc/debtcollecttechworkshop>, and following the instructions on the Web-based form. Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex F), 600 Pennsylvania Avenue, NW., Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below. To be considered in preparation for the workshop, comments must be received by Thursday, April 7, 2011. However, comments will be accepted through Friday, May 27, 2011.

**Requests to Participate as Workshop Panelists:** FTC staff will identify and invite individuals with relevant expertise to participate as panelists. In addition, the FTC staff may invite other persons to participate as panelists who submit requests in response to this **Federal Register** notice. Requests to participate as panelists in the workshop must be received on or before 5 p.m. EST, Tuesday, March 22, 2011. Persons filing requests to participate as panelists will be notified whether they have been selected on or before Wednesday, March 31, 2011. For further instructions, please see the "Requests to Participate as Workshop Panelists" section under **SUPPLEMENTARY INFORMATION** below.

**FOR FURTHER INFORMATION CONTACT:** Leah Frazier, (202) 326-3224, [dctech@ftc.gov](mailto:dctech@ftc.gov), Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Mail Stop NJ-3158, Washington, DC 20580.  
**SUPPLEMENTARY INFORMATION:** When the Fair Debt Collection Practices Act

("FDCPA"), 15 U.S.C. 1692–1692p, was enacted in 1977, debt collectors contacted consumers to collect debts primarily through mail and landline telephone, reflecting the means of communication then available. Technological advances have expanded the tools available to debt collection companies as they attempt to locate consumers, monitor their employees' practices, communicate with consumers, and receive payment on debts. The Commission examined these developments as part of a broad review of the evolution of the debt collection industry at a public workshop held in 2007. Using data gleaned from the workshop, public comments, and the FTC's law enforcement experience, the Commission issued a report in 2009, *Collecting Consumer Debts: The Challenges of Change—A Workshop Report*.<sup>1</sup> The Report recognized that the legal framework for consumer debt collection had not been updated to account for many technological advances, and that, in some instances, the Commission lacked data on the use of new technologies in the debt collection system.<sup>2</sup>

Further exploration of the impact of evolving technology on consumer debt collection is warranted not only in light of questions raised by the 2007 workshop and ensuing Report, but also due to developments that have occurred since then, such as the increasing popularity of social media networking sites.<sup>3</sup> Facebook, which did not become available to the general public until 2006, now has approximately 150 million users in the United States,<sup>4</sup> and some debt collectors are using it to find and contact debtors.<sup>5</sup> The technology that debt collectors use to obtain, store, and manage information about

consumers also continues to evolve.<sup>6</sup> In addition, collectors may be using older technologies in new ways. For example, although electronic mail ("e-mail") is not a new technology, its use by debt collectors to contact consumers has increased, giving rise to questions about its treatment under the current regulatory scheme.<sup>7</sup> Similarly, the use of electronic payments continues to rise.<sup>8</sup> Debt collectors, like many retailers, have begun to accept payment from consumers electronically.<sup>9</sup> These trends call for a discussion of the relative costs and benefits to consumers and the debt collection industry of these technologies and correspondingly, whether there is a need for action, including changes in law, policy, or industry practice.

As discussed below, advances in technology can affect the entire debt collection life cycle, from locating consumers and communicating with them to receiving payment.

### Information Technologies

Advances in technology may assist debt collectors in managing the flow of information about consumers and improving its accuracy. The Internet, through public search engines and proprietary commercial platforms, allows access to large quantities of information about consumers in a consolidated and searchable format.<sup>10</sup> Web-based social media channels also contribute to the available pool of data, as they allow consumers to post information about themselves online, including the identities of friends and family members, whom collectors could approach for certain information. Further, a variety of database platforms now exist that purport to aid debt collectors in maintaining and updating

information about consumers.<sup>11</sup> All of these technologies may enhance collectors' ability to locate or skip-TRACE consumers and verify the accuracy of their information. At the same time, however, the collection and retention of what may be sensitive personally identifiable information may raise privacy concerns for consumers.

Developments in technology may also aid collection companies in complying with the law by enabling them to better monitor and constrain their individual collectors as they communicate with consumers. For example, certain software may allow companies to track both volume level during calls and the words used and to record calls so that companies can monitor for verbal abuse.<sup>12</sup> Other software programs might be used to limit the number of calls per day placed to a telephone number, exclude placing calls to a telephone number before 8 a.m. or after 9 p.m. in the relevant area code, or otherwise limit how frequently a collector dials a particular number.<sup>13</sup>

### Communication Technologies

Post-FDCPA advances in communication technologies are of particular import, since the existing legal framework focuses heavily on communications between consumers and debt collectors.<sup>14</sup> Technology has expanded debt collectors' capacity to access consumers. Collectors may use automatic or predictive dialers and recorded voice technology to contact people more efficiently. Mobile phones now abound. Indeed, many households have given up land line phones in favor of mobile phones, enabling consumers to receive calls regardless of their location.<sup>15</sup> Additionally, means of communication exist today beyond the simple voice and written communications contemplated by the FDCPA. For instance, collectors sometimes send text messages using the Short Messaging System. In addition, at times debt collectors use the Internet to interact with consumers. Internet communications include sending e-mails and instant messages as well as interacting on social networking sites. While these communication

<sup>1</sup> Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change—A Workshop Report* (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcw.pdf> (hereinafter "Report").

<sup>2</sup> *Id.* at 38 (lack of data on frequency of debt collection calls resulting in "hang-ups" or "dead air" calls). The Commission requested that interested parties submit information on the use of certain technologies in debt collection. *Id.* at 42 (mobile phones); *id.* at 45 (caller ID); *id.* at 49 (voice-mail); *id.* at 50–51 (e-mail and instant messaging).

<sup>3</sup> Social media refers to Internet Web sites that enable people to network, communicate, or share information. Examples of social media sites include Facebook, MySpace, Twitter, and LinkedIn.

<sup>4</sup> See Facebook, Statistics, <http://www.facebook.com/press/info.php?statistics> (last visited Jan. 25, 2011).

<sup>5</sup> See, e.g., Alexis Madrigal, *Facebook Warns Debt Collectors About Using Its Service*, The Atlantic (Nov. 19, 2010), available at <http://www.theatlantic.com/technology/archive/2010/11/facebook-warns-debt-collectors-about-using-its-service/66831/#>.

<sup>6</sup> See, e.g., Press Release, Collections & Credit Risks, Convolve Systems Adopted By Debt Buyers (Jan. 20, 2011), available at <http://www.collectionscreditrisk.com/news/news-release-convolve-systems-adopted-by-debt-buyers-3004747-1.html>; *Global Debt Registry Recognized As Visa PCI DSS Validated Service Provider*, Business Wire (Jan. 31, 2011), available at <http://www.businesswire.com/news/home/20110131006698/en/Global-Debt-Registry-Recognized-Visa-PCI-DSS>.

<sup>7</sup> Letter from FTC Secretary Donald S. Clark to Barbara A. Sinsley & Manny H. Newburger, counsel for Vion Holdings LLC.

<sup>8</sup> Federal Reserve System, *The 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States: 2006–2009* (Dec. 8, 2010), at 13 ("The number of electronic payments grew 9.3 percent per year from 2006 to 2009. The proportion of electronic payments to overall noncash payments increased from 67.9 percent to 77.6 percent over the same period. The value of electronic payments increased 6.0 percent per year, growing from 45.1 percent of noncash payments in 2006 to 56.3 percent in 2009."), available at [http://www.frb-services.org/files/communications/pdf/press/2010\\_payments\\_study.pdf](http://www.frb-services.org/files/communications/pdf/press/2010_payments_study.pdf).

<sup>9</sup> Report, *supra* note 1, at 20.

<sup>10</sup> Report, *supra* note 1, at 18–19.

<sup>11</sup> Report, *supra* note 1, at 17–20.

<sup>12</sup> See, e.g., Anne Rosso, *Technology Tug O= War*, Collector, Dec. 2010, at 20.

<sup>13</sup> See John H. Bedard Jr., *Dialer Control*, Collector, Feb. 2010, at 32.

<sup>14</sup> See, e.g., FDCPA § 805(a)(1), 15 U.S.C. 1692c(a)(1) (time and place restrictions on telephone calls from debt collectors communications); FDCPA §§ 805(c), 809(b) (written notice requirements).

<sup>15</sup> Report, *supra* note 1, at 16 (By June 2008, 16% of consumers had replaced their landline telephones with mobile phones.).

technologies may provide benefits, they raise potential consumer protection concerns as well, including the security of electronic communications, whether such communications satisfy the FDCPA's written notice requirements, and how they implicate the FDCPA's prohibition against contacting consumers at inconvenient times or places.<sup>16</sup>

### Payment Technologies

Debt collectors, like many retailers, offer payment options to consumers other than cash or check, such as credit, debit, and stored value cards and automated clearinghouse transactions ("ACH").<sup>17</sup> As discussed in the Report, these technologies can benefit consumers and debt collectors alike by streamlining the payment process and, in some cases, allowing consumers to engage in online negotiations with collectors.<sup>18</sup> The Report, however, also identified the potential for unauthorized debits as a significant consumer protection concern arising from the use of electronic payment technologies.<sup>19</sup>

### The Workshop

The workshop will focus on post-FDCPA advancements in information, communication, and payment technologies. Workshop panelists will discuss, among other things, the effects that these technologies have had on the debt collection industry, the prevalence of their use, best practices for their use, what consumer protection concerns they raise, and what responses those concerns may warrant.

The Commission seeks public comment and data submission on the topics and questions set forth below or any issue raised by this notice. Comments or data submissions may address the issues raised in these questions or other issues relevant to the topics to be addressed at the workshop. Any interested person may submit written comments. In preparing for the workshop, the Commission will consider comments received by April 7, 2011. Later comments will be accepted as well through May 27, 2011.

Topics for comment and discussion include:

1. What technologies have come into existence since the enactment of the FDCPA that have significantly affected consumer debt collection, or are likely

to do so in the future? What are the nature and magnitude of these effects?

### Information Technologies

2. Have any advances in technology been made that could increase the likelihood that collectors will contact the correct consumer regarding the correct debt amount? What are the costs and benefits of using any such technology to consumers and the industry? How commonly is such technology being used? Does its use vary by size or type of debt collector? If its use is not widespread, why is that the case? What role, if any, should the Commission or other policymakers play in fostering the use of such technology?

3. Have technological advances changed how and where debt collectors obtain information about consumers and debt? How have technological advances affected the efficacy of skip-tracing and recovery rates? What are the recent innovations in skip-tracing applications? What are the sources of the data they access about consumers?

4. What technologies do collectors use to maintain information regarding consumers and debts (*e.g.*, how do collectors record consumer disputes)? How do technological advances affect collectors' ability to ensure both that inaccurate information is removed from collectors' databases and that information indicating that a consumer should not be contacted is reflected in collectors' databases? To what extent is information overwritten by collectors in using or transferring to others the contents of databases, and what problems can this cause?

5. Do new information technologies create greater or different privacy or data security risks in the context of debt collection than traditional communication technologies? If so, what are the risks of such technologies, and how are the risks different? What, if anything, should collectors be required to do to prevent or mitigate these risks? What do debt collectors do to keep information on consumers and debts secure? How frequently do data breaches occur? What sorts of breaches occur?

6. What technologies do creditors, debt buyers, and debt collectors use in transferring information among themselves about alleged debtors and debts? What information is transferred, and when and how is it transferred? How has technology affected the availability of media evidencing debt and the ability to store and transfer that material? To what extent are there problems with systems being unable to interact with each other?

7. What is the prevalence and feasibility of outsourcing the transfer (and storage) of information to third-party firms that act as repositories of information on consumer debts? What are the potential costs and benefits to consumers, collectors, and creditors of such repositories? What role should creditors play with respect to these repositories? Should the Commission or other policymakers mandate or encourage the use or creation of such repositories?

8. To what extent do advances in technology affect the process of selling debts, the ease and speed of selling debts, and the quantity and nature of the information conveyed when debts are sold? Are debt sales negotiated or closed using social media sites or Internet marketplaces? What is the significance, if any, of whether debts are bought or sold via social media or the Internet? What would be the costs and benefits to consumers of buying or selling debts through these media?

9. How do current federal and state laws apply to debt collectors' use of post-FDCPA information technologies? How, if at all, should the law be changed to take into account the costs and benefits of these technologies to consumers and collectors?

### Communication Technologies

10. What are the costs and benefits to collectors and consumers of using various methods to communicate with consumers? Are the costs and benefits different for traditional communication technologies (*e.g.*, letters and landline telephone calls) compared with new communication technologies (*e.g.*, social networking sites, e-mail, text messages, *etc.*)?

11. Should debt collectors be required to obtain consumer consent to use particular methods of communication to contact consumers? If so, which communication methods and why? Should it depend on whether the consumer provided the creditor or collector with the necessary contact information? If consent should be required, what, if anything, should collectors be required to do to obtain such consent? How likely are consumers to provide such consent?

12. Do new communication technologies create any greater or different privacy or data security risks in the context of debt collection than traditional communication technologies? If so, which communication methods create greater or different risks? What are the risks of such methods, and how are the risks different? What, if anything, should

<sup>16</sup> FDCPA § 809(a) (written validation notice from collector to consumer); FDCPA §§ 805(c) & 809(b) (written notices from consumer to collector); FDCPA § 805(a)(1) (convenience restrictions).

<sup>17</sup> Report, *supra* note 1, at 20.

<sup>18</sup> Report, *supra* note 1, at 20.

<sup>19</sup> Report, *supra* note 1, at 51–55.

collectors be required to do to prevent or mitigate these risks?

13. Do new communication technologies in the context of debt collection create different risks of deception, unfairness, or abuse, compared to those associated with traditional technologies? If so, which technologies, and why?

14. What proportion of debt collectors' communications to consumers proceed by various modalities (e.g., letters, e-mail messages, calls to mobile phones, use of artificial or prerecorded voices, etc.)? Are there variations by size of collection firm or type of debt subject to collection? If so, what are the variations?

15. How do current Federal and State laws apply to debt collectors' and consumers' use of post-FDCPA communication technologies? How, if at all, should the law be changed to take into account the costs and benefits of these technologies to collectors and consumers?

#### Payment Technologies

16. What proportion of consumer payments to debt collectors proceed by various payment methods (e.g., paper checks, ACH debits, or online credit card payment portals)? Are there variations by size of collection firm or type of debt subject to collection? If so, how?

17. What are the costs and benefits to collectors and consumers of accepting consumer payments using electronic payment technologies (e.g., direct ACH debits, electronic checks, online payment portals) as compared to traditional payment technologies (e.g., paper checks, credit card payments)?

18. Does debt collector use of electronic payment technologies create any greater or different privacy or data security risks in the context of debt collection than in the general retail industry? If so, which payment technologies create greater or different risks? What are the risks of such methods, and how are the risks different? What, if anything, should collectors be required to do to prevent or mitigate these risks?

19. Do electronic payment technologies in the context of debt collection create different risks of deception, unfairness, or abuse, compared to those associated with traditional technologies? If so, which technologies, and why?

20. How, if at all, should collectors be required to obtain and document consumer consent to making a payment using various payment technologies? Should requirements for collectors

differ from requirements for general retailers?

21. How do current federal and state laws apply to debt collectors' use of post-FDCPA payment technologies? How, if at all, should the law be changed to take into account the costs and benefits of these technologies to consumers and collectors?

#### Instructions for Filing Comments

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Debt Collection 2.0, Project No. P114802" to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, <http://www.ftc.gov/os/publiccomments.shtm>. To be considered in preparation for the workshop, comments must be received by April 7, 2011, although the Commission will accept comments until May 27, 2011.

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential \* \* \*," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>20</sup>

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted using the following Web link: <https://>

<sup>20</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

[ftcpublic.commentworks.com/ftc/debtcollecttechworkshop](http://ftcpublic.commentworks.com/ftc/debtcollecttechworkshop) (and following the instructions on the Web-based form). If this document appears at <http://www.regulations.gov/#/home>, you may also file an electronic comment through that Web site. The Commission will consider all timely comments that regulations.gov forwards to it. You may also visit the FTC Web site at <http://www.ftc.gov> to read this notice and the related news release.

A comment filed in paper form should include the "Debt Collection 2.0, Project No. P114802" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex F), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at <http://www.ftc.gov/ftc/privacy.shtm>.

#### Requests To Participate as Workshop Panelists

The FTC staff will identify and invite individuals with relevant expertise to participate as panelists. In addition, the FTC staff may invite other persons to participate as panelists who submit requests in response to this **Federal Register** notice.

Requests to participate as workshop panelists must be received in writing by 5 p.m. EST on Tuesday, March 22, 2011, and should refer to "Debt Collection 2.0—Panelist Participation Request." Such requests (except requests containing any confidential material)

should be submitted in electronic form to [dctech@ftc.gov](mailto:dctech@ftc.gov) and should be captioned: ADebt Collection 2.0—Panelist Participation Request.” If the request to participate contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled “Confidential.” Please include an original and two copies of each document submitted in paper form. Requests submitted in paper form should include this reference both in the text and on the envelope, and should be sent by overnight delivery or courier to the following address: Debt Collection 2.0, c/o Leah Frazier, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Mail Stop 3158, Washington, DC 20580.

Requests to participate as workshop panelists should include the following information:

(1) A brief biographical description, résumé, or curriculum vitae, including name and affiliation;

(2) A statement setting forth the potential panelist’s expertise in or knowledge of one or more issues likely to be addressed by the workshop;

(3) A list of the topic(s) that the potential panelist would like to address, and a one-paragraph summary of the potential panelist’s unique perspective or knowledge of each such topic; and

(4) Contact information, including a daytime telephone number, facsimile number, and e-mail address (if available).

Parties filing requests to participate as workshop panelists will be notified whether they have been selected on or before Thursday, March 31, 2011.

The FTC Act and other laws the Commission administers permit the collection of requests to participate as workshop panelists to consider and use in this proceeding as appropriate. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy at <http://www.ftc.gov/ftc/privacy/htm>.

By direction of the Commission.

**Donald S. Clark,**

Secretary.

[FR Doc. 2011–6002 Filed 3–14–11; 8:45 am]

**BILLING CODE 6750–01–P**

## FEDERAL TRADE COMMISSION

### Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles

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

**ACTION:** Notice announcing public roundtables, requesting participation, and providing opportunity for comment.

**SUMMARY:** On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Pursuant to the Dodd-Frank Act, the FTC is authorized to prescribe rules under Section 553 of the Administrative Procedure Act (APA) with respect to unfair or deceptive acts or practices by motor vehicle dealers. To explore consumer protection issues pertaining to motor vehicle sales and leasing, the FTC is hosting a series of public roundtables in 2011. The roundtables will be held in three to five cities around the United States, starting in April 2011. The roundtables will provide an opportunity for regulators, consumer advocates, industry participants, and other interested parties to discuss consumer protection issues in connection with motor vehicle sales and leasing. This notice addresses various topics and questions that the Commission expects to discuss at the first roundtable. This notice also provides an opportunity for comment.

**DATES:** The first roundtable will occur on April 12, 2011. Dates for the additional roundtables to be held in 2011 will be posted on the FTC Web site at <http://www.ftc.gov>. Requests to participate as a panelist for the first roundtable, and any written comments on roundtable topics, must follow the instructions provided below under **SUPPLEMENTARY INFORMATION** and be received by March 28, 2011, to be considered in preparing for the roundtable.

**ADDRESSES:** The first roundtable will be held at Wayne State University Law School, in Detroit, Michigan on April 12, 2011. Further information about all of the roundtables will be posted on the FTC’s Web site at <http://www.ftc.gov>. All of the roundtables will be free and open to the public. Those who plan to attend a roundtable are encouraged to preregister by sending an email listing their name and affiliation to [PreregisterMotorVehicleRoundtables1@ftc.gov](mailto:PreregisterMotorVehicleRoundtables1@ftc.gov). This information will be used for planning purposes only. Those who wish to participate as a panelist at a roundtable, and those who wish to submit comments, should follow the instructions in the **SUPPLEMENTARY INFORMATION** section below. Whether or not selected to participate, persons may submit written comments on roundtable topics.

**FOR FURTHER INFORMATION CONTACT:** Katherine Worthman or Carole Reynolds, Attorneys, Division of

Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3224.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Having access to a motor vehicle is essential for many consumers to fulfill their daily obligations. However, purchasing or leasing a car is usually a substantial expense. For many consumers, aside from housing costs, a car purchase or lease is their most expensive financial transaction.<sup>1</sup> With prices averaging more than \$28,000 for a new vehicle and \$14,000 for a used vehicle from a dealer, most consumers seek to lease or finance the purchase of a new or used car. Consumers may seek financing from their local bank or credit union, as well as from the dealer selling the vehicle. Financing obtained at the dealership, whether it is provided by a third party or directly by the dealer, may provide benefits for many consumers such as convenience, special manufacturer-sponsored programs, access to a variety of banks and financial entities, or access to credit otherwise unavailable to a buyer. Dealer-arranged financing, however, can be a complicated, opaque process and could potentially involve unfair or deceptive practices.

As the nation’s consumer protection agency,<sup>2</sup> the Commission is committed to protecting consumers in connection with these financial transactions.

<sup>1</sup> The average price of a new car sold in the U.S. is \$28,966, according to the National Automobile Dealers Association. See NADA DATA 2010, at 2, available at <http://www.nada.org/Publications/NADADATA/2010/default> (2009 data). Average used car prices range from \$8,459 (independent companies) to \$14,976 (dealerships). See NIADA Used Car Industry Report 2010, at 18, available at <http://www.niada.com/PDFs/Publications/2010IndustryReport.pdf> (citing data from the National Independent Automobile Dealers Association Report and CNW Marketing Research), and NADA DATA 2010, at 2, respectively (2009 data).

<sup>2</sup> The Commission currently has enforcement authority over most non-bank entities for numerous consumer protection statutes, including, for example, Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, which broadly proscribes unfair or deceptive acts or practices in or affecting commerce; the Truth in Lending Act, 15 U.S.C. 1601–1666j, and the Consumer Leasing Act, 15 U.S.C. 1667–1667f, and their implementing Regulation Z, 12 CFR 226; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691–1691f, and its implementing Regulation B, 12 CFR 202; the Electronic Fund Transfer Act, 15 U.S.C. 1693–1693r, and its implementing Regulation E, 12 CFR 205; and the privacy provisions of the Gramm-Leach Bliley Act, 15 U.S.C. 6801–6809. Subject to various provisions of the Dodd-Frank Act, the Commission generally retains its enforcement authority for these various statutes; in some instances, that authority may be concurrent with the Bureau of Consumer Financial Protection (CFPB).



Throughout the years, the FTC has undertaken substantial efforts to fulfill this commitment in connection with the sale, financing, and leasing practices of motor vehicle dealers. For example, the agency has brought numerous enforcement actions addressing:

- Deceptive advertising by motor vehicle dealers regarding purchase, loan, or lease terms or costs, as well as add-on products;<sup>3</sup>
- Auto warranty issues by, among other things, enforcing the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act and its implementing rules concerning the disclosure and pre-sale availability of warranty terms;<sup>4</sup> and
- Deceptive claims by auto warranty robocallers.<sup>5</sup>

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>6</sup> Pursuant to the Dodd-Frank Act, the FTC is authorized to prescribe rules under Section 553 of the Administrative Procedure Act (APA)<sup>7</sup> with respect to unfair or deceptive acts or practices by motor vehicle dealers.<sup>8</sup> Under Section 1029 of the Dodd-Frank Act, the Commission retains all of its enforcement authority over motor vehicle dealers.<sup>9</sup> The FTC's authority is exclusive as to motor vehicle dealers that routinely assign credit contracts to unaffiliated third

parties,<sup>10</sup> and concurrent with the new CFPB as to dealers that do not.<sup>11</sup>

The Dodd-Frank Act also authorizes the FTC to prescribe rules using APA procedures with respect to unfair or deceptive acts or practices by motor vehicle dealers.<sup>12</sup> The motor vehicle roundtables are intended to inform the Commission regarding what consumer protection issues, if any, exist that could be addressed through a possible rulemaking or other initiatives.

## II. Roundtable Goals and Topics for Comment

Consistent with the Commission's authority under the Dodd-Frank Act, and other consumer protection statutes that it enforces,<sup>13</sup> the agency will conduct a series of roundtables to gather more information on consumer protection issues in connection with motor vehicle sales, financing, and leasing to assess the propriety of promulgating a rule or conducting other initiatives. The roundtables will focus primarily on cars (including automobiles, SUVs, and light trucks) because those are the vehicles consumers most often use.<sup>14</sup>

The FTC staff is seeking public comment on a number of topics listed below, which will be discussed at the roundtables. Of particular interest to the FTC staff is data and empirical evidence

supporting comments provided in response to this request.

(1) What categories of motor vehicle dealers (*i.e.* "franchise," "independent," and/or "buy here, pay here"<sup>15</sup>) offer credit or leases to consumers? Do these different categories of dealers offer different types, or terms, of credit or leasing to consumers? If so, in what manner and under what terms?

(2) What types of financing and leasing are offered to consumers today? Who are the typical consumers for each type of product?

(3) What practices involving motor vehicle dealers raise consumer protection issues? How prevalent are these practices in the industry as a whole or in any subset of the industry?

(4) Do motor vehicle dealers engage in "yo-yo financing?"<sup>16</sup> If so, please describe in detail how such a transaction occurs. Do these practices occur in leasing? How prevalent are these practices in the industry as a whole or in any subset of the industry? What types of entities are involved, and what role does each play? What types of consumers are impacted by these practices, and how? What are the costs and/or benefits to consumers of these practices? What are the incentives or benefits to dealers for engaging in these practices? Do consumers understand when they purchase and finance a car that there may be circumstances in which the financing terms, and monthly payments, could change? Is yo-yo financing sometimes combined with a practice whereby the dealer has sold the consumer's trade-in before the consumer learns of the higher interest and/or payments from the dealer?

(5) Do finance companies provide incentives or payments to motor vehicle dealers in exchange for consumers receiving more expensive credit? Does this practice occur in leasing? How prevalent is this practice in the industry

<sup>3</sup> These matters were generally resolved by consent agreements. *See, e.g., In re Simmons Rockwell Ford Mercury, Inc.*, F.T.C. Dkt. No. C-3950 (2000); *In re R.N. Motors, Inc.*, F.T.C. Dkt. No. C-3947 (2000); *In re Dunphy Nissan, Inc.*, F.T.C. Dkt. No. C-3924 (2000); and *In re Bill Crouch Foreign, Inc.*, 96 F.T.C. 111 (1980). For additional information regarding recent FTC activities in the motor vehicle area, see *Prepared Statement of the Federal Trade Commission on A Consumer Protection in the Used and Subprime Car Market@: Hearing Before the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection*, Mar. 5, 2009, available at <http://www.ftc.gov/opa/2009/03/autotest.shtm>.

<sup>4</sup> *See, e.g., In re Bob Rice Ford, Inc.*, 96 F.T.C. 18 (1980).

<sup>5</sup> *See, e.g., FTC v. Voice Touch, Inc.*, No. 1:09CV2929 (N.D. Ill. 2010).

<sup>6</sup> Public Law 111-203, 124 Stat. 1376 (July 21, 2010) (to be codified in scattered titles and sections of the U.S. Code).

<sup>7</sup> 5 U.S.C. 553.

<sup>8</sup> *See* Dodd-Frank Act § 1029(d). The term "motor vehicle dealer" refers to "any person or resident in the United States, or any territory of the United States, who (A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and (B) takes title to, holds an ownership in, or takes physical custody of motor vehicles." Dodd-Frank Act § 1029(f)(2). The term "motor vehicle" includes, among other things, motorcycles, motor homes, recreational vehicle trailers, recreational boats and marine equipment, and other vehicles titled and sold through dealers. *See* Dodd-Frank Act § 1029(f)(1).

<sup>9</sup> Dodd-Frank Act § 1029(f)(1).

<sup>10</sup> *Id.* § 1029(a) and (c). Section 1029(a) of the Dodd-Frank Act provides that, "(e)xcept as permitted in subsection (b), the Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both." Section 1029(c) provides that "nothing in this title, including subtitle F, shall be construed as modifying, limiting, or superseding the operation of any provision of Federal law, or otherwise affecting the authority of the Board of Governors, the Federal Trade Commission, or any other Federal agency, with respect to a person described in subsection (a)."

<sup>11</sup> *Id.* § 1029(b)(2) ("Subsection (a) shall not apply to any person, to the extent that such person . . . operates a line of business—(A) that involves the extension of retail credit or retail leases involving motor vehicles; and (B) in which—(i) the extension of retail credit or retail leases are provided directly to consumers; and (ii) the contract governing such extension of retail credit or retail leases is not routinely assigned to an unaffiliated third party finance or leasing source."). Motor vehicle dealers that do not routinely assign credit contracts to unaffiliated parties often are referred to as "buy here, pay here" dealers.

<sup>12</sup> *See id.* § 1029(d). Under the Dodd-Frank Act, the FTC's APA rulemaking authority becomes effective as of the designated "transfer date." *See* Dodd-Frank Act § 1029A. The CFPB and Department of Treasury have set July 21, 2011 as the transfer date. *See* 75 FR 57252 (Sept. 20, 2010).

<sup>13</sup> *See supra* notes 2, 8 and 10.

<sup>14</sup> However, the Commission is interested in issues that pertain to all types of motor vehicles, as defined by the Dodd-Frank Act, and welcomes comments on all such topics. *See supra* note 8.

<sup>15</sup> "Buy here, pay here" dealers typically provide financing directly or through an in-house finance company. "Buy here, pay here" dealerships tend to operate in the subprime credit area. In some regions, "lease here, pay here" dealerships may provide leases to consumers, through similar programs.

<sup>16</sup> In many states, a dealer may deliver a vehicle to a consumer pending approval of the consumer's financing (a practice known as "spot delivery"). In general terms, "yo-yo financing" refers to a spot delivery in which the dealer appraises a consumer that the dealer has secured or expects to secure a particular interest rate and other terms for financing the sale. Days after the consumer has signed the purchase or credit documents and driven home in the newly purchased motor vehicle, the dealer contacts the consumer with information that the financing "fell through" and the consumer must return to the dealership. Upon the consumer's return, the consumer learns he or she now must pay a higher interest rate and higher monthly payments to finance the purchase.

as a whole or in any subset of the industry? How does this practice work? What types of entities are involved, and what role does each play? What types of consumers are impacted by this practice and how? What are the costs and/or benefits of this practice? Do consumers understand this practice, and to what extent does it affect consumers' decisions to purchase and finance a motor vehicle? Is this an issue unique to the sale and financing of motor vehicles, or are there other industries where sellers may have incentives of which buyers are unaware and that may be contrary to buyers' interests? If not, should the sale and financing of motor vehicles be treated differently from other industries, and why?

(6) Do motor vehicle dealers misrepresent credit or lease terms to consumers? How prevalent is this practice in the industry as a whole or in any subset of the industry? What types of terms do dealers misrepresent and in what circumstances? Are other entities involved in these practices, and if so, which entities?

(7) Do motor vehicle dealers charge interest rate mark-ups or up-front charges to consumers for credit or leases about which consumers are unaware? How prevalent is this practice in the industry as a whole or in any subset of the industry? How does this occur? Do consumers understand that dealer financing may include dealer mark-ups in addition to the cost of the credit or lease, and to what extent does this practice affect consumers' decisions to purchase and finance a motor vehicle? Is this an issue unique to the sale and financing of motor vehicles or are there other industries where sellers charge mark-ups of which buyers are unaware and that may be contrary to buyers' interests? If not, should the sale and financing of motor vehicles be treated differently from other industries, and why?

(8) Is substantial negative equity from a prior purchase, or money owed on a prior lease, frequently rolled into consumers' next vehicle purchases or leases?<sup>17</sup> What are the costs and/or benefits of this practice? How prevalent is this practice in the industry as a whole or in any subset of the industry? How does this occur? Do consumers understand when negative equity is

<sup>17</sup> In this situation, a consumer may seek to trade in a vehicle for which the consumer owes more than the vehicle is worth. The dealer may accept the trade-in, but will include the negative equity (the amount owed) for the trade-in in the credit package for the newly-purchased vehicle, with or without further explanation to the consumer. This process can result in the consumer being in another "upside-down" credit situation and owing higher monthly payments.

rolled into the credit package of a newly purchased and financed vehicle?

(9) Do motor vehicle dealers engage in credit or lease packing, such as by including amounts for credit insurance, guaranteed automobile protection ("GAP"), or other add-ons into payment amounts or other terms quoted to consumers?<sup>18</sup> How prevalent is this practice in the industry as a whole or in any subset of the industry? How does this occur? Do consumers understand this practice?

(10) Do dealers include warranties, service contracts, and other add-ons in credit or lease contracts? How prevalent is this practice in the industry as a whole or in any subset of the industry? At what point in the sales process are these items included in the contracts? How does this practice occur? Do consumers understand this practice?

(11) Do consumers experience discrimination on a prohibited basis as set forth in Section 701 of the Equal Credit Opportunity Act, 15 U.S.C. 1691, in motor vehicle financing or leasing? How prevalent is this practice in the industry as a whole or in any subset of the industry? Do interest rate mark-ups by motor vehicle dealers disparately impact any groups of consumers in violation of the ECOA? What other practices by motor vehicle dealers violate the ECOA? What data exists to measure compliance with the ECOA by motor vehicle dealers? What other information can motor vehicle dealers collect to assess ECOA compliance?

(12) Do military personnel or their families face unique consumer protection concerns when purchasing motor vehicles? What practices cause those concerns? How prevalent are those concerns in the industry as a whole or in any subset of the industry? Do or can these concerns impact military readiness? What practices are involved? What steps have motor vehicle dealers, states, and consumer groups taken to address these practices? How successful have they been?

(13) Do motor vehicle dealers fail to pay off liens or trade-ins or otherwise

fail to transfer title at a sale?<sup>19</sup> How prevalent is this practice in the industry as a whole or in any subset of the industry? What are the reasons for failing to pay off a lien? What problems does this practice raise for consumers? What state laws exist to address this practice?

(14) Do motor vehicle dealers use global positioning systems or similar devices to locate and track financed and leased cars? How prevalent is this practice in the industry as a whole or in any subset of the industry? What problems does this practice raise for consumers? Do consumers understand this practice? Does this practice affect accounts in default? For those consumers who have these devices installed on their cars, what is done with their route information? Do service providers retain this data? How do they use it? Does this practice raise privacy concerns? Do consumers understand that their vehicles could be tracked, and the extent to which they are being, or could be, tracked?

(15) How do motor vehicle auction houses operate? Do consumer protection issues exist in connection with such auction houses? If so, which issues?

### III. Public Participation

#### A. Registration Information

The roundtables will involve discussion on the issues described above by those individuals selected to be panelists. A court reporter will be present to record the proceedings so that a transcript can be made for the public record. The roundtables are free and open to the public. FTC will accept pre-registration for the roundtables. Pre-registration is not necessary to attend, but is encouraged so that staff may better plan the event. To pre-register, please e-mail your name and affiliation to [PreregisterMotorVehicleRoundtables1@ftc.gov](mailto:PreregisterMotorVehicleRoundtables1@ftc.gov). When you pre-register, the FTC collects your name, affiliation, and e-mail address. We will use this information to estimate how many people will attend and better understand the likely audience for the

<sup>18</sup> "Packing" refers to a situation in which a dealer includes "add-ons" in the credit package for the sale or lease of a motor vehicle, which might be without the consumer's understanding or at significantly inflated prices. The practice might include quoting monthly payments with the add-on amounts automatically rolled-into the dollar figure stated to the consumer. Such add-ons might include charges for products and services such as: rust proofing, undercoating, service agreements, extended warranty packages, credit life insurance, guaranteed auto protection (GAP, which refers to coverage for the difference between the amount the consumer owes on the loan and the current market value of the vehicle), and other products and services.

<sup>19</sup> When consumers seek to purchase a vehicle, they may trade in a prior vehicle on which amounts are still owed. The consumer may seek to pay off the amounts owed by refinancing the outstanding amount owed on the prior vehicle into the credit agreement for the current vehicle being purchased. As part of the new credit agreement, the dealer is required to pay-off the amount owed and secure a release of the lien on the prior vehicle, so that the consumer is no longer liable for that debt. However, a dealer may fail to pay off the prior loan and secure a release of lien on the prior vehicle. As a result, the consumer could become liable for two credit agreements and two vehicles: the current one being purchased, and the prior vehicle that the consumer thought was being paid off but was not.

roundtables, and will dispose of it following the roundtables. We may use your e-mail address to contact you with information about the roundtable. The FTC Act and other laws the Commission administers permit the collection of this contact information to consider and use for the above purposes. Under the Freedom of Information Act or other laws, we may be required to disclose the information you provide to outside organizations. For additional information, including routine uses permitted by the Privacy Act, see the Commission's privacy policy at <http://www.ftc.gov/ftc/privacy.shtm>.

#### B. Requests To Participate as a Panelist

The format will consist of a roundtable with participation by panelists selected by FTC staff. FTC staff will identify and invite persons with relevant expertise to participate in the roundtables. In addition, the FTC staff may invite other persons to participate who submit requests in response to the **Federal Register** notice. Persons seeking to participate as panelists in the roundtables must notify the FTC in writing of their interest in participating on or before March 28, 2011. Requests to participate filed in an electronic form should be submitted by e-mail to: [MotorVehicleRoundtables1@ftc.gov](mailto:MotorVehicleRoundtables1@ftc.gov). Emails should be captioned "Motor Vehicle Roundtables—Request to Participate, Project No. P104811."

A request to participate as a panelist filed in paper form should also include the reference "Motor Vehicle Roundtables, Project No. P104811" both in the text of the comment and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex V), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that requests to participate filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington, DC area and at the Commission is subject to delay due to heightened security precautions.

#### C. Comments

Interested parties are invited to submit written comments electronically or in paper form on the topics to be discussed at the roundtable. Submission of comments should be captioned "Motor Vehicle Roundtables—Comment, Project No. P104811." Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly

accessible FTC Web site, at <http://www.ftc.gov/os/publiccomments.shtm>.

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>20</sup>

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted at <https://ftcpublic.commentworks.com/ftc/motorvehicleroundtables1> following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/search/index.jsp>, you may also file an electronic comment through that website. The Commission will consider all comments forwarded to it by regulations.gov. You may also visit the FTC Web site at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the reference "Motor Vehicle Roundtables, Project No. 104811" both in the text of the comment and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex V), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that comments filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington, DC

<sup>20</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See 16 CFR 4.9(c).

area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at <http://www.ftc.gov/os/publics.htm>. As a matter of discretion, the Commission makes every effort to remove home contact information of individuals before their comments are placed on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.shtm>.

By direction of the Commission.

**Donald S. Clark,**

Secretary.

[FR Doc. 2011-5873 Filed 3-14-11; 8:45 am]

BILLING CODE 6750-01-P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Call for Comments on the Draft Report of the Adult Immunization Working Group to the National Vaccine Advisory Committee on Adult Immunization: Complex Challenges and Recommendations for Improvement; Correction

**AGENCY:** Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health, National Vaccine Program Office.

**ACTION:** Notice: correction.

**SUMMARY:** The Department of Health and Human Services published a notice in the **Federal Register** of March 4, 2011, announcing a call for comment on the draft report of the Adult Immunization Working Group to the National Vaccine Advisory Committee. It was announced that the draft report and recommendations could be found on the Web at <http://www.hhs.gov/nvpo/nvac/subgroups/adultimmunization>. The Web address where the draft report and recommendations can be found is <http://www.hhs.gov/nvpo/nvac/subgroups/adultimmunization.html>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lauren Wu, e-mail: [lauren.wu@hhs.gov](mailto:lauren.wu@hhs.gov), phone: 202-690-1191.

**Correction**

In the **Federal Register** of March 4, 2011, Vol. 76, No. 43, on page 12118, in the first column, correct the **ADDRESSES** caption to read:

(1) The draft report and recommendations are available on the Web at <http://www.hhs.gov/nvpo/nvac/subgroups/adultimmunization.html>.

Dated: March 9, 2011.

**Bruce Gellin,**

*Director, National Vaccine Program Office.*

[FR Doc. 2011-5851 Filed 3-14-11; 8:45 am]

**BILLING CODE 4150-44-P**

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**
**Centers for Disease Control and Prevention**

[60Day-11-11DE]

**Proposed Data Collections Submitted for Public Comment and Recommendations**

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404-639-5960 and send comments to Carol E. Walker, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS-D74, Atlanta, GA 30333 or send an email to [omb@cdc.gov](mailto:omb@cdc.gov).

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) the quality, utility, and clarity of the information to be collected; and (4) the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Collection**

Communication Research on Folic Acid to Support the Division of Birth Defects and Developmental

Disabilities—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Since mandatory folic acid fortification of cereal grain products was mandated in 1998, rates of folic acid-preventable neural tube defects (NTDs) have declined. Disparities in rates remain, however, with NTD prevalence being highest among Hispanic women of childbearing age. Efforts to increase consumption of vitamin supplements containing folic acid among women in this ethnic group have been ongoing, however, due to differences in diet, many of these women have not benefitted from food fortification to the extent that other race/ethnic groups have. A performance goal for NCBDDD focuses specifically on the reduction of these disparities: Reduce health disparities in the occurrence of folic acid-preventable spina bifida and anencephaly by reducing the birth prevalence of these conditions. Moreover, Healthy People 2010 objectives refer to the reduction of NTD rates and increase of folic acid consumption for all women of childbearing age: (1) Reduce the occurrence of spina bifida and other NTDs; (2) Increase the proportion of pregnancies begun with an optimum folic acid level by increasing the consumption of at least 400 mcg of folic acid each day from fortified foods or dietary supplements by nonpregnant women aged 15 to 44 and increasing the median red blood cell folate level among nonpregnant women aged 15 to 44 years. The 2009 congressional omnibus appropriations language includes reference to reducing health disparities: "There is significant concern about disparity in the rates of folic acid intake and neural tube defects, particularly in the Hispanic population. Within the funds provided for folic acid, CDC is encouraged to provide increased funding to expand the folic acid education campaign to inform more women and healthcare providers about the benefits of folic acid \* \* \*". Finally, CDC partners are working to develop a food additive petition that will be submitted for approval to the FDA. This petition would allow for the addition of folic acid to corn masa flour and corn masa flour products. Knowing the consumer attitudes toward this endeavor is important to the overall success of the effort. Although up to 70% of neural tube defects can be prevented if a woman consumes folic acid before and during the first weeks of pregnancy, many women are still

unaware of folic acid until they are already pregnant. Because half of all pregnancies in the U.S. are unplanned, reaching women with the folic acid message prior to pregnancy is critical. NCBDDD currently has several folic acid educational brochures, tip sheets, and booklets available in both English and Spanish. Since 2000, over 12 million folic acid materials have been distributed. Providing our partners, health care providers, and the public with evidence-based information in a format that is easy to read and visually appealing is important to the mission of the Prevention Research team. We want to ensure that the materials we currently have available still meet the needs of the intended audience.

CDC, with contract support from Battelle Centers for Public Health Research and Evaluation, is conducting research to inform efforts to promote folic acid consumptions among women of child-bearing age through two closely-related data collection efforts: (1) Exploratory Research of Hispanic Women's Reactions to and Beliefs About Folic Acid Fortification of Corn Masa Flour, and (2) Exploratory Research of Childbearing Age Women's Folic Acid Awareness and Knowledge, and their Reactions to Existing CDC Folic Acid Educational Materials. The purpose of the first proposed primary data collection effort is to better understand consumer acceptance of fortifying corn masa flour, a staple product in many traditional Latino, and in particular Mexican, foods. The purpose of the second proposed primary data collection effort is to determine whether educational materials developed over 10 years ago to promote folic acid consumption continue to be appealing and resonate with the target audience today. To address these two purposes and support the folic acid education efforts of CDC, focus groups with the target audience are needed.

For the first data collection activity phase, participants will be English and Spanish-speaking women 18-44 years who self identify as Mexican or Mexican American, or Central American. Participants will be segmented into groups based on whether they consume corn masa flour less than 4 times per day or 4 or more times per day. The contractor will conduct sixteen (16) focus groups with five (5) participants in each focus group. It is estimated that 320 respondents will have to be screened in order to recruit 80 focus group participants. Each screening will take approximately 6 minutes. The estimated response burden for the screening process is 32 hours. The focus group session will be structured to

identify women's general awareness and knowledge about folic acid and its role in NTD prevention, perception of their risk for having an affected pregnancy, awareness and knowledge about fortification of cereal grain products, whether fortification of corn masa flour products would change their current reported use of these products, and overall reaction to potential folic acid fortification of these products.

For the second data collection activity phase, focus group participants will be women 18–44 years of age who are not pregnant at the time of the focus groups, who do not have a child with a birth defect such as spina bifida or anencephaly. The contractor will conduct sixteen (16) focus groups with five (5) participants in each focus group. It is estimated that 320 respondents will

have to be screened in order to recruit 80 focus group participants. Each screening will take approximately 6 minutes. The estimated response burden for the screening process is 32 hours. Participants will be segmented into groups based on whether they self-identify as either vitamin users (take a vitamin containing folic acid 4–7 days per week) or non-users (take a vitamin containing folic acid less than 4 days per week). The focus group session shall be structured to identify women's awareness and knowledge about folic acid, and how they would like to see folic acid information portrayed in a written format. Focus group participants shall be shown written educational materials that are currently being used and asked questions designed to address whether the materials are effective in

getting the folic acid message across to the audience, whether the visual images portrayed in the materials resonate with the audience, and how the materials could be improved. Also, differences based on pregnancy contemplation status shall be explored through segmentation of the focus groups.

Sixteen focus groups will be conducted in both phase one and phase two, with a total of 80 participants in each phase. The focus groups will have five participants each. Each respondent will participate in a 1.5-hour focus group, for a total burden of 120 hours. Data collection materials will be available in both English and Spanish. This request is being submitted to obtain OMB clearance for one (1) year. There are no costs to respondents except for their time to participate.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Annual burden (in hours)
Women 18–44, Mexican or Central American heritage; English and Spanish speakers.	Phase One Screener.	320	1	6/60	32
Women 18–44, Mexican or Central American heritage; English and Spanish speakers.	Phase One Focus Group Guide.	80	1	1.5	120
Women 18–44 (English speakers) .....	Phase Two Screener.	320	1	6/60	32
Women 18–44 (English speakers) .....	Phase Two Focus Group Guide.	80	1	1.5	120
Total .....	.....	.....	.....	.....	304

Dated: March 9, 2011.

**Carol E. Walker,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–5922 Filed 3–14–11; 8:45 am]

**BILLING CODE 4163–18–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

[60Day–11–0109]

**Proposed Data Collections Submitted for Public Comment and Recommendations**

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the

proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Carol E. Walker, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to [omb@cdc.gov](mailto:omb@cdc.gov).

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Respiratory Protective Devices—42 CFR part 84—Regulation—(0920–0109)—Extension—National Institute for Occupational Safety and Health (NIOSH), of the Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

This data collection was formerly named Respiratory Protective Devices 30 CFR part 11 but in 1995, the respirator standard was moved to 42 CFR part 84. The regulatory authority for the National Institute for Occupational Safety and Health (NIOSH) certification program for respiratory protective devices is found in the Mine Safety and Health Amendments Act of 1977 (30 U.S.C. 577a, 651 *et seq.*, and 657(g)) and the Occupational Safety and Health Act of 1970 (30 U.S.C. 3, 5, 7, 811, 842(h), 844). These regulations have as their basis the performance tests and criteria for approval of respirators used by millions of American construction workers, miners, painters, asbestos

removal workers, fabric mill workers, and fire fighters. Regulations of the Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission (NRC) also require the use of NIOSH-approved respirators. These regulations also establish methods for respirator manufacturers to submit respirators for testing under the regulation and have them certified as NIOSH-approved if they meet the criteria given in the above regulation. NIOSH, in accordance with 42 CFR Part 84: (1) Issues certificates of approval for respirators which have met specified construction, performance, and protection requirements; (2) establishes procedures and requirements to be met in filing applications for approval; (3) specifies minimum requirements and methods to be employed by NIOSH and by applicants in conducting inspections, examinations, and tests to determine effectiveness of respirators; (4) establishes a schedule of fees to be charged applicants for testing and certification; and (5) establishes approval labeling requirements. Information is collected from those who request services under 42 CFR part 84 in order to properly establish the scope and intent of request. Information

collected from requests for respirator approval functions includes contact information and information about factors likely to affect respirator performance and use. Such information includes, but is not necessarily limited to, respirator design, manufacturing methods and materials, quality assurance plans and procedures, and user instruction and draft labels, as specified in the regulation.

The main instrument for data collection for respirator approval functions is the SAF, Standard Application for the Approval of Respirators, currently Version 7. A replacement instrument, SAF V.8, which collects the same information is available for applicants without the requisite software environment for V.7. Respirator manufacturers are the respondents (estimated to average 75 each year over the years 2011–2013) and upon completion of the SAF their requests for approval are evaluated. Although there is no cost to respondents to submit an application other than their time to participate, respondents requesting respirator approval are required to submit fees for necessary testing as specified in 42 CFR 84.20–22, 84.66, 84.258 and 84.1102. In calendar

year 2010 \$395,564.00 was accepted. Applicants are required to provide test data that shows that the respirator is capable of meeting the specified requirements in 42 CFR part 84. The requirement for submitted test data is likely to be satisfied by standard testing performed by the manufacturer, and no extra burden is expected.

42 CFR part 84 approvals offer corroboration that approved respirators are produced to certain quality standards. Although 42 CFR part 84, subpart E prescribes certain quality standards, it is not expected that requiring approved quality standards will impose an additional cost burden over similarly effective quality standards that are not approved under 42 CFR part 84. Manufacturers with current approvals are subject to site audits by the Institute or its agents. There is no fee associated with audits. Audits may occur periodically or as a result of a reported issue. An average of 61 site audits were conducted annually over the calendar years 2008–2010, and this rate is expected to continue. Audits take an average of 23.5 burden hours from the respondent.

There are no costs to respondents other than their time.

Form	Number of respondents	No. of responses per respondent	Avg. burden per response (in hrs)	Total burden (in hrs)
Standard Application for the Approval of Respirators .....	75	8	229	137,400
Audit .....	60	1	24	1,440
Total .....				138,840

Dated: March 9, 2011.

**Carol E. Walker,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–5921 Filed 3–14–11; 8:45 am]

BILLING CODE 4163–18–P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

[30Day–11–0406]

**Agency Forms Undergoing Paperwork Reduction Act Review**

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance

Officer at (404) 639–5960 or send an e-mail to [omb@cdc.gov](mailto:omb@cdc.gov). Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

State and Local Area Integrated Telephone Survey (SLAITS), (OMB No. 0920–0406, Expiration 04/30/2011)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States. This revision is to notify the public of a request to

continue the SLAITS mechanism for the 2011 to 2014 survey period. A three year clearance is requested.

SLAITS is an integrated and coordinated survey system that has been conducted since 1997, in accordance with the 1995 initiative to increase the integration of surveys within DHHS. It is designed to collect needed health and well-being data at the national, state, and local levels. Using the large sampling frame of the ongoing National Immunization Survey (NIS) and Computer Assisted Telephone Interviewing (CATI), and when necessary independent samples, mail, and Internet modes to support data collection activities, SLAITS has quickly collected and produced household and person-level data to monitor health-related areas. Questionnaire content is drawn from existing surveys within DHHS and other Federal agencies, or developed specifically to meet project sponsor needs.

Examples of topical areas include infant, child, adolescent, parent, and family health, well-being, and knowledge, attitude, and behaviors; children with special health care needs (CSHCN); functioning; life course and social determinants of health; developmental delays and disabilities; acute and chronic conditions; immunizations; access to and use of health care; program participation; adoption; and changes in health insurance coverage and experiences.

Users of SLAITS data include, but are not limited to, Congressional offices, Federal agencies, state and local

governments, schools of public health, colleges and universities, private industry, nonprofit foundations, professional associations, clinicians, researchers, administrators, advocates, and health planners, to evaluate content and/or programs. SLAITS data continue to be heavily used by Federal and state Maternal and Child Health Bureau Directors to evaluate programs and service needs. Several SLAITS modules provided data for multiple Congressionally-mandated reports on healthcare disparities and quality; at least one report to Congress on health insurance coverage among children; and

reports of the National Academy of Sciences. Within DHHS, the Office of the Assistant Secretary for Planning and Evaluation and the Administration for Children and Families used SLAITS to collect data for the first nationally representative survey of adoptive families across adoption types for children with and without special health care needs, and to assess their post-adoption service use and unmet needs.

There is no cost to respondents other than their time to participate. The total estimated annualized burden hours are 194,675.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Household screening .....	1,800,000	1	2/60
Household interview .....	306,000	1	25/60
Pilot work, pre-testing, and planning activities .....	12,300	1	35/60

Dated: March 9, 2011.

**Carol E. Walker,**

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011-5920 Filed 3-14-11; 8:45 am]

BILLING CODE 4163-18-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

[30 Day 11-10GP]

**Agency Forms Undergoing Paperwork Reduction Act Review**

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639-5960 or send an e-mail to [omb@cdc.gov](mailto:omb@cdc.gov). Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395-5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

*Clostridium difficile* Infection (CDI) Surveillance—New—National Center for Emerging and Zoonotic Infectious Diseases, (NCEZID), Centers for Disease Control and Prevention, (CDC).

*Background and Brief Description*

Steady increases in the rate and severity of *Clostridium difficile* infection (CDI) indicate a clear need to conduct longitudinal assessments of the impact of CDI in the United States. *C. difficile* is an anaerobic, spore-forming, gram positive bacillus that produces two pathogenic toxins: A and B. CDI ranges in severity from mild diarrhea to fulminant colitis and death. Transmission of *C. difficile* occurs primarily in healthcare facilities, where environmental contamination by *C. difficile* spores and exposure to antimicrobial drugs are common. No longer limited to healthcare environments, community-associated CDI is the focus of increasing attention. Recently, several cases of serious CDI have been reported in what have been considered low-risk populations, including healthy persons living in the community and peri-partum women.

The surveillance population will consist of persons residing in the

catchment area of the participating Emerging Infections Program (EIP) sites. This surveillance poses no more than minimal risk to the study participants as there will be no interventions or modifications to the care study participants receive. EIP surveillance personnel will perform active case finding from laboratory reports of stool specimens testing positive for *C. difficile* toxin and abstract data on cases using a standardized case report form. For a subset of cases (e.g., community-associated *C. difficile* cases) sites will administer a health interview. Remnant stool specimens from cases testing positive for *C. difficile* toxin will be submitted to reference laboratories for culturing, and isolates will be sent to CDC for confirmation and molecular typing. Outcomes of this surveillance project will include the population-based incidence of community- and healthcare-associated CDI, and a description of the molecular characteristics of *C. difficile* strains and the epidemiology of this infection among the population under surveillance.

There is no cost to respondents to participate in this program. The total annualized burden for this data collection is 5,840 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
CDI Surveillance Case Report Form—Complete .....	10	437	1

ESTIMATE OF ANNUALIZED BURDEN HOURS—Continued

Respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
CDI Surveillance Case Report Form—Partial .....	10	438	15/60
CDI Surveillance Health Interview .....	10	50	45/60

Dated: March 9, 2011.  
**Carol Walker,**  
*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*  
 [FR Doc. 2011-5919 Filed 3-14-11; 8:45 am]  
**BILLING CODE 4163-18-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**Withdrawal of Publication**

This is to serve notice that the following **Federal Register** notice published on March 1, 2011, page 11250, is being rescinded:

**Submission for OMB Review: Comment Request**

*Title:* Child Care and Development Fund Tribal Plan Preprint—ACF-118-A.

*OMB No.:* 0970-0198.

The original notice published on February 9, 2011, pages 7218-7219 is still in effect.

Dated: March 9, 2011.

**Robert Sargis,**  
*Reports Clearance Officer.*  
 [FR Doc. 2011-5845 Filed 3-14-11; 8:45 am]  
**BILLING CODE 4184-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2010-N-0554]

**Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Devices; Reports of Corrections and Removals**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by April 14, 2011.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-7285, or e-mailed to *oira\_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910-0359. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50-400B, Rockville, MD 20850, 301-796-5156, *Daniel.Gittleson@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

**Medical Devices; Reports of Corrections and Removals—(OMB Control Number 0910-0359)—(Extension)**

The collection of information required under the reports of corrections and removals, part 806 (21 CFR part 806), implements section 519(g) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360i(g)), as amended by the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 301) (Pub. L. 105-115). Each device manufacturer or importer under § 806.10 shall submit a written report to FDA of any action initiated to correct or remove a device to reduce a risk to health posed by the device, or to remedy a violation of the FD&C Act caused by the device that may present a risk to health, within 10 working days of initiating such correction or removal. Each device manufacturer or importer of a device who initiates a correction or removal of a device that is not required to be reported to FDA under § 806.20 shall keep a record of such correction or removal.

The information collected in the reports of corrections and removals will be used by FDA to identify marketed

devices that have serious problems and to ensure that defective devices are removed from the market. This will assure that FDA has current and complete information regarding these corrections and removals and to determine whether recall action is adequate.

Respondents to this collection of information are manufacturers and importers of medical devices. FDA reviewed reports of device corrections and removals submitted to the Agency for the previous 3 years as part of responding to the current request for approval of the information collection requirements for §§ 806.10 and 806.20. This information was obtained through the Agency's voluntary recall provisions (*i.e.*, 21 CFR part 7). The specific information requested was the total number of class I, II, and III recalls for the last 3 years. This information was obtained from the Agency's Recall Enterprise System—a database of all recalls submitted to the Agency.

This information is relevant since a § 806.10 report is required for all class I and II recalls. Although class III recalls are not required to be submitted to FDA (by § 806.10), a record must be kept in the firm's § 806.20 file. Therefore, the number of class I and II recalls can be used to estimate the maximum number of reports that are required to be submitted under § 806.10. Also, the recordkeeping burden can be estimated based upon the number of class III recalls, which are not required to be reported, but must be retained in a § 806.20 file.

FDA has determined that estimates of the reporting burden for § 806.10 should be revised to reflect a projected 7.3 percent increase (from the last PRA numbers) in reports submitted to FDA as class I and II. FDA also estimates the recordkeeping burden in § 806.20 should be revised to reflect a reduction of 6.8 percent (from the last PRA numbers) in records filed and maintained under § 806.20. The estimates of time needed to collect part 806 information have not changed.

In the **Federal Register** of November 23, 2010 (75 FR 71446), FDA published a 60-day notice requesting public comment on the proposed collection of



information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours)	Total hours
806.10 .....	666	1	666	10	6660

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED AVERAGE ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours
806.20 .....	90	1	90	10	900

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5916 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2009-P-0177]

#### **Determination that ROCEPHIN (Ceftriaxone Sodium) Injection, 250 Milligrams, 500 Milligrams, 1 Gram, 2 Grams, and 10 Grams Base/Vial, Approved Under New Drug Application 050585, 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 ROCEPHIN (ceftriaxone sodium) Injection, 250 milligrams (mg), 500mg, 1 gram (g), 2g, and 10g base/vial, approved under new drug application (NDA) 050585, were not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for any of these products if all other legal and regulatory requirements are met.

**FOR FURTHER INFORMATION CONTACT:** Patrick Raulerson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6368, Silver Spring, MD 20993-0002, 301-796-3522.

**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 applicants 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. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of an 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 known generally as the “Orange Book.” Under FDA regulations, a drug is removed 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)(1) (21 CFR 314.161(a)(1)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness before an ANDA that refers to that listed drug may be approved. FDA may not approve an

ANDA that does not refer to a listed drug.

ROCEPHIN (ceftriaxone sodium) Injection, 250mg, 500mg, 1g, 2g, and 10g base/vial, are the subject of NDA 050585 held by F. Hoffman-La Roche Ltd. (La Roche). ROCEPHIN (ceftriaxone sodium) is a semisynthetic cephalosporin antibiotic for intravenous or intramuscular administration and is indicated for the treatment of certain infections as described in the labeling. The drug products approved under NDA 050585 are currently listed in the “Discontinued Drug Product List” section of the Orange Book.

Steven H. Sklar of Leydig, Voit & Mayer, Ltd., submitted a citizen petition dated April 3, 2009 (Docket No. FDA-2009-P-0177), under 21 CFR 10.30, requesting that FDA determine that ROCEPHIN (ceftriaxone sodium) Injection, 250mg, 500mg, 1g, 2g, and 10g base/vial, approved under NDA 050585, were withdrawn from sale for reasons other than safety or effectiveness.

After considering the citizen petition and reviewing Agency records, FDA has determined under § 314.161 that ROCEPHIN (ceftriaxone sodium) Injection, 250mg, 500mg, 1g, 2g, and 10g base/vial, approved under NDA 050585, were not withdrawn from sale for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that these products were withdrawn from sale for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of these products from sale. We have also independently evaluated the relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that any of these products were

withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list ROCEPHIN (ceftriaxone sodium) Injection, 250mg, 500mg, 1g, 2g, and 10g base/vial, approved under NDA 050585, in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" delineates, among other items, drug products that have been withdrawn from sale for reasons other than safety or effectiveness. ANDAs that refer to any of the products described in this notice may be approved by FDA as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for any of these drug products should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5947 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2011-D-0104]

#### **Draft Guidance for Industry on Non-Penicillin Beta-Lactam Risk Assessment: A CGMP Framework; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Non-Penicillin Beta-Lactam Risk Assessment: A CGMP Framework." This guidance describes the importance of implementing appropriate steps during the manufacturing process to prevent cross-contamination of finished pharmaceuticals and active pharmaceutical ingredients (APIs) with non-penicillin beta-lactam antibiotics. The draft guidance is intended to assist manufacturers in assessing whether separate facilities should be used based on the relative health risk of cross-reactivity.

**DATES:** Although you can comment on any guidance at any time (*see* 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the

final version of the guidance, submit either electronic or written comments on the draft guidance by May 16, 2011.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request. The guidance may also be obtained by mail by calling CDER at 301-796-3400. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments concerning the draft guidance to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Edwin Melendez, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 4370, Silver Spring, MD 20993-0002, 301-796-3284.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

FDA is announcing the availability of a draft guidance for industry entitled "Non-Penicillin Beta-Lactam Risk Assessment: A CGMP Framework." This draft guidance describes the importance of implementing appropriate steps during the manufacturing process to prevent cross-contamination of finished pharmaceuticals and APIs with non-penicillin beta-lactam antibiotics. It also provides information regarding the relative health risk of, and the potential for, cross-reactivity in the classes of sensitizing beta-lactams (penicillins and non-penicillin beta-lactams).

Drug cross-contamination is the contamination of one drug with one or more different drugs. Cross-contamination with non-penicillin beta-lactam drugs can initiate drug-induced hypersensitivity reactions, including anaphylaxis, an allergic reaction that may be a life-threatening event. One critical aspect of manufacturing non-penicillin beta-lactam drugs is preventing cross-contamination to reduce the potential for drug-induced, life-threatening allergic reactions. FDA is recommending that manufacturers establish appropriate separation and control systems designed to prevent the

following types of cross-contamination: (1) Non-penicillin beta-lactam contamination in a non-beta-lactam product (*e.g.*, cefaclor in aspirin) and (2) non-penicillin beta-lactam contamination in another non-penicillin beta-lactam (*e.g.*, cephalexin in imipenem).

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on non-penicillin beta-lactam risk assessment. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

##### **II. Comments**

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

##### **III. Electronic Access**

Persons with access to the Internet may obtain the document at either <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> or <http://www.regulations.gov>.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5948 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2008-D-0150]

#### **Guidance for Industry on Hypertension Indication: Drug Labeling for Cardiovascular Outcome Claims; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the

availability of a guidance for industry entitled "Hypertension Indication: Drug Labeling for Cardiovascular Outcome Claims." This guidance is intended to assist applicants in developing labeling for outcome claims for drugs that are indicated to treat hypertension. With few exceptions, current labeling for antihypertensive drugs includes only the information that these drugs are indicated to reduce blood pressure; the labeling does not include information on the clinical benefits related to cardiovascular outcomes expected from such blood pressure reduction. However, blood pressure control is well established as beneficial in preventing serious cardiovascular events, and inadequate treatment of hypertension is acknowledged as a significant public health problem. The Agency believes that the appropriate use of these drugs can be encouraged by making the connection between lower blood pressure and improved cardiovascular outcomes more explicit in labeling.

**DATES:** Submit either electronic or written comments on Agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Devi Kozeli, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 4183, Silver Spring, MD 20993-0002, 301-796-1128.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

FDA is announcing the availability of a guidance for industry entitled "Hypertension Indication: Drug Labeling for Cardiovascular Outcome Claims." The intent of the guidance is to provide common labeling for antihypertensive drugs except where differences are clearly supported by clinical data. With publication of this guidance, applicants are encouraged to submit labeling

supplements containing the new language.

A draft guidance of the same title was announced in the **Federal Register** on March 13, 2008 (73 FR 13546), and Docket No. FDA-2008-D-0150 was open for comments until May 12, 2008. Comments received from industry, professional societies, and consumer groups on the draft guidance were taken into consideration by FDA in finalizing this guidance. Throughout the guidance, the language has been condensed and simplified to be more concise and clear. A section has been added to clarify procedures for obtaining approval of new labeling and its applicability to advertising. The guidance describes how applicants can provide clinical evidence for any drugs they perceive to be missing from Table 1, Approved Drugs for Chronic Treatment of Hypertension, by submitting the information to the docket number listed in brackets in the heading of this document. The division will review the information and revise the guidance to include any new labeling changes supported by clinical data submitted to the docket.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on labeling for cardiovascular outcome claims for drugs to treat hypertension. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

##### **II. The Paperwork Reduction Act of 1995**

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The collection of information in this guidance was approved under OMB control number 0910-0670.

##### **III. Comments**

Interested persons may submit to the Division of Dockets Management (*see ADDRESSES*) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

##### **IV. Electronic Access**

Persons with access to the Internet may obtain the document at either <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> or <http://www.regulations.gov>.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5945 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

##### **Food and Drug Administration**

[Docket No. FDA-2009-D-0568]

##### **Guidance for Industry on Planning for the Effects of High Absenteeism To Ensure Availability of Medically Necessary Drug Products; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled "Planning for the Effects of High Absenteeism to Ensure Availability of Medically Necessary Drug Products." The guidance encourages manufacturers of medically necessary drug products (MNPs) and components to develop production plans in the event of an emergency that results in high absenteeism at one or more production facilities. The purpose of the guidance is to provide to industry considerations for developing plans for these types of emergencies, as well as to discuss the Center for Drug Evaluation and Research's (CDER's) intended approach to assist in avoiding drug product shortages that may have a negative impact on the national public health during such emergencies.

**DATES:** Submit either electronic or written comments on Agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:**

Thomas J. Christl, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 3358, Silver Spring, MD 20993-0002, 301-796-2057.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

FDA is announcing the availability of a guidance for industry entitled "Planning for the Effects of High Absenteeism to Ensure Availability of Medically Necessary Drug Products." The guidance encourages manufacturers of MNPs and components to develop production plans in the event of an emergency that results in high absenteeism at one or more production facilities. In particular, the guidance provides recommendations regarding considerations for the development and implementation of a production plan, including specific elements to include in such a plan. The guidance is intended for manufacturers of finished drug products as well as manufacturers of the raw materials necessary for manufacturing of an MNP.

The purpose of this guidance is to provide to industry considerations for developing plans for these types of emergencies, as well as to discuss CDER's intended approach to assist in avoiding shortages that may have a negative impact on the national public health during such emergencies. This guidance applies to manufacturers of drug and therapeutic biologic products regulated by CDER, and any components of those products. These considerations include, but are not limited to:

- General preparedness through employee education and immunization,
- Prioritization of manufactured products based on medical necessity,
- Developing training, manufacturing and laboratory contingencies for high absenteeism, and
- How to plan for returning to normal operations.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on planning for the effects of high absenteeism to ensure availability of MNPs. It does not create or confer any rights for or on any person

and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

**II. Comments**

Interested persons may submit to the Division of Dockets Management (*see ADDRESSES*) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

**III. Paperwork Reduction Act of 1995**

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The collections of information in this guidance were approved under OMB control number 0910-0675.

**IV. Electronic Access**

Persons with access to the Internet may obtain the document at either <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> or <http://www.regulations.gov>.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5949 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2011-N-0002]

**Antiviral Drugs Advisory Committee; Notice of Meeting**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee:* Antiviral Drugs Advisory Committee.

*General Function of the Committee:* To provide advice and

recommendations to the Agency on FDA's regulatory issues.

*Date and Time:* The meeting will be held on April 27, 2011, from 8 a.m. to 5 p.m.

*Location:* FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993-0002. Information regarding special accommodations due to a disability, visitor parking and transportation may be accessed at: <http://www.fda.gov/AdvisoryCommittees/default.htm>; under the heading "Resources for You", click on "White Oak Conference Center Parking and Transportation Information for FDA Advisory Committee Meetings". Please note that visitors to the White Oak Campus must enter through Building 1.

*Contact Person:* Paul Tran, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993-0002, 301-796-9001, FAX: 301-847-8540, e-mail: [paul.tran@fda.hhs.gov](mailto:paul.tran@fda.hhs.gov), or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda:* On April 27, 2011, the committee will discuss a new drug application (NDA) 202-258, boceprevir (a hepatitis C virus protease inhibitor), manufactured by Merck & Co., Inc., with a proposed indication for the treatment of chronic hepatitis C genotype 1 infection, in combination with peginterferon alfa and ribavirin (two medicines approved to treat chronic hepatitis C infection) in adult patients with compensated liver disease who are previously untreated or who have failed previous therapy. Compensated liver disease is a stage in which the liver is damaged but maintains ability to function.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the

location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at <http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee link.

**Procedure:** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 13, 2011. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before April 5, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by April 6, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Paul Tran at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5900 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2011-N-0002]

#### Antiviral Drugs Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

**Name of Committee:** Antiviral Drugs Advisory Committee.

**General Function of the Committee:** To provide advice and recommendations to the Agency on FDA's regulatory issues.

**Date and Time:** The meeting will be held on April 28, 2011, from 8 a.m. to 5 p.m.

**Location:** FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993-0002. Information regarding special accommodations due to a disability, visitor parking and transportation may be accessed at: <http://www.fda.gov/AdvisoryCommittees/default.htm>; under the heading "Resources for You", click on "White Oak Conference Center Parking and Transportation Information for FDA Advisory Committee Meetings." Please note that visitors to the White Oak Campus must enter through Building 1.

**Contact Person:** Paul Tran, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993-0002, 301-796-9001, Fax: 301-847-8540, e-mail: [paul.tran@fda.hhs.gov](mailto:paul.tran@fda.hhs.gov), or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

**Agenda:** On April 28, 2011, the committee will discuss a new drug

application (NDA) 201-917, telaprevir (a hepatitis C virus protease inhibitor), manufactured by Vertex Pharmaceuticals, Inc., with a proposed indication for the treatment of chronic hepatitis C genotype 1 infection, in combination with peginterferon alfa and ribavirin (two medicines approved to treat chronic hepatitis C infection) in adult patients with compensated liver disease who are previously untreated or who have failed previous therapy. Compensated liver disease is a stage in which the liver is damaged but maintains ability to function.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at <http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee link.

**Procedure:** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 14, 2011. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before April 6, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by April 7, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to

a disability, please contact Paul Tran at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5901 Filed 3-14-11; 8:45 am]

BILLING CODE 4160-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2010-N-0381]

#### Generic Drug User Fee; Notice of Public Meeting; Reopening of the Comment Period

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; reopening of the comment period.

**SUMMARY:** The Food and Drug Administration (FDA) is reopening until June 30, 2011, the comment period for the notice of public meeting, published in the **Federal Register** of August 9, 2010 (75 FR 47820), entitled "Generic Drug User Fee; Public Meeting; Request for Comments." In that notice, FDA announced a public meeting that took place on September 17, 2010, to gather stakeholder input on the development of a generic drug user fee program. FDA is reopening the comment period for the expected duration of the active negotiation phase to ensure that all interested stakeholders have the opportunity to share their views on the matter.

**DATES:** Submit either electronic or written comments by June 30, 2011.

**ADDRESSES:** Submit electronic comments to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Peter C. Beckerman, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4238, Silver Spring, MD 20993, 301-

796-4830, FAX: 301-847-3541, e-mail: [peter.beckerman@fda.hhs.gov](mailto:peter.beckerman@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In the **Federal Register** of August 9, 2010 (75 FR 47820), FDA published a notice of a public meeting on the development of a generic drug user fee (GDUF) program. In that notice, FDA posed several questions related to a user fee for human generic drugs and sought public input on such a program. The Agency received submissions and presentations from the public meeting, which are now posted on FDA's Web site. On November 4, 2010 (75 FR 67984), FDA subsequently reopened the comment period for 30 days to allow consideration of submissions received after the original docket closing date. Because after that reopening FDA received multiple requests to reopen the docket, including requests from generic industry segments that did not previously comment, FDA reopened the docket again to permit public input on all the submissions.

Interested persons were originally given until October 17, 2010, to comment on the development of a generic drug user fee program. In the last docket reopening on January 24, 2011 (76 FR 4119), FDA reopened the docket to permit comments until February 23, 2011.

To ensure that all interested persons, whether a member of a trade organization at the negotiating table or not, have sufficient opportunity to share their views on the GDUF program throughout the negotiation phase, FDA is reopening the comment period until June 30, 2011. FDA expects that the public component of the GDUF negotiations will be complete by the end of June 2011. Therefore, the Agency is reopening the comment period for this anticipated duration.

##### II. Additional Information on GDUF

There is information on FDA's Web site that may be useful for interested stakeholders to better understand FDA's effort to establish a generic drug user fee and its current status. Information on the September 17, 2010, public meeting on GDUF, the **Federal Register** notice announcing the meeting, the transcript of the meeting, and slide presentations from the meeting are available at <http://www.fda.gov/Drugs/NewsEvents/ucm224121.htm>. Additional information on that Web page includes subsequent FDA updates, slide presentations, and speeches related to generic drug user fees, and this is also where FDA will post meeting minutes

from the negotiation sessions with industry.

#### III. How To Submit Comments

Interested persons may submit to the Division of Dockets Management (*see ADDRESSES*) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5917 Filed 3-14-11; 8:45 am]

BILLING CODE 4160-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2011-N-0122]

#### Center for Devices and Radiological Health 510(k) Implementation: Online Repository of Medical Device Labeling, Including Photographs; Public Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public meeting; request for comments.

The Food and Drug Administration (FDA) is announcing a public meeting entitled "510(k) Implementation: Discussion of an Online Repository of Medical Device Labeling and of Making Device Photographs Available in a Public Database Without Disclosing Proprietary Information." The purpose of the meeting is to obtain public comment on the following topics: FDA's plans to establish an online public repository of medical device labeling and strategies for displaying device photographs in a public database without disclosing proprietary information.

**DATES:** *Date and Time:* The public meeting will be held on April 7, 2011, from 8:30 a.m. to 5 p.m.

*Location:* The public meeting will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31, rm. 1503, Silver Spring, MD 20903.

*Contact Person:* Joyce Siwarski, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5402, Silver Spring, MD 20903,

301-796-5422, FAX: 301-847-8510, e-mail: [Joyce.Siwarski@fda.hhs.gov](mailto:Joyce.Siwarski@fda.hhs.gov).

**Registration and Requests for Oral Presentations:** Online registration is available at <http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm243829.htm>. Required registration information includes name, title, firm name, address, e-mail, telephone, and fax number, if available. Space is limited, so online registration will close at 5 p.m. on March 31, 2011. You will be notified if you are on a waiting list. If registration is not filled, onsite registration may become available.

If you wish to make an oral presentation during any of the open comment sessions at the meeting, you must indicate this at the time of registration. FDA has included general topics for comment in this document. You should also indicate which topic you wish to address in your presentation. In order to keep each open session focused on the topic at hand, each oral presentation should address only one topic. FDA will do its best to accommodate requests to speak. Individuals and organizations with common interests are urged to consolidate or coordinate their presentations and to request time for a joint presentation. FDA will determine the amount of time allotted to each presenter and the approximate time that each oral presentation is to begin.

Registration is free and will be on a first-come-first-served basis. Early registration is recommended because seating is limited. FDA may limit the number of participants from each organization based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration the day of the public meeting will be provided on a space-available basis beginning at 7:30 a.m. Non-U.S. citizens are subject to additional security screening, and they should register as soon as possible.

Requests to make oral presentations, as well as presentation materials, must be sent to the contact person by March 21, 2011. If you need special accommodations due to a disability, please contact Susan Monahan, 301-796-5661 or [Susan.Monahan@fda.hhs.gov](mailto:Susan.Monahan@fda.hhs.gov), no later than March 31, 2011.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Center for Devices and Radiological Health (CDRH) is exploring the development of a searchable medical device labeling repository that would be accessible by the public and provide useful product information to

patients and health care practitioners. This might be similar to the labeling repository specific to drugs that is already available through DailyMed on the National Library of Medicine's Web site (<http://www.dailymed.nlm.nih.gov/dailymed/about.cfm>). The repository could eventually cover all classes of devices and could facilitate patient access to information on what types of devices are available for their medical condition and how the devices could be used. It could also assist health care professionals to access labeling that may not always accompany a medical device.

FDA anticipates benefits for device manufacturers, including improved information about potential predicate devices. The labeling available in the repository might cover specific highlighted areas, such as indications for use, operational instructions, warning and precautions, and basic maintenance and cleaning. There might also be a photo of the device and any acceptable accessories. We anticipate that the repository would not include service and technical manuals or supply any proprietary information.

CDRH is holding a public meeting to discuss any comments, concerns, or questions the public may have about putting all device labeling onto one Web site and to solicit input from the public on what they would want and need in labeling and how they would want to access it. CDRH is also interested in learning more about how patients, consumers, and caregivers acquire and use medical device labeling and is seeking input about the circumstances under which patients, consumers, and caregivers receive or should receive risk-benefit information and instructions for use for prescription and over-the-counter devices. In addition, CDRH seeks input on which types of medical devices need patient labeling and what elements that labeling should include. CDRH is also interested in learning what resources, such as guidance or training, the public would like it to provide in order to improve the quality of professional and patient labeling.

The second topic to be discussed during this meeting is that of public access to photographs of cleared medical devices. The CDRH Preliminary Internal Evaluations 510(k) Working Group Report of August 2010 recommended that nonproprietary photos be made available in a public database. In considering how to address this recommendation, CDRH recognizes the sensitivity and potential confidentiality issues with photos that would be made publicly available.

Accordingly, CDRH is interested in seeking feedback regarding the implementation of this recommendation, including what guidance is needed to better ensure that this recommendation may be implemented consistently and in a manner that is useful to the public without adverse impact on industry.

##### **II. Comments**

FDA is holding this public meeting to obtain information on a number of issues regarding FDA's plans to establish an online public repository of medical device labeling and strategies for displaying device photographs available in a public database without disclosing proprietary information. FDA believes development of a searchable online labeling repository holds many potential benefits for industry, consumers, and health care providers. However, FDA is aware of the concerns some members of industry have expressed about the costs of submitting labeling to FDA. FDA is particularly interested in comments on the costs and benefits of establishing an online labeling repository and is soliciting comments on the following issues:

1. FDA has statutory authority to require the annual submission of updated device labeling as part of the annual registration and listing process under section 510(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360(j)). FDA could rely on this authority to develop a device labeling repository. An alternative approach would be to link to labeling contained on manufacturers' Web sites; however, information about devices no longer being marketed may not be maintained on those sites. What are the advantages and disadvantages of these alternative approaches? Do other alternatives exist to developing a searchable online device labeling repository?

2. "Labeling" is a broad term that can cover practitioner labeling, patient labeling, instructional manuals, and other materials. What types of labeling should be included in an online repository?

3. There is currently no regulation mandating the content and format of labeling for most devices. How can FDA define the type of labeling that must be included in the repository to ensure consistency across products and to ensure the most important information is included in the repository?

Regardless of attendance at the public workshop, interested persons may submit either electronic or written comments up to 4 weeks before and after the public workshop (March 10, 2011, through May 10, 2011) regarding

this document. Submit electronic comments to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Comments are to be identified with the docket number found in brackets in the heading of this document. In addition, when responding to specific discussion topics as outlined in this document, please identify the topic you are addressing. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

### III. Transcripts

Please be advised that as soon as a transcript is available, it will be accessible at <http://www.regulations.gov>. It may be viewed at the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. A transcript will also be available in either hardcopy or on CD-ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI-35), Office

of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6-30, Rockville, MD 20857.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011-5950 Filed 3-14-11; 8:45 am]

**BILLING CODE 4160-01-P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2011-N-0110]

#### Extension of Memorandum of Understanding Between the Food and Drug Administration and Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria of the United Mexican States Concerning Entry of Mexican Cantaloupes Into the United States of America

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is providing notice of an extension of memorandum of understanding (MOU) between FDA and Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria of

the United Mexican States. The purpose of the MOU is to establish, and build confidence in, a system that increases the likelihood that cantaloupes from Mexico offered for import into the United States comply with U.S. law. This MOU also establishes a risk-based classification system for firms in Mexico producing cantaloupes for import into the United States to protect the public health.

**DATES:** The agreement became effective on October 26, 2005, amended on April 19, 2007, and extended on October 28, 2010, for 1 year.

**FOR FURTHER INFORMATION CONTACT:**

Naomi Kawin, Office of Global Engagement, Office of International Programs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 3416, Silver Spring, MD 20993-0002, 301-796-8372, FAX: 301-595-7941.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the Agency is publishing notice of this MOU.

Dated: March 9, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

**BILLING CODE 4160-01-P**



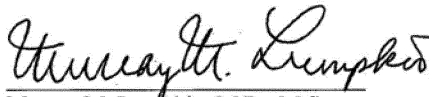
EXTENSION OF MEMORANDUM OF UNDERSTANDING  
BETWEEN THE  
FOOD AND DRUG ADMINISTRATION  
DEPARTMENT OF HEALTH AND HUMAN SERVICES  
OF THE UNITED STATES OF AMERICA  
AND  
SERVICIO NACIONAL DE SANIDAD, INOCUIDAD  
Y CALIDAD AGROALIMENTARIA  
OF THE UNITED MEXICAN STATES  
CONCERNING  
ENTRY OF MEXICAN CANTALOUPE  
INTO THE UNITED STATES OF AMERICA

Whereas the United States Food and Drug Administration and the Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria (collectively, the Participants) entered into a Memorandum of Understanding Concerning Entry of Mexican Cantaloupes into the United States of America signed on October 26, 2005 (the MOU); and

Whereas activities under the MOU were to continue for a period of five years which five year period will end on the 26<sup>th</sup> of October, 2010; and

Whereas the Participants desire to extend the cooperative work under the MOU in promoting the safety of public health and to ensure the safety of cantaloupes exported to the United States of America from the United Mexican States;

The Participants hereby consent to extend the MOU for a period of one year from the last date of signature of this document.

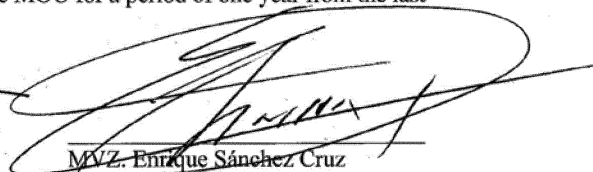


Murray M. Lumpkin, M.D., M.Sc.  
Deputy Commissioner  
International Programs

United States Food and Drug Administration  
Department of Health and Human Resources

UNITED STATES OF AMERICA

Date: 25 Oct 2010



MVZ. Enrique Sánchez Cruz  
Director en Jefe

Servicio Nacional de Sanidad, Inocuidad  
y Calidad Agroalimentaria  
Secretaría de Agricultura, Ganadería,  
Desarrollo Rural, Pesca y Alimentación

UNITED MEXICAN STATES

Date: 28 Oct. 2010

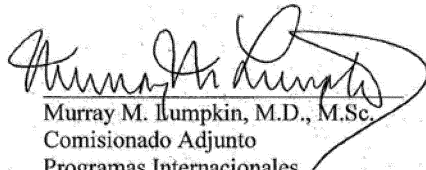
PRÓRROGA DEL MEMORANDO DE ENTENDIMIENTO  
ENTRE  
LA ADMINISTRACIÓN DE ALIMENTOS Y MEDICAMENTOS  
DEL DEPARTAMENTO DE SALUD Y SERVICIOS HUMANOS  
DE LOS ESTADOS UNIDOS DE AMÉRICA  
Y EL  
SERVICIO NACIONAL DE SANIDAD, INOCUIDAD  
Y CALIDAD AGROALIMENTARIA  
DE LOS ESTADOS UNIDOS MEXICANOS  
ACERCA DEL  
INGRESO DE MELONES CANTALUPOS MEXICANOS  
A LOS ESTADOS UNIDOS DE AMÉRICA

Considerando que la Administración de Alimentos y Medicamentos de los Estados Unidos y el Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria (colectivamente, los Participantes) celebraron un Memorando de Entendimiento acerca del ingreso de melones cantalupos mexicanos a los Estados Unidos de América, suscrito el 26 de octubre de 2005 (el MdE); y

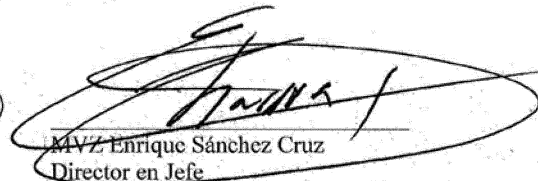
Considerando que, de conformidad con el MdE, las actividades deberían continuar por un período de cinco años que finalizará el 26 de octubre de 2010; y

Considerando que los Participantes desean prorrogar la labor de cooperación de conformidad con el MdE destinada a fomentar la seguridad de la salud pública y garantizar la inocuidad de los melones cantalupos exportados de los Estados Unidos Mexicanos a los Estados Unidos de América;

los Participantes consienten por medio del presente en prorrogar el MdE por un período de un año a partir de la última fecha de firma de este documento.

  
Murray M. Lumpkin, M.D., M.Sc.  
Comisionado Adjunto  
Programas Internacionales  
Administración de Alimentos y  
Medicamentos de los Estados Unidos

Fecha: 25 Oct 2010

  
MVZ Enrique Sánchez Cruz  
Director en Jefe  
Servicio Nacional de Sanidad, Inocuidad  
y Calidad Agroalimentaria

Fecha: 28 Oct 2010

[FR Doc. 2011-5944 Filed 3-14-11; 8:45 am]  
BILLING CODE 4160-01-C

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call the HRSA

Reports Clearance Office on (301) 443-1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

#### Proposed Project: Children's Hospitals Graduate Medical Education Payment Program (CHGME Payment Program) (OMB No. 0915-0247)—Revision

The CHGME Payment Program was enacted by Public Law 106-129 and reauthorized by Public Law 109-307 to provide Federal support for graduate medical education (GME) to freestanding children's hospitals. This legislation attempts to provide support for GME comparable to the level of Medicare GME support received by other, non-children's hospitals. The legislation indicates that eligible children's hospitals will receive payments for both direct and indirect

medical education. Direct payments are designed to offset the expenses associated with operating approved graduate medical residency training programs and indirect payments are designed to compensate hospitals for expenses associated with the treatment of more severely ill patients and the additional costs relating to teaching residents in such programs. The CHGME Payment Program application forms received OMB clearance on June 30, 2010. Centers for Medicare and Medicaid Services (CMS) final rule regarding Sections 5503, 5504, 5505 and 5506 of the Affordable Care Act of 2010, Public Law 111-148, published in the **Federal Register** on Wednesday, November 24, 2010, requires some modification of the data collection within the CHGME Payment Program application. The CHGME Payment Program application forms have been

adjusted to accommodate CMS policy and require OMB approval.

Data are collected on the number of full-time equivalent residents in applicant children's hospitals' training programs to determine the amount of direct and indirect medical education payments to be distributed to

participating children's hospitals. Indirect medical education payments will also be derived from a formula that requires the reporting of discharges, beds, and case mix index information from participating children's hospitals. Hospitals will be requested to submit such information in an annual

application. Hospitals will also be requested to submit data on the number of full-time equivalent residents a second time during the Federal fiscal year to participate in the reconciliation payment process.

The estimated annual burden is as follows:

Form name	Number of respondents	Responses per respondent	Total number of responses	Hours per response	Total burden hours
HRSA 99-1 (Initial) .....	60	1	60	26.5	1,590
HRSA 99-1 (Reconciliation) .....	60	1	60	6.5	390
HRSA 99-2 (Initial) .....	60	1	60	11.33	679.8
HRSA 99-2 (Reconciliation) .....	60	1	60	3.67	220.2
HRSA 99-3 (Initial) .....	60	1	60	0.5	30
HRSA 99-3 (Reconciliation) .....	60	1	60	0.5	30
HRSA 99-4 (Reconciliation) .....	60	1	60	12.5	750
HRSA 99-5 (Initial) .....	60	1	60	0.33	19.8
HRSA 99-5 (Reconciliation) .....	60	1	60	0.33	19.8
Total .....	60		60		3,729.6

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) or by fax to 202-395-6974. Please direct all correspondence to the "attention of the desk officer for HRSA."

Dated: March 8, 2011.

**Reva Harris,**

*Acting Director, Division of Policy and Information Coordination.*

[FR Doc. 2011-6016 Filed 3-14-11; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### National Advisory Council on Nurse Education and Practice; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meetings:

*Name:* National Advisory Council on Nurse Education and Practice (NACNEP).

*Dates and Times:* April 11, 2011, 8:30 a.m.–4 p.m.

April 12, 2011, 8:30 a.m.–4 p.m.

*Place:* Webinar format.

*Status:* The meeting will be open to the public.

*Purpose:* The purpose of this meeting is to address diversity in nurse

education and practice. The objectives of the meeting are to: (1) Articulate the definition, goals and implications of diversification of the nursing workforce; (2) summarize the current data trends and existing information on diversity in the nursing workforce, including nursing students; (3) examine existing policies, practices and legal constraints that influence or limit the recruitment of diverse students into the profession of nursing; (4) identify the key elements of successful programs in nursing education that have increased the recruitment and graduation of diverse individuals; and (5) identify the key elements of success in innovative models that have improved the retention, professional development and promotion of diverse individuals within the nursing profession. Experts from nursing professions of both public and private organizations will make presentations on a range of issues related to diversity in the nursing workforce and health professions. This meeting will form the basis for NACNEP's legislatively mandated Eleventh Annual Report to the Secretary of Health and Human Services and the Congress.

*Agenda:* The meeting will include a panel presentation and discussion of model diversity programs that have demonstrated successful implementation and results. There will be a discussion to help identify best practices to implement diversity in the nursing workforce. The agenda will be available on the NACNEP Web site (<http://bhpr.hrsa.gov/nursing/nacnep.htm>) 1 day prior to the meeting.

Agenda items are subject to change as priorities dictate.

**SUPPLEMENTARY INFORMATION:** For members of the public interested in participating in the Webinar, please contact CDR Serina Hunter-Thomas, Executive Secretary by e-mail at [SHunter-Thomas@hrsa.gov](mailto:SHunter-Thomas@hrsa.gov). Requests to attend can be made up to two days prior to the meeting. Participants will receive an e-mail response containing the link to the Webinar. Requests to provide written comments should be sent to CDR Serina Hunter-Thomas by e-mail. Members of the public will have the opportunity to provide written comments before and after the meeting.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding NACNEP, to obtain a roster of members, minutes of the meeting, or other relevant information, contact CDR Serina Hunter-Thomas, Executive Secretary, National Advisory Council on Nurse Education and Practice, Parklawn Building, Room 9-61, 5600 Fishers Lane, Rockville, Maryland 20857, [SHunter-Thomas@Hrsa.gov](mailto:SHunter-Thomas@Hrsa.gov), telephone (301) 443-4499. Information can also be found at the following Web site: <http://bhpr.hrsa.gov/nursing/nacnep.htm>.

Dated: March 8, 2011.

**Reva Harris,**

*Acting Director, Division of Policy and Information Coordination.*

[FR Doc. 2011-6018 Filed 3-14-11; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**Proposed Collection; Comment Request; A Generic Submission for Formative Research, Pretesting, Stakeholder Measures and Advocate Forms at NCI**

**SUMMARY:** Under the provisions of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

*Proposed Collection: Title:* A Generic Submission for Formative Research, Pre-testing, Stakeholder Measures and Advocate Forms at NCI. *Type of Information Collection Request:* New. *Need and Use of Information Collection:* In order to carry out NCI's legislative mandate, the Office of Advocacy Relations (OAR) disseminates cancer-

related information to a variety of stakeholders, seeks their input and feedback, and facilitates collaboration between the Institute and these external partners to advance NCI's authorized programs. It is beneficial for NCI, through the OAR, to pretest strategies, concepts, activities and materials while they are under development. Additionally, administrative forms may be part of this generic submission since they are a necessary part of collecting demographic information and areas of interest for advocates. Pre-testing, or formative evaluation, helps ensure that the products and services developed by NCI have the greatest capacity of being received, understood, and accepted by their target audiences. Since OAR is responsible for matching advocates to NCI programs and initiatives across the cancer continuum, it is necessary to measure the satisfaction of both internal and external stakeholders with this collaboration. This customer satisfaction research helps ensure the relevance, utility, and appropriateness of the many initiatives and products that OAR and NCI produce. The OAR will use a variety of qualitative (focus groups,

interviews) and quantitative (paper, phone, in-person, and web surveys) methodologies to conduct this research, allowing NCI to: (1) Understand characteristics (attitudes, beliefs, and behaviors) of the intended target audience and use this information in the development of effective strategies, concepts, activities; (2) use a feedback loop to help refine, revise, and enhance OAR's efforts—ensuring that they have the greatest relevance, utility, appropriateness, and impact for/to target audiences; and (3) expend limited program resource dollars wisely and effectively. *Frequency of Response:* On occasion. *Affected Public:* Individuals or households; Businesses or other for profit; Not-for-profit institutions and organizations; Federal Government; State, Local, or Tribal Government. *Type of Respondents:* Adult cancer research advocates; members of the public; health care professionals; organizational representatives. Table 1 outlines the estimated burden hours required for a three-year approval of this generic submission. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

**TABLE 1—ESTIMATE OF BURDEN HOURS OVER THREE YEARS**  
[For generic submissions]

Survey/Instrument	Number of respondents	Frequency of response	Average time per response (minutes/hour)	Annual burden hours
Self-Administered Post-Activity Questionnaires .....	3,600	1	20/60 (.33)	1,200
Other Self-Administered Questionnaires and Forms .....	1,800	1	60/60 (1.0)	1,800
Individual In-Depth Interviews .....	225	1	60/60 (1.0)	225
Focus Group Interviews .....	300	1	90/60 (1.5)	450
<b>Totals .....</b>	<b>5,925</b>	<b>.....</b>	<b>.....</b>	<b>3,675</b>

*Request for Comments:* Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans, contact Shannon Bell, Director of Office of Advocacy Relations (OAR), NCI, NIH, 31 Center Drive, Bldg. 31, Room 10A28, MSC 2580, Bethesda, MD 20892, call non-toll-free number 301-451-3393 or e-mail your request, including your address to: [bells@mail.nih.gov](mailto:bells@mail.nih.gov).

*Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: March 9, 2011.  
**Vivian Horovitch-Kelley,**  
*NCI Project Clearance Liaison, National Institutes of Health.*  
[FR Doc. 2011-6022 Filed 3-14-11; 8:45 am]  
**BILLING CODE 4101-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**Proposed Collection; Comment Request; NCI Cancer Genetics Services Directory Web-Based Application Form and Update Mailer**

*Summary:* In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

*Proposed Collection: Title:* NCI Cancer Genetics Services Directory Web-based Application Form and Update Mailer.

*Type of Information Collection Request:* Existing Collection in Use Without an OMB Number. *Need and Use of Information Collection:* The purpose of the online application form and the Web-based update mailer is to collect information about genetics professionals to be included in the NCI Cancer Genetics Services Directory on NCI's

Cancer.gov Web site. The information collected includes name, practice locations, professional qualifications, and areas of specialization. *Frequency of Response:* Information is collected once via the online application form, and then updated annually via the Web-based mailer. *Affected Public:* Individuals. *Type of Respondents:*

Genetics professionals including nurses, physicians, genetic counselors, and other professionals who provide services related to cancer genetics. The annual reporting burden is estimated at 180 hours (see Table below). There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

TABLE 1—ESTIMATES OF ANNUAL BURDEN HOURS

Type of respondents	Tool	Number of respondents	Frequency of response	Average time per response minutes/hour (hours)	Annual burden hours
Genetics Professionals .....	Application Form .....	60	1	30/60 (.50)	30
	Web-based Update Mailer .....	600	1	15/60 (0.25)	150
Totals .....	.....	660	.....	.....	180

*Request for Comments:* Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*For Further Information Contact:* To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Margaret Beckwith, Acting Branch Chief, International Cancer Research Databank Branch, Office of Cancer Content Management, Office of Communication and Education, National Cancer Institute, 6116 Executive Blvd., Rockville, MD 20852, or call non-toll-free number 301-496-9096 or e-mail your request, including your address to: [mbeckwit@mail.nih.gov](mailto:mbeckwit@mail.nih.gov).

*Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: March 9, 2011.  
**Vivian Horovitch-Kelley,**  
*NCI Project Clearance Liaison, National Institutes of Health.*  
 [FR Doc. 2011-6021 Filed 3-14-11; 8:45 am]  
**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**Notice of Establishment**

Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. app.), the Director, National Institutes of Health (NIH), announces the establishment of the NCI-Frederick Advisory Committee.

The Council will provide advice and recommendations to the Director, National Cancer Institute (NCI), and the Associate Director, NCI-Frederick, on the optimal use of the NCI-Frederick facility to rapidly meet the most urgent needs of the NCI. The Committee will consist of 16 members, including the Chair, appointed by the Director, NCI. Members will be authorities knowledgeable in drug and vaccine development, clinical trials support, AIDS research, bioinformatics, genomics, nanotechnology, biological repositories, and basic research in immunology and infectious diseases.

Duration of this committee is continuing unless formally determined by the Director, NCI that termination would be in the best interest of the public.

Dated: March 9, 2011.  
**Francis S. Collins,**  
*Director, National Institutes of Health.*  
 [FR Doc. 2011-6023 Filed 3-14-11; 8:45 am]  
**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Career Development, Research Training and Pathways to Independence Grant Review.

*Date:* March 29, 2011.  
*Time:* 10 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Helen Lin, PhD, Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Blvd., Suite 800, Bethesda, MD 20892, 301-594-4952, [linh1@mail.nih.gov](mailto:linh1@mail.nih.gov).

*Name of Committee:* National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Clinical Trial Planning, Pilot, and Research Grants.

*Date:* April 7, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Charles N Rafferty, PhD, Chief, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Blvd., Suite 800, Bethesda, MD 20892, 301-594-5019, [charles.rafferty@nih.gov](mailto:charles.rafferty@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: March 8, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011-6031 Filed 3-14-11; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**Center for Scientific Review; 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:* Center for Scientific Review Special Emphasis Panel; Neurodegenerative Diseases.

*Date:* March 22, 2011.

*Time:* 1 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Alexander Yakovlev, PhD, Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5206, MSC 7846, Bethesda, MD 20892, 301-435-1254, [yakovleva@csr.nih.gov](mailto:yakovleva@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS/HIV.

*Date:* April 4-5, 2011.

*Time:* 8 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Kenneth A Roebuck, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435-1166, [roebuck@csr.nih.gov](mailto:roebuck@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Gastrointestinal and Hepatobiliary Pathobiology.

*Date:* April 5, 2011.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

*Contact Person:* Atul Sahai, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, 301-435-1198, [sahaia@csr.nih.gov](mailto:sahaia@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Risk Prevention and Health Behavior.

*Date:* April 12, 2011.

*Time:* 3 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Claire E Gutkin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3106, MSC 7808, Bethesda, MD 20892, 301-594-3139, [gutkincl@csr.nih.gov](mailto:gutkincl@csr.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 9, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011-6030 Filed 3-14-11; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Library of Medicine; Notice of Closed Meetings**

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 PubMed Central National Advisory Committee.

The meeting will be open to the public as indicated below, 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:* PubMed Central National Advisory Committee.

*Date:* June 17, 2011.

*Time:* 9 a.m. to 3 p.m.

*Agenda:* Review and Analysis of Systems.

*Place:* National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

*Contact Person:* David J. Lipman, MD, Director, National Center for Biotechnology Information, National Library of Medicine, Building 38, Room 8N805, Bethesda, MD 20894, 301-435-5985, [dlipman@mail.nih.gov](mailto:dlipman@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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: <http://www.pubmed.central.nih.gov/about/nac/html>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: March 9, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011-6028 Filed 3-14-11; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Library of Medicine; 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 a meeting of the Biomedical Library and Informatics Review Committee.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Biomedical Library and Informatics Review Committee.

*Date:* June 9, 2011.

*Time:* June 9, 2011, 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

*Time:* June 10, 2011, 8 a.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Contact Person:* Arthur A. Petrosian, PhD, Chief Scientific Review Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892-7968, 301-496-4253, [petrosia@mail.nih.gov](mailto:petrosia@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: March 9, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011-6027 Filed 3-14-11; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HOMELAND SECURITY****Coast Guard**

[Docket No. USCG-2010-0164]

**National Boating Safety Advisory Council**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Boating Safety Advisory Council (NBSAC) will meet on

April 1-2, 2011, in Arlington, Virginia. NBSAC discusses issues relating to recreational boating safety. The meetings will be open to the public.

**DATES:** NBSAC will meet Friday, April 1, 2011, from 9 a.m. to 5 p.m. and Saturday, April 2, 2011, from 9 a.m. to 5 p.m. Please note that the meetings may conclude early if NBSAC has completed all business.

All written materials, comments, and requests to make oral presentations at the meetings should reach Mr. Jeff Ludwig, Assistant Designated Federal Officer (ADFO) for NBSAC by March 23, 2011, via one of the methods described in **ADDRESSES**. Any written material submitted by the public will be distributed to the committee and become part of the public record.

**ADDRESSES:** The meeting will be held in the Ballroom at the Holiday Inn Arlington, 4610 N Fairfax Drive, Arlington, VA 22203.

Please send written material, comments, and requests to make oral presentations to Mr. Jeff Ludwig, ADFO for NBSAC, by one of the submission methods described below. All materials, comments, and requests must be identified by docket number USCG-2010-0164.

**Submission Methods:** Please use only one of the following methods:

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

- **E-mail:** [jeffrey.a.ludwig@uscg.mil](mailto:jeffrey.a.ludwig@uscg.mil).

Include the docket number in the subject line of the message.

- **Fax:** (202) 372-1932.

- **Mail:** Mr. Jeff Ludwig, COMDT (CG-54221), 2100 2nd Street, SW., Stop 7581, Washington, DC 20593.

**Instructions:** All submissions received must include the words "U.S. Coast Guard" and docket number USCG-2010-0164. All submissions received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided.

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

**Docket:** For access to the docket to read background documents or submissions received by the NBSAC, go to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeff Ludwig, ADFO for NBSAC, COMDT (CG-54221), 2100 2nd Street, SW., Stop

7581, Washington, DC 20593; (202) 372-1061; [jeffrey.a.ludwig@uscg.mil](mailto:jeffrey.a.ludwig@uscg.mil).

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Pub. L. 92-463). Congress established NBSAC in the Federal Boat Safety Act of 1971 (Pub. L. 92-75). NBSAC currently operates under the authority of 46 U.S.C. 13110, which requires the Secretary of Homeland Security, and the Commandant of the Coast Guard by delegation, to consult with NBSAC in prescribing regulations for recreational vessels and associated equipment, and on other major boating safety matters. See 46 U.S.C. 4302(c) and 13110(c).

**Tentative Agendas of Meetings**

The agenda for NBSAC meeting is as follows:

*Friday, April 1, 2011:*

(1) Opening Remarks—Mr. James P. Muldoon, NBSAC Chairman;

(2) Receipt and discussion of the following reports:

(a) Chief, Office of Auxiliary and Boating Safety Update on NBSAC Resolutions and Recreational Boating Safety Program report.

(b) Executive Secretary's report.

(c) Towing Safety Advisory Committee (TSAC) Liaison's report.

(d) Navigation Safety Advisory Council (NAVSAC) Liaison's report.

(e) National Association of State Boating Law Administrators (NASBLA) report.

(f) Boating Industry Risk Management Council (BIRMC) Liaison's report.

(g) Life Jacket Working Group report.

(3) Presentation on Boat Rental Education Kit.

(4) Presentation on non-USCG Approved Life Jackets.

(5) Presentation on Progress Made on Recommendation Regarding the Development of New Life Jacket Standards and Approval Processes for Life Jackets.

(6) Discussion of Potential Recommendation to the Coast Guard on the Mandatory Wear of Life Jackets.

*Saturday, April 2, 2011:*

(7) Discussion of Potential Recommendation to the Coast Guard on the Mandatory Wear of Life Jackets (Cont.).

A more detailed agenda can be found at: <http://homeport.uscg.mil/NBSAC>, after March 23, 2011.

**Procedural**

These meetings are open to the public. Please note that the meeting may conclude early if all business is finished. Members of the public may make oral presentations during the

meetings concerning the matters being discussed. Public comments will be limited to three minutes per speaker. If you would like to make an oral presentation at the meetings, please notify Mr. Jeff Ludwig as described in the **ADDRESSES** section above by March 23, 2011.

#### Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Mr. Jeff Ludwig as described in the **ADDRESSES** section above as soon as possible.

Dated: March 8, 2011.

#### Lincoln D. Stroh,

Captain, U.S. Coast Guard, Acting Director of Prevention Policy.

[FR Doc. 2011-5892 Filed 3-14-11; 8:45 am]

BILLING CODE 9110-04-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

[Docket No. USCG-2011-0129]

#### Twic/MTSA Policy Advisory Council; Voluntary Use of Twic Readers

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** The Coast Guard announces the release of and seeks comments on Policy Advisory Council (PAC) Decision 01-11, "Voluntary Use of Twic Readers." This PAC Decision provides guidance for using Transportation Security Identification Credential (Twic) readers as part of a Vessel Security Plan or Facility Security Plan. This PAC Decision is directed at owners and operators of vessels and facilities regulated under the Maritime Transportation Security Act, for the purpose of purchasing and installing Twic readers and systems.

**DATES:** Comments and related material must either be submitted to our online docket via <http://www.regulations.gov> on or before May 16, 2011 or reach the Docket Management Facility by that date.

**ADDRESSES:** You may submit comments identified by docket number USCG-2011-0129 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of

Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

The PAC Decision is available in the docket and can be viewed by going to <http://www.regulations.gov>, inserting USCG-2011-0129 in the "Keyword" box, and then clicking "Search." This policy is also available at <http://www.homeport.uscg.mil>; under the Maritime Security tab, click on the "MTSA/ISPS Policy Advisory Council" link, PAC 01-11.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice or the policy, call or e-mail LCDR Loan O'Brien (CG-5442), U.S. Coast Guard, telephone 202-372-1133, e-mail [Loan.T.O'Brien@uscg.mil](mailto:Loan.T.O'Brien@uscg.mil). If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### SUPPLEMENTARY INFORMATION:

##### Public Participation and Request for Comments

We encourage you to submit comments and related material on the Policy Advisory Council (PAC) Decision 01-11, "Voluntary Use of Twic Readers." All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided.

*Submitting comments:* If you submit a comment, please include the docket number for this notice (USCG-2011-0129) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and insert "USCG-2011-0129" in the "Keyword" box. If you submit your comments by

mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

*Viewing the comments and PAC Decision 01-11:* To view the comments and PAC Decision 01-11, go to <http://www.regulations.gov>, click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG-2011-0129" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

This PAC Decision 01-11 is also available at <http://www.homeport.uscg.mil> under the Twic tab of the "Featured Homeport Links" section, click on the "Policy Advisory Council Decisions for Twic" link, PAC Decision 01-11.

*Privacy Act:* Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

#### Background and Purpose

In accordance with the Maritime Transportation Security Act of 2002 (MTSA) (Pub. L. 107-295), and the Security and Accountability for Every Port Act of 2006 (Pub. L. 109-347), this PAC Decision facilitates the use of transportation security card readers to leverage the full security benefits of the Transportation Worker Identification Credential (Twic). The Department of Homeland Security, Coast Guard, and the Transportation Security Administration (TSA) remain in the process of finishing the Twic reader pilot program. As such, many facility owners and operators who received grant funding have been reluctant to move forward on purchasing Twic



equipment. This Policy Advisory Council (PAC) Decision 01–11, “Voluntary Use of TWIC Readers” provides guidance on how vessel and facility owners and operators can use TWIC readers to meet existing regulatory requirements for effective (1) identity verification, (2) card validity, and (3) card authentication.

#### Discussion

TWIC regulations state that all persons requiring unescorted access to secure areas of MTSA-covered vessels, facilities and outer continental shelf facilities must possess a TWIC before such access is granted. 33 CFR 101.514. At each entry, the TWIC must be checked for (1) identity verification, (2) card validity, and (3) card authentication. 33 CFR 104.265(c)(1), 105.255(c)(1), or 106.260(c)(1). The current requirement for identity verification is to visually compare the photograph on the TWIC to the person at the access point. The Coast Guard, however, may determine an alternative method of identity verification if the method meets or exceeds the effectiveness of a visual inspection. 33 CFR 101.130.

With this PAC Decision 01–11, the Coast Guard determines that a biometric match using a TWIC reader from the TSA list of readers that have passed the Initial Capability Evaluation Test to confirm that the biometric template stored on the TWIC matches the fingerprint of the individual presenting the TWIC meets or exceeds the effectiveness of a visual identity verification check. An owner or operator of a vessel or facility may also use a TWIC reader to check for card validity by either (1) comparing the card’s internal Federal Agency Smart Card Number to the TSA Cancelled Card List, or (2) using a Certificate Revocation List. An owner or operator may also perform card authentication by using a TWIC reader to perform the CHALLENGE/RESPONSE protocol using the Card Authentication Certificate and the card authentication private key on the TWIC.

PAC Decision 01–11 also contains additional guidance. It states that TWIC readers used under this determination should be used in accordance with manufacturer instructions, and operated by trained personnel. Additionally, it points out that TWIC readers allowed pursuant to this interim guidance may no longer be valid after promulgation of a TWIC reader final rule requiring the use of readers. Finally, it reminds vessel and facility owners/operators using PAC Decision 01–11 that they must submit a Vessel Security Plan or Facility Security

Plan amendment in accordance with applicable regulations.

Comments on PAC Decision 01–11 may be submitted to the Coast Guard via the docket as described above under **ADDRESSES**. PAC Decision 01–11 is considered a “significant guidance document” under the terms of the Office of Management and Budget’s “Final Bulletin for Agency Good Guidance Practices,” which was published in the **Federal Register** on January 25, 2007 (72 FR 3432).

**Authority:** This notice is issued under authority of 5 U.S.C. 552(a) and 33 CFR 101.130.

Dated: March 7, 2011.

**Kevin S. Cook,**

*Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.*

[FR Doc. 2011–5893 Filed 3–14–11; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID: FEMA–2009–0003]

#### Collection of Overpayments

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** On September 5, 2008, the Federal Emergency Management Agency (FEMA) published a notice in the **Federal Register** that announced FEMA’s intention to implement a revised recoupment process, where warranted, on an individual basis pursuant to the procedures established by regulation for the administrative collection of debts. Now FEMA is providing notice of its revised recoupment process and the availability of the “FEMA Debt Resolution Process: In Summary,” a document which includes a section describing “Your Rights and Options” and provides general information to the public on FEMA’s revised recoupment procedures. The revised procedures provide the opportunity for individuals to request an oral hearing.

**DATES:** FEMA’s revised recoupment procedures are effective March 15, 2011.

**ADDRESSES:** “FEMA Debt Resolution Process: In Summary” can be viewed at <http://www.regulations.gov> under Docket ID FEMA–2009–0003. A hard copy may be inspected at FEMA, Office of Chief Counsel, Room 835, 500 C Street, SW., Washington, DC 20472.

#### FOR FURTHER INFORMATION CONTACT:

Gloria Hernandez, Federal Emergency Management Agency, Department of Homeland Security, Texas National Processing Services Center, P.O. Box 90215, Denton, TX 76202, telephone (940) 891–8722 (this is not a toll-free number). Individuals who are deaf, hard of hearing or those with speech disabilities may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

#### SUPPLEMENTARY INFORMATION: On

September 5, 2008, FEMA published a notice in the **Federal Register** (73 FR 51831) announcing FEMA’s intention to implement a revised recoupment process, where warranted, on an individual basis pursuant to the procedures established by regulation for the administrative collection of debts. FEMA has developed revised recoupment procedures pursuant to Department of Homeland Security recoupment regulations at 6 CFR part 11 (adopting general procedures for administrative collection of debts set forth at 31 CFR parts 900–904). FEMA will examine the files of individual disaster applicants for evidence of overpayment. If FEMA determines that recoupment is warranted after review, the revised recoupment procedures will apply. A brief summary of these procedures follows.

Under the revised procedures, when FEMA identifies a potential overpayment, FEMA will send the applicant written notification that a debt is owed, specifying the amount of the debt and the reason for the debt. This “Notice of Debt” letter will describe the applicant’s available options, including payment of the debt in full within 30 days to avoid any potential interest and/or penalties, a payment plan, a compromise of the debt, or an appeal of the debt determination within 60 days. FEMA will advise the applicant that, if the applicant believes that his or her appeal cannot be decided based on the documentary evidence, for example, when the validity of the debt turns on a question of credibility or veracity, the applicant may request an oral hearing. The applicant will be advised that any request for an oral hearing must be accompanied by an explanation as to why the issue in dispute requires oral testimony and cannot be resolved solely by reviewing documentary evidence. Oral hearings will generally be conducted via telephone conference or may, in certain exceptional circumstances, be held in-person at a FEMA office.

If there is no request for an oral hearing, or if the appeals officer decides the appeal can be resolved fairly based on the documentary evidence alone, FEMA will review the debt based on the written administrative record alone (that is, through a “paper hearing”).

Following review by either an oral or a paper hearing, FEMA will decide the applicant’s appeal within 90 days after FEMA receives the applicant’s appeal letter and will send a final decision in writing to be included in the individual’s official record. If the individual requests an oral hearing and the request is granted, the time limit may be extended to complete that process.

If FEMA determines that the individual owes no debt to FEMA, the recoupment will be terminated and FEMA will reimburse any payments made on the debt. If FEMA determines that the individual owes a debt to FEMA, the individual will be notified of payment options.

**Authority:** 31 U.S.C. 3701 *et seq.*; 6 CFR part 11.

Dated: February 24, 2011.

**W. Craig Fugate,**  
Administrator, Federal Emergency  
Management Agency.

[FR Doc. 2011–6036 Filed 3–14–11; 8:45 am]

**BILLING CODE 9111–23–P**

**DEPARTMENT OF THE INTERIOR**

**Bureau of Ocean Energy Management,  
Regulation and Enforcement**

**Outer Continental Shelf (OCS), Central  
and Western Gulf of Mexico, Oil and  
Gas Lease Sales for Years 2012–2017**

**AGENCY:** Bureau of Ocean Energy  
Management, Regulation and  
Enforcement (BOEMRE), Interior.

**ACTION:** Call for information and  
nominations.

**SUMMARY:** This Call for Information and Nominations (hereinafter referred to as “Call”) is the initial step in a single multisale process covering all lease sales in the Central and Western Gulf of Mexico (GOM) Planning Areas to be included in the OCS Oil and Gas Leasing Program for 2012–2017. Ten lease sales are specifically covered by this Call: five in the Central GOM Planning Area and five in the Western GOM Planning Area. Concurrent with this Call, BOEMRE is preparing a multisale Environmental Impact Statement (EIS) covering the same ten sales in the Central and Western GOM Planning Areas. For each of the ten individual lease sales associated with

this Call, BOEMRE will comply with the National Environmental Policy Act (NEPA), the Outer Continental Shelf Lands Act (OCSLA), and the Coastal Zone Management Act (CZMA).

**DATES:** Nominations and comments must be received at the address specified below no later than 30 days following publication of this document in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Carrol Williams, Bureau of Ocean Energy Management, Regulation and Enforcement, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, telephone (504) 736–2803.

**SUPPLEMENTARY INFORMATION:** On August 1, 2008, BOEMRE initiated the 5-year oil and gas leasing program preparation process with publication of a Request for Information (RFI) on a program to cover the 2010–2015 time period, two years earlier than the usual cycle. On January 16, 2009, BOEMRE announced the release of the Draft Proposed Program (DPP) and Notice of Intent to Prepare an EIS for 2010–2015. On February 10, 2009, Secretary Salazar extended the comment period on the DPP to September 21, 2009, and later conducted four regional meetings to provide additional opportunities for input by all stakeholders.

On December 1, 2010, the Secretary announced the OCS Oil and Gas Strategy as part of President Obama’s comprehensive energy plan for the country. This strategy will guide the next steps in preparation of the new 2012–2017 program. As part of this strategy, on January 4, 2011, BOEMRE published a Notice of Scoping Meetings on the EIS modifying the OCS areas to be scoped for inclusion in the 5-year EIS (76 FR 376). The planning areas are the Western and Central GOM, as well as the area of the Eastern GOM not included in the Congressionally-mandated drilling moratorium; and the Beaufort Sea, Chukchi Sea, and Cook Inlet, which are located off Alaska.

This multisale Call covers only the lease sales in the Central and Western GOM Planning Areas that will be included in the OCS Oil and Gas Leasing Program for 2012–2017. On February 9, 2011, BOEMRE published a Notice of Intent to Prepare an EIS on the 2012–2017 oil and gas leasing proposals in the Western and Central Planning Areas of the GOM (76 FR 7228).

This Call is the sixth issuance of a Gulf of Mexico OCS Region multisale Call. In 1996, BOEMRE implemented two multisale Call processes for lease sales in the Central and Western GOM Planning Areas, respectively, in

association with the 1997–2002 OCS Oil and Gas Leasing Program. In the 2002–2007 OCS Oil and Gas Leasing Program, BOEMRE implemented one multisale Call process for Central and Western GOM Planning Areas lease sales and one multisale Call process for Eastern GOM Planning Area lease sales. BOEMRE issued one multisale Call process for Central and Western GOM Planning Area lease sales in the 2007–2012 OCS Oil and Gas Leasing Program.

**Call for Information and Nominations**

*1. Authority*

This Call is published pursuant to OCSLA (43 U.S.C. 1331 *et seq.*) and implementing regulations (30 CFR part 256).

*2. Purpose of Call*

The purpose of the Call is to gather information for the following proposed OCS Lease Sales in the Central and Western GOM Planning Areas. Lease Sale numbers for the last two years of this 5-year Program have not been determined and are listed as to be determined (TBD):

Lease sale, OCS planning area	Sale year
Sale 229, Western GOM .....	2012
Sale 231, Central GOM .....	2013
Sale 233, Western GOM .....	2013
Sale 235, Central GOM .....	2014
Sale 238, Western GOM .....	2014
Sale 241, Central GOM .....	2015
Sale TBD, Western GOM .....	2015
Sale TBD, Central GOM .....	2016
Sale TBD, Western GOM .....	2016
Sale TBD, Central GOM .....	2017

BOEMRE seeks information and nominations on oil and gas leasing, exploration, development and production within the Central and Western GOM Planning Areas from all interested parties. This early planning and consultation step ensures that all interests and concerns are communicated to the Department of the Interior for its future decisions in the leasing process pursuant to section 18 of OCSLA (43 U.S.C. 1344) and implementing regulations (30 CFR part 256).

BOEMRE requests responses regarding proposed sales in both the Central and Western GOM Planning Areas. Areawide lease sale proposals in the Central and Western GOM Planning Areas are very similar. Accordingly, this multisale process addresses decisions for all ten lease sales in both the Central and Western GOM Planning Areas.

Pursuant to section 18 of OCSLA (43 U.S.C. 1344) the Secretary of the Interior is developing the 5-year Program for 2012–2017; therefore, this Call should

not be construed as a prejudgment by the Secretary concerning any area to be made available for leasing under the 2012–2017 5-year Program.

In addition, this Call does not indicate a preliminary decision to lease in the areas described below. Final delineation of each area for possible leasing will be made later in compliance with applicable laws (e.g., NEPA, OCSLA, CZMA) and established departmental procedures.

### 3. Description of Areas

The areas of this Call include the entire Central and Western GOM Planning Areas, except for those exclusions listed below in Item 4 (Areas Excluded from this Call).

The Central GOM Planning Area is bounded on the north by the Federal-State boundary offshore Louisiana, Mississippi, and Alabama. The eastern boundary of the Central GOM Planning Area begins at the offshore boundary between Alabama and Florida and proceeds southeasterly to 26.19 degrees North latitude, thence southwesterly to 25.6 degrees North latitude. The western boundary of the Central GOM Planning Area begins at the offshore boundary between Texas and Louisiana and proceeds southeasterly to 28.43 degrees North latitude, thence south southwesterly to 27.49 degrees North latitude, thence south southeasterly to 25.80 degrees North latitude. The Central GOM Planning Area is bounded on the south by the maritime boundary with Mexico as established by the “Treaty Between The Government of The United States of America and The Government of The United Mexican States on The Delimitation of The Continental Shelf in The Western Gulf of Mexico Beyond 200 Nautical Miles,” which took effect in January 2001, and by the limit of the U.S. Exclusive Economic Zone in the area east of the continental shelf boundary with Mexico. The Central GOM Planning Area available for nominations and comments at this time consists of approximately 66.45 million acres, of which approximately 40.85 million acres are currently unleased.

The Western GOM Planning Area is bounded on the west and north by the Federal/State boundary offshore Texas. The eastern boundary begins at the offshore boundary between Texas and Louisiana and proceeds southeasterly to 28.43 degrees North latitude, thence south southwesterly to 27.49 degrees North latitude, thence south southeasterly to 25.80 degrees North latitude. The Western GOM Planning Area is bounded on the south by the maritime boundary with Mexico as

established by the “Treaty Between The Government of The United States of America and The Government of The United Mexican States on The Delimitation of The Continental Shelf in The Western Gulf of Mexico Beyond 200 Nautical Miles,” which took effect in January 2001. The Western GOM Planning Area available for nominations and comments at this time consists of approximately 28.58 million acres, of which approximately 19.45 million acres are currently unleased.

A standard Call for Information Map depicting the Central and Western GOM Planning Areas on a block-by-block basis is available without charge from: Bureau of Ocean Energy Management, Regulation and Enforcement, Public Information Office (MS 5034), 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, or telephone: 1–800–200–GULF. The map is also available via the BOEMRE Web site at: <http://www.boemre.gov>.

### 4. Areas Excluded From This Call

A. The entire Central GOM Planning Area will be considered for possible leasing except:

1. Blocks that were previously included within the Eastern GOM Planning Area and are within 100 miles of the Florida coast.

2. Blocks east of the Military Mission line (86 degrees, 41 minutes west longitude) under an existing moratorium until 2022, as a result of the Gulf of Mexico Energy Security Act of 2006 (December 20, 2006).

3. Blocks that are beyond the United States Exclusive Economic Zone in the area known as the northern portion of the Eastern Gap.

4. Whole and partial blocks that lie within the 1.4 nautical mile buffer zone north of the maritime boundary between the United States and Mexico.

B. The entire Western GOM Planning Area will be considered for possible leasing except:

1. Whole and partial blocks within the boundary of the Flower Garden Banks National Marine Sanctuary.

2. Whole and partial blocks that lie within the 1.4 nautical mile buffer zone north of the continental shelf boundary between the United States and Mexico.

### 5. Instructions on Call

Indications of interest and comments must be received no later than 30 days following publication of this document in the **Federal Register**. Comments must be submitted in envelopes labeled “Nominations for Proposed 2012–2017 Lease Sales in the Central and Western Gulf of Mexico” or “Comments on the Call for Information and Nominations

for Proposed 2012–2017 Lease Sales in the Central and Western Gulf of Mexico” and submitted to the Bureau of Ocean Energy Management, Regulation and Enforcement, Gulf of Mexico OCS Region, Leasing Activities Section, (Attention: Mr. Carrol Williams), 1201 Elmwood Park Boulevard (Mail Stop 5422), New Orleans, Louisiana 70123–2394. You may also submit comments on the Call via e-mail to [carrol.williams@boemre.gov](mailto:carrol.williams@boemre.gov). You should include “Comments on the Call for Proposed 2012–2017 Lease Sales” in the subject line of your message.

The standard Call for Information Map delineates the Call area that has been identified by BOEMRE as having potential for the discovery of accumulations of oil and gas. Respondents are requested to indicate interest in and comment on any or all of the Federal acreage within the boundaries of the Call area that they wish to have included in each of the proposed lease sales in the Central and Western GOM Planning Areas. Indications of interest and/or comments must be submitted to the Gulf of Mexico Region’s Leasing Activities Section (Attention: Mr. Carrol Williams), at the previously-noted address.

Respondents indicating interest should outline the areas of interest along block lines and rank the areas in which they have expressed interest according to priority of their interest (e.g., priority 1 [high], 2 [medium], or 3 [low]), specifically indicating blocks by priority. Areas where interest has been indicated, but on which respondents have not indicated priorities will be considered priority 3 (low).

Respondents may also submit a list of blocks nominated by Official Protraction Diagram and Leasing Map designations to ensure correct interpretation of their nominations. Official Protraction Diagrams and Leasing Maps can be purchased from the Public Information Office.

Also, BOEMRE seeks comments from all interested parties about particular geological, environmental (including natural disasters), biological, archaeological and socioeconomic conditions or conflicts, or other information that affect the potential leasing and development of particular areas, or possible conflicts between future OCS oil and gas activities that may result from the proposed sales and State Coastal Management Programs (CMPs). These comments should identify specific CMP policies of concern, the nature of the conflict foreseen, and proposed means to avoid or mitigate potential conflicts.

Comments may refer to both broad areas or may refer to particular blocks.

6. Information from Call

Information submitted in response to this Call will be used for several purposes, including identifying and prioritizing areas with potential for oil and gas development as well as determining possible environmental effects and potential conflicts in the Call area. The areas nominated in the proposed sales, their respective rankings, and comments will be analyzed to make a preliminary determination of the potential advantages and disadvantages of oil and gas exploration and development to the region and the Nation. Comments collected will be used to develop proposed actions and alternatives in the EIS scoping process, to develop lease terms and conditions to ensure safe offshore operations, and to assess

potential conflicts between offshore gas and oil activities and a State CMP.

7. Existing Information

BOEMRE routinely assesses the status of information acquisition efforts and the quality of the information base for potential decisions on tentatively scheduled lease sales. As a result of this continually ongoing assessment, it has been determined that the status of the existing and extensive data available for planning, analysis, and decision making is adequate.

An extensive environmental studies program has been underway in the GOM since 1973. The emphasis, including continuing studies, has been on environmental characterization of biologically sensitive habitats, physical oceanography, ocean-circulation modeling, and ecological effects of oil and gas activities.

A complete listing of available study reports, and information for ordering

copies, can be obtained from the Public Information Office referenced above. The reports may also be ordered, for a fee, from the U.S. Department of Commerce, National Technical Information Service, 5301 Shawnee Road, Springfield, Virginia 22312, or telephone (703) 605-6000 or (800) 553-6847. In addition, a program status report for continuing studies in this area can be obtained from the Chief, Environmental Sciences Section (MS 5430), Bureau of Ocean Energy Management, Regulation and Enforcement, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123-2394, or telephone (504) 736-2752, or via the BOEMRE Web site at: <http://www.gomr.boemre.gov/homepg/regulate/environ/studiesprogram.html>.

8. Tentative Schedule

MILESTONES FOR MULTISALE EIS FOR PROPOSED 2012-2017 CENTRAL AND WESTERN GOM PLANNING AREA SALES

Notice of Intent (NOI) to Prepare a Multisale EIS .....	February 2011.
Call for Information and Nominations .....	March 2011.
Comments received on NOI .....	March/April 2011.
Comments received on Call .....	April 2011.
Area Identification Decision .....	May/June 2011.
Draft EIS published .....	Summer 2011.
Public Hearings on Draft EIS .....	Fall 2011.
Final EIS .....	Spring 2012.

9. Sale Milestones

The following is a list of tentative milestone dates applicable to lease sales covered by this Call:

SALE-SPECIFIC MILESTONES FOR PROPOSED 2012-2017 CENTRAL AND WESTERN GOM PLANNING AREA SALES

Request for Information to Begin Lease Sale Specific Process .....	12 months before each lease sale.
Environmental Review Completed .....	5 to 7 months before each lease sale.
Proposed Notice and CZM Consistency Determination .....	5 months before each lease sale.
Final Notice of Sale .....	1 month before each lease sale.

Finally, the tentative months for GOM lease sales during 2012-2017 are:

*Central GOM Sales:* March of each year.

*Western GOM Sales:* November 2012. August of each year thereafter.

Dated: February 28, 2011.

**Michael R. Bromwich,**

*Director, Bureau of Ocean Energy, Management, Regulation and Enforcement.*

[FR Doc. 2011-5953 Filed 3-14-11; 8:45 am]

**BILLING CODE 4310-MR-P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**[FWS-R6-R-2011-N014]; 60138-1265-6CCP-S3]**

**San Luis Valley National Wildlife Refuge Complex, Alamosa, CO; Comprehensive Conservation Plan and Environmental Impact Statement**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of intent; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), intend to

prepare a Comprehensive Conservation Plan (CCP) and an Environmental Impact Statement (EIS) for the San Luis Valley National Wildlife Refuge Complex (Complex) in Alamosa, Colorado. The Complex comprises Baca, Monte Vista, and Alamosa National Wildlife Refuges (NWRs). We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

**DATES:** To ensure consideration, please send your written comments by April 29, 2011. Submit comments by one of the methods under **ADDRESSES**. We will

announce opportunities for public input in local news media throughout the CCP process.

**ADDRESSES:** Send your comments or requests for more information by any of the following methods.

*E-mail:* [SLVrefuges@fws.gov](mailto:SLVrefuges@fws.gov). Include "San Luis Valley National Wildlife Refuge Complex CCP" in the subject line of the message.

*Fax:* Attn: Laurie Shannon, Planning Team Leader, 303/236-4792.

*U.S. Mail:* Laurie Shannon, Planning Team Leader, Division of Refuge Planning, P.O. Box 25486, Denver, CO 80225-0486.

*In-Person Drop-off:* You may drop off comments during regular business hours at the above address, or at the San Luis Valley National Wildlife Refuge Complex administrative office located at 8249 Emperius Road, Alamosa, CO 81101.

**FOR FURTHER INFORMATION CONTACT:**

Laurie Shannon, 303/236-4317 (phone) or [laurie\\_shannon@fws.gov](mailto:laurie_shannon@fws.gov) (e-mail); or David C. Lucas, Chief, Division of Planning, 303/236-4366 (phone), P.O. Box 25486, Denver Federal Center, Denver, CO 80225-0486.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

With this notice, we initiate our process for developing a CCP for the San Luis Valley National Wildlife Refuge Complex in Alamosa, CO. This notice complies with our CCP policy to (1) advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge and (2) to obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

**Background**

*The CCP Process*

The National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. 668dd-668ee) (Administration Act) by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward 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, where appropriate, 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 Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments; agencies; organizations; and the public. At this time we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of the San Luis Valley National Wildlife Refuge Complex.

We will conduct the environmental review of this project and develop an EIS in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500-1508 and 43 CFR part 46); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

*San Luis Valley National Wildlife Refuge Complex*

The San Luis Valley National Wildlife Refuge Complex is composed of three national wildlife refuges (NWRs): Monte Vista, Alamosa, and Baca. These NWRs are located in the San Luis Valley, a high mountain basin located in Rio Grande, Alamosa, and Saguache Counties, Colorado. Monte Vista NWR, authorized in 1952, and Alamosa NWR, authorized in 1962, were set aside under the Migratory Bird Conservation Act (16 U.S.C. 715D) for "use as inviolate sanctuaries, or for any other management purpose, for migratory birds." Baca NWR was authorized in 2000 with passage of Public Law 106-530, also known as the "Great Sand Dunes National Park and Preserve Act of 2000." In 2008, Congress amended the act and established the purposes of the

Baca NWR to "restore, enhance, and maintain wetland, upland, riparian, and other habitats for native wildlife, plant, and fish species in the San Luis Valley." In administering the Baca NWR, the Service is required to the maximum extent practicable to emphasize migratory bird conservation; take into consideration the role of the refuge in broader landscape conservation efforts; and, subject to any other agreement or the purposes of the refuge, use decreed water rights on the refuge in approximately the same manner that the water rights have been used historically.

A wide variety of habitats are found across the three refuges, including wet meadows, playa wetlands, riparian areas within the flood plain of the Rio Grande, desert shrublands and grasslands, and croplands. Totalling about 106,000 acres, the refuges are an important stopover for numerous migratory birds. The refuges support many groups of nesting, migrating, and wintering birds, including grebes, herons, ibis, ducks, geese, hawks, eagles, falcons, shorebirds, owls, songbirds, and others. Nearly 20,000 sandhill cranes spend several weeks in the San Luis Valley during the spring and fall migrations, feeding and resting to replace critical fat reserves. Among the cranes that make a stopover are about 95 percent of the Rocky Mountain population of greater sandhill cranes and a portion of the midcontinent population of sandhill cranes. The Federally endangered southwestern willow flycatcher, a small neo-tropical bird species, is found fairly frequently in the willow-cottonwood corridor along the Rio Grande on Alamosa NWR. Additionally, there are several other Federal and State species of concern, including the Rio Grande sucker, Rio Grande chub, the Northern leopard frog, and other species that are found within or adjacent to the refuges. Many species of mammals also use the refuges, including elk, deer, coyote, porcupine, and other small mammals.

**Scoping: Preliminary Issues, Concerns, and Opportunities**

There are a number of issues, concerns, and opportunities for the San Luis Valley National Wildlife Refuge Complex. A few of these are briefly described.

Although Congress significantly expanded the Service's acquisition authority and subsequent management responsibilities in the San Luis Valley, to date, funding for operation of the Baca NWR has been limited. This has posed a number of challenges for the refuge staff in the management of refuge operations across the complex. The

Service will identify ways to increase management efficiencies, prioritize, and look for creative solutions during the planning process.

Since the late 1980s, increasing numbers of elk have been using Monte Vista and Alamosa NWRs during the fall and winter months. Similarly, elk numbers on the Baca NWR and adjacent Federal and private lands have been an ongoing concern in the valley. The Colorado Division of Wildlife estimates the elk population in game management unit 82 to be about 5,000 elk. Generally this population travels between Baca NWR, neighboring National Park Service lands, and The Nature Conservancy lands, both inside and outside the authorized boundary of Baca NWR, along with other surrounding private lands and Federal lands. Although it is unclear to what extent biological carrying capacities are being reached or exceeded, there has been substantial impact occurring on riparian areas along with crop depredation on private lands. Many stakeholders agree that a coordinated approach is needed for elk management.

There has also been interest in the reintroduction of bison on Baca NWR. Whether the refuge could support free-roaming bison without negatively affecting other species will need to be evaluated and determined during the CCP process.

All the refuges were set aside largely for the protection of migratory birds; therefore water management has been an important tool in providing food and cover for birds. Climate change data is showing a pattern of decreasing precipitation and increasing temperatures in the San Luis Valley. This pattern may shift habitats, requiring greater flexibility in future land management of the refuges. Water management, including quantity, quality, and movement of water, is a complex issue that needs to be addressed.

The Service is also proposing to study the potential for a landscape-level strategic habitat conservation initiative within the Southern Rockies Landscape Conservation Cooperative, a network of partnerships working in unison to ensure the sustainability of America's land, water, wildlife and cultural resources. The study would analyze the potential protection of about 430,000 acres primarily through conservation easements and limited fee-title acquisition in the San Luis Valley.

We request input on these issues and other concerns affecting refuge management or public use during the planning process. We are especially

interested in receiving public input in the following areas:

(a) What suggestions do you have for managing migratory birds on the refuges in the face of climate change and declining precipitation?

(b) What ideas do you have regarding visitor services and wildlife-dependent public uses on the refuges, particularly Baca NWR, which is currently closed to any public use?

(c) What changes, if any, would you like to see in the management of Alamosa and Monte Vista NWRs?

(d) What concerns do you have regarding the additional protection of wildlife and wetland habitat in the San Luis Valley? Can the use of conservation easements protect important wildlife resources in the valley?

(e) What concerns do you have regarding ungulate management on the refuges or the reintroduction of species such as bison?

We provide the above questions for your optional use. We have no requirement that you provide information; however, any comments the planning team receives will be used as part of the planning process.

#### Public Meetings

We will give the public an opportunity to provide input at a public meeting. You can obtain the schedule from the planning team leader (*see ADDRESSES*). We will announce opportunities for public input in local news media throughout the CCP process. You may also send comments anytime during the planning process by U.S. mail, e-mail, or fax (*see ADDRESSES*). There will be additional opportunities to provide public input once we have prepared a draft CCP.

#### Public Availability of Comments

Any comments we receive will become part of the administrative record and may be available to the public. Before submitting comments that include your address, phone number, e-mail address, or other personal identifying information, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: February 15, 2011.

**Noreen E. Walsh,**

*Deputy Regional Director, Mountain-Prairie Region, Denver, CO.*

[FR Doc. 2011-5924 Filed 3-14-11; 8:45 am]

**BILLING CODE 4310-55-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS-R8-FHC-2011-N044; 81331-1334-8TWG-W4]

#### Trinity Adaptive Management Working Group

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** The Trinity Adaptive Management Working Group (TAMWG) affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the Trinity Management Council (TMC). The TMC interprets and recommends policy, coordinates and reviews management actions, and provides organizational budget oversight. This notice announces a TAMWG meeting, which is open to the public.

**DATES:** TAMWG will meet from 9:30 a.m. to 5 p.m. on Tuesday, April 12, 2011.

**ADDRESSES:** The meeting will be held at the Trinity County Library, 351 Main Street, Weaverville, CA 96093.

**FOR FURTHER INFORMATION CONTACT:**  
*Meeting Information:* Randy A. Brown, TAMWG Designated Federal Officer, U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521; telephone: (707) 822-7201. *Trinity River Restoration Program (TRRP) Information:* Jennifer Faler, Acting Executive Director, Trinity River Restoration Program, P.O. Box 1300, 1313 South Main Street, Weaverville, CA 96093; telephone: (530) 623-1800; e-mail: [jfaler@usbr.gov](mailto:jfaler@usbr.gov).

**SUPPLEMENTARY INFORMATION:** Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces a meeting of the TAMWG. The meeting will include discussion of the following topics:

- Annual flow release schedule,
- New TAMWG charter,
- Acting Executive Director's Report,
- Channel rehabilitation policies,
- TRRP performance measures,
- Membership update,
- Election of TAMWG chair and vice-chair for 2011, and
- TAMWG bylaws.

Completion of the agenda is dependent on the amount of time each item takes. The meeting could end early if the agenda has been completed.

Dated: March 9, 2011.

**Randy A. Brown,**

*Designated Federal Officer, Arcata Fish and Wildlife Office, Arcata, CA.*

[FR Doc. 2011-5923 Filed 3-14-11; 8:45 am]

**BILLING CODE 4310-55-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Notice of Intent To Repatriate a Cultural Item: Museum of Anthropology at Washington State University, Pullman, WA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of the Museum of Anthropology at Washington State University, Pullman, WA, that meets the definition of unassociated funerary object under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural item. The National Park Service is not responsible for the determinations in this notice.

In 2005, a copper pendant was given to the Museum of Anthropology at Washington State University for intended repatriation by Whitney and Mariana Sue Johnson of Charlotte, MI. Attached to it was a card with a handwritten label reading "Copper pendant from Indian Burial No. 195. Zimmerman. Snake River 5 mi east of Riparia Columbia Co. Wash." They acquired the item through inheritance from Mr. Johnson's grandfather, Ralph Hunter, who they believe purchased the item while traveling through the area between the 1920s and 1940s. The pendant is similar in style to other pendants often found in protohistoric period graves (A.D. 1700-1900) on the southern Plateau.

Zimmerman was a railroad siding that was located between Riparia and Lyons ferries, which are less than 10 river miles apart. The area is within the overlapping 19th century territories of the Nez Perce and Palus (Sprague 1998; Walker 1998). Descendants of these communities are members of the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian

Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe, Idaho; and the Wanapum Band, a non-federally recognized Indian group.

Officials of the Museum of Anthropology at Washington State University have determined that, pursuant to 25 U.S.C. 3001(3)(B), the one cultural item described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and is believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the Museum of Anthropology at Washington State University also have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary object and the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe, Idaho; and the Wanapum Band, a non-federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary object should contact Mary Collins, WSU Museum of Anthropology, P.O. Box 644910, Pullman, WA 99164, telephone (509) 335-4314, before April 14, 2011. Repatriation of the unassociated funerary object to the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe, Idaho; and the Wanapum Band, a non-federally recognized Indian group, may proceed after that date if no additional claimants come forward.

The Museum of Anthropology at Washington State University is responsible for notifying the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe, Idaho; and the Wanapum Band, a non-federally

recognized Indian group, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5850 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Intent To Repatriate Cultural Items: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC and Arizona State Museum, University of Arizona, Tucson, AZ

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In 1929, cultural items were removed from Canyon Creek Ruin, AZ C:2:8(GP)/AZ V:2:1(ASM), within the boundaries of the Fort Apache Indian Reservation, Gila County, AZ, during legally authorized excavations conducted by the Gila Pueblo Foundation, under the direction of Emil Haury. The items were found in association with human burials, but the human remains were not removed from these graves. In 1950, the Gila Pueblo Foundation closed and the collections were transferred to the Arizona State Museum. The 185 unassociated funerary objects are 5 basketry mat fragments, 1 bone awl, 1 bone awl fragment, 3 lots of botanical material, 30 ceramic bowls, 5 ceramic bowl fragments, 11 ceramic jars, 1 ceramic jar fragment, 1 ceramic ladle, 1 ceramic pitcher, 77 pieces of flaked stone, 2 pieces of hematite mineral, 1 quartz crystal, 2 shell beads, 1 shell

disk, 3 shell pendants, 1 stone artifact, 8 stone beads, 23 stone projectile points, 1 stone shaft smoother, 1 textile fragment, 2 turquoise beads, 2 turquoise pendants, 1 turquoise tessera, and 1 unidentified object.

Canyon Creek Ruin is a cliff dwelling site of approximately 140 rooms. Based on the ceramic and perishable artifact assemblage, the site is dated to A.D. 1300 to 1400. The ceramic and architectural forms are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

A detailed discussion of the basis for cultural affiliation of archeological sites in the region where the above site is located may be found in "Cultural Affiliation Assessment of White Mountain Apache Tribal Lands (Fort Apache Indian Reservation)", by John R. Welch and T.J. Ferguson (2005). To summarize, archeologists have used the terms Upland Mogollon or prehistoric Western Pueblo to define the archeological complexes represented by the site listed above.

Material culture characteristics of these traditions include a temporal progression from earlier pit houses to later masonry pueblos, villages organized in room blocks of contiguous dwellings associated with plazas, rectangular kivas, polished and paint-decorated ceramics, unpainted corrugated ceramics, inhumation burials, cradleboard cranial deformation, grooved stone axes, and bone artifacts. The combination of the material culture attributes and a subsistence pattern, which included hunting and gathering augmented by maize agriculture, helps to identify an earlier group. Archeologists have also remarked that there are strong similarities between this earlier group and present-day tribes included in the Western Pueblo ethnographic group, especially the Hopi Tribe of Arizona and the Zuni Tribe of the Zuni Reservation, New Mexico. The similarities in ceramic traditions, burial practices, architectural forms, and settlement patterns have led archeologists to believe that the prehistoric inhabitants of the Mogollon Rim region migrated north and west to the Hopi mesas, and north and east to the Zuni River Valley. Certain objects found in Upland Mogollon archeological sites have been found to have strong resemblances to ritual paraphernalia that are used in continuing religious practices by the Hopi and Zuni. Some petroglyphs on the Fort Apache Indian Reservation have also persuaded archeologists of continuities between the earlier

identified group and current-day Western Pueblo people. Biological information from the site of Grasshopper Pueblo, which is located in close proximity to the site listed above, supports the view that the prehistoric occupants of the Upland Mogollon region had migrated from various locations to the north and west of the region.

Hopi and Zuni oral traditions parallel the archeological evidence for migration. Migration figures prominently in Hopi oral tradition, which refers to the ancient sites, pottery, stone tools, petroglyphs, and other artifacts left behind by the ancestors as "Hopi Footprints." This migration history is complex and detailed, and includes traditions relating specific clans to the Mogollon region. Hopi cultural advisors have also identified medicinal and culinary plants at archeological sites in the region. Their knowledge about these plants was passed down to them from the ancestors who inhabited these ancient sites. Migration is also an important attribute of Zuni oral tradition, and includes accounts of Zuni ancestors passing through the Upland Mogollon region. The ancient villages mark the routes of these migrations. Zuni cultural advisors remark that the ancient sites were not abandoned. People returned to these places from time to time, either to reoccupy them or for the purpose of religious pilgrimages—a practice that has continued to the present-day. Archeologists have found ceramic evidence at shrines in the Upland Mogollon region that confirms these reports. Zuni cultural advisors have names for plants endemic to the Mogollon region that do not grow on the Zuni Reservation. They also have knowledge about traditional medicinal and ceremonial uses for these resources, which has been passed down to them from their ancestors. Furthermore, Hopi and Zuni cultural advisors have recognized that their ancestors may have been co-resident at some of the sites in this region during their ancestral migrations.

There are differing points of view regarding the possible presence of Apache people in the Upland Mogollon region during the time that these ancient sites were occupied. Some Apache traditions describe interactions with Ancestral Puebloan people during this time, but according to these stories, Puebloan people and Apache people were regarded as having separate identities. The White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, does not claim cultural affiliation with the human remains and

associated funerary objects from this ancestral Upland Mogollon site. As reported by Welch and Ferguson (2005), consultations between the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, and the Navajo Nation, Arizona, New Mexico & Utah; Pueblo of Acoma, New Mexico; and Pueblo of Laguna, New Mexico, have indicated that that none of these tribes wish to pursue claims of affiliation with sites on White Mountain Apache Tribal lands. Finally, the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, supports the repatriation of human remains and associated funerary objects from the ancestral Upland Mogollon site and is ready to assist the Hopi Tribe of Arizona and Zuni Tribe of the Zuni Reservation, New Mexico, in their reburial on tribal land.

Officials of the Bureau of Indian Affairs and Arizona State Museum have determined, pursuant to 25 U.S.C. 3001(3)(B), that the 185 cultural item described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the Bureau of Indian Affairs and Arizona State Museum also have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Hopi Tribe of Arizona and Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626-2950, before April 14, 2011. Repatriation of the unassociated funerary objects to the Hopi Tribe of Arizona and Zuni Tribe of the Zuni Reservation, New Mexico, may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying the Hopi Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico, that this notice has been published.



Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5859 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Intent To Repatriate Cultural Items: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

At an unknown date, an iron fish spear, a string of bird bone ornaments, and a segment of bird bone were removed from an Indian grave in Ontonagon, Ontonagon County, MI, by an unknown individual. The string of bird bone ornaments was donated to the Peabody Museum of Archaeology and Ethnology by Mary S. Felton and Dr. Joseph Leidy in 1868. The iron fish spear and segment of bird bone were donated to the Peabody Museum of Archaeology and Ethnology by Mary Felton in 1868.

At an unknown date, a string of glass beads and a mirror were removed from Indian graves in Ontonagon, Ontonagon County, MI, by an unknown individual. These items were donated by Mary S. Felton to the Peabody Museum of Archaeology and Ethnology in 1868.

At an unknown date, a silver trade cross was removed from an Indian grave in Ontonagon, Ontonagon County, MI, by an unknown individual. Mary S. Felton donated this item to the Peabody Museum of Archaeology and Ethnology in 1869.

Museum records indicate that these cultural items were removed from Indian graves in Ontonagon, Ontonagon County, MI. The Peabody Museum is not in possession or control of the human remains from these interments. The presence of trade items, such as the iron fish spear, mirror, glass beads, and silver trade cross, indicates that these interments date to the Historic/Contact period, specifically the late 18th and 19th centuries. Historical documentation indicates that the Ontonagon area was occupied by the Ontonagon Band of Chippewa people during this time period. The present-day tribe that represents the Ontonagon Band of Chippewa is the Keweenaw Bay Indian Community, Michigan.

Officials of the Peabody Museum of Archaeology and Ethnology have determined, pursuant to 25 U.S.C. 3001(3)(B), that the six cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of Native American individuals. Officials of the Peabody Museum of Archaeology and Ethnology also have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Keweenaw Bay Indian Community, Michigan.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Patricia Capone, Repatriation Coordinator, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Ave., Cambridge, MA 02138, telephone (617) 496-3702, before April 14, 2011. Repatriation of the unassociated funerary objects to the Keweenaw Bay Indian Community, Michigan, may proceed after that date if no additional claimants come forward.

The Peabody Museum of Archaeology and Ethnology is responsible for notifying the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bois Forte Band (Nett Lake) of the Minnesota Chippewa Tribe, Minnesota; Fond du Lac Band of the Minnesota Chippewa Tribe, Minnesota; Grand Portage Band of the Minnesota Chippewa Tribe, Minnesota; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac Vieux Desert Band of Lake Superior

Chippewa Indians, Michigan; Leech Lake Band of the Minnesota Chippewa Tribe, Minnesota; Mille Lacs Band of the Minnesota Chippewa Tribe, Minnesota; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; St. Croix Chippewa Indians of Wisconsin; Sokaogon Chippewa Community, Wisconsin; and the White Earth Band of the Minnesota Chippewa Tribe, Minnesota, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5870 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Intent to Repatriate Cultural Items: California Department of Transportation (Caltrans), Sacramento, CA and California State University, Sacramento, CA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the control of the California Department of Transportation (Caltrans), Sacramento, CA, and in the possession of the California State University, Sacramento, CA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In 1970, unassociated funerary objects were removed from CA-SJO-91 on private property, in San Joaquin County, CA, during a salvage excavation project. Faculty and students from what was then Sacramento State College (now California State University, Sacramento) were brought in by the California Division of Highways (now California Department of Transportation [Caltrans]) to conduct salvage excavations. The location of the associated human remains is unknown,

however, other human remains and associated funerary objects also removed from this site are described in a Notice of Inventory Completion. The 393 unassociated funerary objects are 384 beads, 2 bifaces, 1 charmstone fragment, 4 round stones, 1 ornament and 1 quartz rock. There are an additional 30 missing unassociated funerary objects (30 beads).

Multiple lines of evidence were used to determine the cultural affiliation of the CA-SJO-91 collection. Archeological evidence indicates that the site was occupied from the Early Horizon through the Late Horizon. Most of the burials were in two cemeteries that were located 60 meters apart. Other burials were located between the two cemeteries or are of uncertain horizontal provenience due to construction activities. Cemetery I was radiometrically dated to between 1845±90 and 2985±160 years B.P. The burial patterns and artifact types in Cemetery I correspond to a transitional time period between the Early Horizon and Middle Horizon time periods. Cemetery II was not radiometrically dated. Based on mode of interment and artifact types, Cemetery II burials date slightly earlier to the Early Horizon, although there are similarities in constituents between the two cemeteries. A Late Horizon component (1500 B.P. to European contact) at CA-SJO-91 was essentially removed by construction activities before salvage excavations began.

Biological, archeological, and linguistic evidence indicate that population movement occurred between the Early and Middle Horizon in the French Camp Slough area. It may be that the individuals buried in the Early Horizon Cemetery II represent an earlier, Utian speaking people (linguistic evidence supports a relationship of shared group identity between early Utian speaking peoples and contemporary Miwok tribes), while the individuals in the Middle Horizon Cemetery I may represent a more recent pre-Yokut speaking people. Historical and geographical lines of evidence indicate that CA-SJO-91 lies on the border of the traditional territory of the Plains Miwok and the Northern Valley Yokuts. At the time of first contact with Spanish missionaries in the early 19th century, the area is thought to have been occupied by the Passasime, a Northern Valley Yokuts people who were also related to the Plains Miwok. Oral and documentary evidence provided by representatives of Indian tribes during consultation demonstrates an inter-relationship between Northern Valley Yokuts and Plains Miwok tribes.

Officials of Caltrans and California State University, Sacramento, have determined, pursuant to 25 U.S.C. 3001(3)(B), that the 393 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of Caltrans and California State University, Sacramento, also have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the Tachi Yokut Tribe); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, as well as the non-Federally recognized Indian groups: The Southern Sierra Miwoks of California and Northern Valley Yokuts.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Tina Biorn, Caltrans, P.O. Box 942874 (M.S. 27), Sacramento, CA 94274-0001, telephone (916) 653-0013, or Charles Gossett, Dean of the College of Social Sciences and Interdisciplinary Studies, California State University, Sacramento, CA, 95819-6109, telephone (916) 278-6504, before April 14, 2011. Repatriation of the unassociated funerary objects to the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the

Tachi Yokut Tribe); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; United Auburn Indian Community of the Auburn Rancheria of California; and/or Wilton Rancheria, California, may proceed after that date if no additional claimants come forward.

California State University, Sacramento, is responsible for notifying the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the Tachi Yokut Tribe); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, as well as the non-federally recognized Indian groups: The Southern Sierra Miwoks of California, Northern Valley Yokuts, and Tubatulabals of Kern Valley, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5883 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Intent To Repatriate a Cultural Item: Arizona State Museum, University of Arizona, Tucson, AZ

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of the Arizona State Museum, University of Arizona,

Tucson, AZ, that meets the definition of sacred object and object of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The cultural item consists of a dance kilt and accoutrements, also known as *jish* (Medicine Bundle). The item is composed of sections of cloth with stitched decorative elements, bird feathers, and cloth streamers affixed to a loop of cotton string. The item was removed circa 1950 by Dr. Gwinn Vivian from the floor of an abandoned hogan located on private land east of Chaco Canyon, in McKinley County, NM. Dr. Vivian donated the cultural item to the Arizona State Museum in 1971.

According to the collector, refuse near the hogan indicated occupation during the late 1920s or early 1930s. This is consistent with the historically documented time period of Navajo occupation in this area. Consultations with representatives of the Navajo Nation have identified the object as a Navajo *jish* (Medicine Bundle) used in the *Tł'éejí* (*Night Way Ceremony*). This ceremony is widely practiced by members of the Navajo Nation.

The Navajo people believe that *jish* are alive and must be treated with respect. The primary purpose of the *jish* is to cure people of diseases, mental and physical illness, and to restore beauty and harmony. Accordingly, no single individual can truly own any *jish*. The right to control *jish* is outlined by Navajo traditional laws, which vest this responsibility in *Hataakii* (Medicine persons). *Hataakii* are not owners of *jish*, but only care, utilize, and bequeath them for the Navajo people.

Officials of the Arizona State Museum have determined, pursuant to 25 U.S.C. 3001(3)(C), that the cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Arizona State Museum also have determined, pursuant to 25 U.S.C. 3001(3)(D), that the cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Lastly, officials of the Arizona State Museum have

determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the sacred object/object of cultural patrimony and the Navajo Nation of Arizona, New Mexico and Utah.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred object/object of cultural patrimony should contact John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626-2950, before April 14, 2011. Repatriation of the sacred object/object of cultural patrimony to the Navajo Nation of Arizona, New Mexico and Utah may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying the Navajo Nation of Arizona, New Mexico and Utah that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5882 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Intent To Repatriate Cultural Items: California State University, Sacramento, Sacramento, CA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of intent to repatriate cultural items in the possession of California State University, Sacramento, Sacramento, CA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In a companion Notice of Inventory Completion, the Native American human remains and associated funerary objects removed from Site CA-SAC-16 are described.

At an unknown time in the 1930s, cultural items were removed from site CA-SAC-16 on private property, in Sacramento County, CA. In 1951, the Zallio Collection, which included these objects, was donated to Sacramento State College (now California State University, Sacramento). The 14 unassociated funerary objects currently in the collection are 13 projectile points and 1 stone tool. Five additional unassociated funerary objects (one bone awl and four projectile points) are missing.

In 1953, cultural items were removed from Site CA-SAC-16 on private property, in Sacramento County, CA, during an excavation project by the university. The unassociated funerary object is one bead. Three additional unassociated funerary objects (one baked clay artifact and two beads) are missing.

From 1961 to 1971, cultural items were removed during an excavation project at Site CA-SAC-16 on private property, in Sacramento County, CA. The American River College conducted the salvage excavation, and the collection was later transferred to California State University, Sacramento. The two unassociated funerary objects are one bead and one bag of debitage. Twenty-three additional unassociated funerary objects (2 bags of baked clay, 1 bead, 2 bags of carbonized material, 13 bags of faunal material, 1 piece of jasper, 1 quartz crystal, 2 unidentified rocks, and 1 stone tool) are missing.

In 1971, cultural items were removed during a salvage excavation project at Site CA-SAC-16 on private property, in Sacramento County, CA, by the university. The 510 unassociated funerary objects are 11 bags of baked clay, 420 beads, 10 bags of carbonized material, 11 bags of debitage, 2 discoids, 23 bags of faunal material, 3 bags of fire cracked rocks, 2 bags of grave fill, 4 modified faunal bones, 4 ornaments, 15 projectile points, and 5 stone tools. Fifty-four additional unassociated funerary objects (1 bone awl, 30 beads, 1 bone tube, 16 bags of faunal material, 1 bag of fire fractured rock, 4 projectile points, and 1 stone tool) are missing.

The artifact types and burial practices observed at Site CA-SAC-16 indicate that it was first occupied during the Middle Horizon, and was inhabited into the Historic Period. The presence of rough disk *Olivella* beads and glass trade beads associated with the Hudson Bay fur trappers suggests that some burials may date to the 1830s, when an epidemic attributed to malaria spread among Native populations along the Sacramento River. The lack of

archeological and historical evidence for occupation of the site after the epidemic provides circumstantial support that the site was abandoned at this time. The surviving occupants of the site may have joined with neighboring groups to the south (in the vicinity of Sacramento), to the north (Verona), and to the east (in the foothills).

Archeological evidence indicates that the lower Sacramento Valley and Delta regions were continuously occupied since at least the Early Horizon (5550–550 B.C.). Cultural changes indicated by artifact typologies and burial patterns, historical linguistic evidence, and biological evidence reveal that the populations in the region were not static, with both *in situ* cultural changes and migrations of outside populations into the area. Linguistic evidence suggests that ancestral-Penutian speaking groups related to modern day Miwok, Nisenan, and Patwin groups occupied the region during the Middle (550 B.C.–A.D. 1100) and Late (A.D. 1100—Historic) Horizons, with some admixing between these groups and Hokan-speaking groups that occupied the region at an earlier date. The genetic data suggests that the Penutians may have arrived later than suggested by the linguistic evidence.

Geographical data from ethnohistoric and ethnographic sources indicate that the site was most likely occupied by Nisenan-speaking groups at the beginning of the Historic Period, while Patwin-speakers occupied the valley west of the Sacramento River and Miwok-speakers resided south of the American River. Ethnographic data and expert testimony from tribal representatives support the high level of interaction between groups in the lower Sacramento Valley and Delta regions that crosscut linguistic boundaries. Historic population movements resulted in an increased level of shifting among populations, especially among the Miwok and Nisenan, who were impacted by disease and Euro-American activities relating to Sutter's Fort and later gold-rush activities.

In summary, officials of California State University, Sacramento, together with the University's College of Social Sciences and Interdisciplinary Studies Committee on Native American Graves Protection and Repatriation Act Compliance (SSIS NAGPRA Committee), reasonably believe that the ethnographic, historical, and geographical evidence indicates that the historic burials and cultural items recovered from Site CA–SAC–16 are most closely affiliated with contemporary descendants of the Nisenan, and have more distant ties to

neighboring groups, such as the Plains Miwok. Furthermore, the earlier cultural items from the Middle and Late Horizons share cultural relations with the Nisenan and Plains Miwok based on archeological, biological, and historical linguistic evidence.

Officials of California State University, Sacramento, have determined, pursuant to 25 U.S.C. 3001(3)(B), that the 527 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of Native American individuals. Officials of California State University, Sacramento, have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Buena Vista Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, as well as the non-Federally recognized Indian groups of the El Dorado Miwok Tribe and Nashville-El Dorado Miwok.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Charles Gossett, Dean of the College of Social Sciences and Interdisciplinary Studies, CSUS, 6000 J St., Sacramento, CA 95819–6109, telephone: (916) 278–6504, before April 14, 2011. Repatriation of the unassociated funerary objects to the Buena Vista Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, may proceed after that date if no additional claimants come forward.

California State University, Sacramento, is responsible for notifying the Buena Vista Rancheria of Me-Wuk Indians of California; Cortina Indian Rancheria of Wintun Indians of California; Ione Band of Miwok Indians of California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California;

Wilton Rancheria, California; and Yocha Dehe Wintun Nation, California, as well as the non-Federally recognized Indian groups of the El Dorado Miwok Tribe and Nashville-El Dorado Miwok that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011–5855 Filed 3–14–11; 8:45 am]

**BILLING CODE 4312–50–P**

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## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253–65]

#### **Notice of Intent To Repatriate a Cultural Item: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC and Arizona State Museum, University of Arizona, Tucson, AZ**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

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Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ, that meets the definition of sacred object and object of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural item. The National Park Service is not responsible for the determinations in this notice.

The cultural item is a medicine bundle, consisting of a sack made from the hide of a small mammal, which contains a necklace composed of large animal claws and shells, one separate large animal claw, two crystals wrapped in fiber, two shell pendants and one bead on a string, one projectile point, one stone disk, one shell disk, one hide bundle containing a reddish-orange mineral, two tied bundles with undetermined contents, and two empty hide bundles. In 1931, the item was recovered at Broken Flute Cave, AZ E:8:1(ASM), located on the Navajo Indian Reservation, in Apache County, AZ, during excavations conducted by

the Carnegie Institution of Washington under the direction of Earl Morris. The item was transferred from the Carnegie Institution to the Arizona State Museum in 1957.

Consultations with representatives of the Navajo Nation have identified the object as a Navajo *jish* (Medicine Bundle) used in the *Hóchó'íjí* (Evil Way Ceremony). The identification is supported by detailed information provided by traditional Navajo religious practitioners regarding the use and origin of the object and its contents.

The Navajo people believe that *jish* are alive and must be treated with respect. The primary purpose of the *jish* is to cure people of diseases, mental and physical illness, and to restore beauty and harmony. Accordingly, no single individual can truly own any *jish*. The right to control *jish* is outlined by Navajo traditional laws, which vest this responsibility in *Hataatii* (Medicine persons). *Hataatii* are not owners of *jish*, but only care, utilize, and bequeath them for the Navajo people. The *jish* was discovered in the fill of a pithouse at the archeological site of Broken Flute Cave, but may have been intrusive from a later time period. According to information provided by traditional religious practitioners, *jish* have occasionally been placed in previously existing archeological contexts for safekeeping.

Officials of the U.S. Department of the Interior, Bureau of Indian Affairs, have determined, pursuant to 25 U.S.C. 3001(3)(C), that the cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the U.S. Department of the Interior, Bureau of Indian Affairs, also have determined, pursuant to 25 U.S.C. 3001(3)(D), that the cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Lastly, officials of the U.S. Department of the Interior, Bureau of Indian Affairs, have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the sacred object/object of cultural patrimony and the Navajo Nation of Arizona, New Mexico and Utah.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred object/object of cultural patrimony should contact Garry Cantley, Bureau of Indian Affairs, Western Regional Office, 2600 N.

Central Ave., 12th floor, Phoenix, AZ 85004, telephone (602) 379-6750, ext.1256, before April 14, 2011.

Repatriation of the sacred object/object of cultural patrimony to the Navajo Nation of Arizona, New Mexico and Utah may proceed after that date if no additional claimants come forward.

The U.S. Department of Interior, Bureau of Indian Affairs, is responsible for notifying the Navajo Nation of Arizona, New Mexico and Utah that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5848 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Inventory Completion: San Francisco State University, San Francisco, CA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of San Francisco State University, San Francisco, CA. The human remains were removed from Kern County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by San Francisco State University professional staff in consultation with representatives of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), and the Tubatulabals of Kern Valley, a non-Federally recognized Indian group.

On an unknown date, human remains representing a minimum of one individual were removed from an unknown site (Ca-Ker-UNK (Lake Isabella)), in Kern County, CA. No known individual was identified. No associated funerary objects are present.

The human remains were found in a box labeled "No Site No., Bones, Lake

Isabella, Box 1 of 1," indicating removal from a Native American archeological site near Lake Isabella, which is located in Kern County, CA. In addition, the human remains were determined to be Native American because the mandibular dentition displayed significant attrition consistent with a prehistoric population. Native American origin was also indicated by the presence of red ochre on some of the skeletal elements. Based on ethnographic study and consultation with the Tubatulabals of Kern Valley, a non-Federally recognized Indian group, Lake Isabella is located in the historically documented territory of the Tubatulabal people. Based on consultation with the Tubatulabals of Kern Valley, a non-Federally recognized Indian group, and the Federally-recognized Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), the Tubatulabal people from the Lake Isabella area are intermarried with Yokuts in the Kern County area. Descendants of these Yokuts and Tubatulabals are members of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe) and/or the Tubatulabals of Kern Valley, a non-Federally recognized Indian group.

Officials of San Francisco State University have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of San Francisco State University also have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), and the Tubatulabals of Kern Valley, a non-federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Jeffrey Boland Fentress, NAGPRA Coordinator, San Francisco State University, Admin. 447, 1600 Holloway Ave., San Francisco, CA 95132, telephone (415) 338-3075, before April 14, 2011. Repatriation of the human remains to the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), may proceed after that date if no additional claimants come forward.

San Francisco State University is responsible for notifying the Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian

Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe); Table Mountain Rancheria of California; Tule River Indian Reservation of the Tule River Reservation, California; and the Tubatulabals of Kern Valley, a non-Federally recognized Indian group, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5877 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Inventory Completion: Sabine River Authority of Texas, Quitman, TX**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of Sabine River Authority of Texas, Quitman, TX. The human remains and associated funerary objects were removed from Hunt County, TX.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by University of North Texas and the Sabine River Authority of Texas professional staff in consultation with representatives of the Caddo Nation of Oklahoma; Comanche Nation, Oklahoma; and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco and Tawakonie), Oklahoma.

On or about June 16, 2006, human remains representing a minimum of one individual were removed from the lakebed of Lake Tawakoni, in Hunt County, TX, by an unknown person. The remains were exposed due to drought related low water levels in Lake Tawakoni in the Caddo Inlet, and subsequently reported to the Hunt County Sheriff's Department. The

Sheriff's Department sent the remains to the University of North Texas, Denton, TX, for forensic evaluation. The human remains and non-human bone fragments, which are considered to be associated funerary objects, were turned over to the Sabine River Authority of Texas on July 6, 2006. No known individual was identified. The 20 associated funerary objects are non-human bone fragments.

Dr. Harrell Gill-King, Anthropologist, University of North Texas, performed an examination of the human and non-human remains at the request of the Hunt County Sheriff's Department. Dr. King's investigation determined that the human remains are of a 30-50-year-old male of Native American ancestry and estimated to be over 200 years old.

The Texas Historical Commission suggested that the Caddo Nation of Oklahoma; Comanche Nation, Oklahoma; and the Wichita and Affiliated Tribes, Oklahoma, may have inhabited the region approximately 200-300 years ago. Following initial correspondence with the Indian tribes, the Wichita and Affiliated Tribes have indicated that the remains are affiliated with their tribe based on the age of the remains and the tribe's presence in the area during that time period. The Caddo Nation of Oklahoma agreed that the age of the remains and their location at the edge of the Caddo Nation's original homelands, indicated that the remains were likely to be affiliated with the Wichita and Affiliated Tribes. The Comanche Nation, Oklahoma indicated that if the remains were buried 200 years ago, then the remains were probably not affiliated with the Comanche Nation.

Officials of the Sabine River Authority of Texas have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Sabine River Authority of Texas also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the 20 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Sabine River Authority of Texas have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Wichita and Affiliated Tribes, Oklahoma.

Representatives of any other Indian tribe that believes itself to be culturally

affiliated with the human remains and associated funerary objects should contact Melvin Swoboda, Sabine River Authority of Texas, P.O. Box 579, Orange, TX 77631-0579, telephone (409) 746-2192, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Wichita and Affiliated Tribes, Oklahoma, may proceed after that date if no additional claimants come forward.

Sabine River Authority of Texas is responsible for notifying the Caddo Nation of Oklahoma; Comanche Nation, Oklahoma; and the Wichita and Affiliated Tribes, Oklahoma, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5881 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Inventory Completion: California State University, Sacramento, Sacramento, CA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of California State University, Sacramento, Sacramento, CA. The human remains and associated funerary objects were removed from Site CA-SAC-16, Sacramento County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by California State University, Sacramento, professional staff in consultation with representatives of the Buena Vista Rancheria of Me-Wuk Indians of California; Cortina Indian Rancheria of Wintun Indians of California; Ione Band of Miwok Indians of California; Shingle

Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; and United Auburn Indian Community of the Auburn Rancheria of California, as well as the non-Federally recognized Indian groups of the El Dorado Miwok Tribe and Nashville-El Dorado Miwok. The Wilton Rancheria, California, and Yocha Dehe Wintun Nation, California (formerly the Rumsey Indian Rancheria of Wintun Indians of California) were also contacted, but did not participate in consultation on the human remains and associated funerary objects described in this notice.

At an unknown time in the 1930s, human remains representing a minimum of four individuals were removed from private property on Site CA-SAC-16, in Sacramento County, CA. The human remains were in the possession of Anthony Zallio, the collector. In 1951, the human remains, along with the rest of the Zallio Collection, were donated to Sacramento State College (now California State University, Sacramento). No known individuals were identified. No associated funerary objects are present.

In 1953, human remains representing a minimum of two individuals were removed from private property on Site CA-SAC-16, in Sacramento County, CA, during an excavation project. Faculty and students from Sacramento State College conducted the excavation. One additional individual is either missing from the collection or was not collected from the field. No known individuals were identified. The 583 associated funerary objects are 545 beads, 5 bags of debitage, 17 bags of faunal material, 2 modified faunal bones, 8 ornaments, and 6 projectile points. Eight additional associated funerary objects (three beads and five projectile points) are missing.

From 1961 to 1971, human remains representing a minimum of 89 individuals were removed from private property on Site CA-SAC-16, in Sacramento County, CA, during an excavation project. Faculty and students from American River College conducted the salvage excavation. The collection was later transferred to California State University, Sacramento. Seven additional individuals are either missing or were not collected from the field. No known individuals were identified. The one associated funerary object is a baked clay net sinker. Eight additional associated funerary objects (seven beads and one projectile point) are missing.

In 1971, human remains representing a minimum of 26 individuals were removed from private property on Site CA-SAC-16, in Sacramento County,

CA, during a salvage excavation project. Faculty and students from Sacramento State College conducted the salvage excavation. Thirteen additional individuals are either missing or were not collected from the field. No known individuals were identified. The 2,867 associated funerary objects are 2 bone awls, 22 bags of baked clay, 2,747 beads, 1 bone tube, 3 bags of carbonized material, 12 bags of debitage, 17 bags of faunal material, 1 piece of glass, 8 bags of grave fill, 2 pieces of metal, 10 modified faunal bones, 29 ornaments, 6 projectile points, 6 stone tools, and 1 whistle. Thirty-two additional associated funerary objects (4 bone awls, 2 bags of baked clay, 2 beads, 1 biface, 1 bone tube, 1 bag of carbonized material, 1 bag of debitage, 15 bags of faunal material, 2 fire cracked rocks, 2 modified faunal bones, and 1 whistle) are missing.

In 1990, human remains representing two individuals were removed from Site CA-SAC-16, in Sacramento County, CA, during a test excavation project. The Far Western Anthropological Research Group Inc. conducted the test excavation. In 1991, the remains were deposited at the university. No known individuals were identified. No associated funerary objects are present.

The artifact types and burial practices observed at Site CA-SAC-16 indicate that it was first occupied during the Middle Horizon, and was inhabited into the Historic Period. The presence of rough disk *Olivella* beads and glass trade beads associated with the Hudson Bay fur trappers suggests that some burials may date to the 1830s, when an epidemic attributed to malaria spread among Native populations along the Sacramento River. The lack of archaeological and historical evidence for occupation of the site after the epidemic provides circumstantial support that the site was abandoned at this time. The surviving occupants of the site may have joined with neighboring groups to the south (in the vicinity of Sacramento), to the north (Verona), and to the east (in the foothills).

Archeological evidence indicates that the lower Sacramento Valley and Delta regions were continuously occupied since at least the Early Horizon (5550–550 B.C.). Cultural changes indicated by artifact typologies and burial patterns, historical linguistic evidence, and biological evidence reveal that the populations in the region were not static, with both *in situ* cultural changes and migrations of outside populations into the area. Linguistic evidence suggests that ancestral-Penutian speaking groups related to modern day

Miwok, Nisenan, and Patwin groups occupied the region during the Middle (550 B.C.–A.D. 1100) and Late (A.D. 1100–Historic) Horizons, with some admixing between these groups and Hokan-speaking groups that occupied the region at an earlier date. The genetic data suggests that the Penutians may have arrived later than suggested by the linguistic evidence.

Geographical data from ethnohistoric and ethnographic sources indicate that the site was most likely occupied by Nisenan-speaking groups at the beginning of the Historic Period, while Patwin-speakers occupied the valley west of the Sacramento River and Miwok-speakers resided south of the American River. Ethnographic data and expert testimony from the tribal representatives support the high level of interaction between groups in the lower Sacramento Valley and Delta regions that crosscut linguistic boundaries. Historic population movements resulted in an increased level of shifting among populations, especially among the Miwok and Nisenan, who were impacted by disease and Euro-American activities relating to Sutter's Fort and later gold-rush activities.

In summary, officials of California State University, Sacramento, together with the University's College of Social Sciences and Interdisciplinary Studies Committee on Native American Graves Protection and Repatriation Act Compliance (SSIS NAGPRA Committee), reasonably believe that the ethnographic, historical, and geographical evidence indicates that the historic burials and cultural items recovered from Site CA-SAC-16 are most closely affiliated with contemporary descendants of the Nisenan, and have more distant ties to neighboring groups, such as the Plains Miwok. Furthermore, the earlier cultural items from the Middle and Late Horizons share cultural relations with the Nisenan and Plains Miwok based on archeological, biological, and historical linguistic evidence.

Officials of California State University, Sacramento, have determined, pursuant to 25 U.S.C. 3001(9), the human remains described above represent a minimum of 123 individuals of Native American ancestry. Officials of California State University, Sacramento, also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the 3,451 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of California State University, Sacramento,

have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Buena Vista Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, as well as the non-Federally recognized Indian groups of the El Dorado Miwok Tribe and Nashville-El Dorado Miwok.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Charles Gossett, Dean of the College of Social Sciences and Interdisciplinary Studies, CSUS, 6000 J St., Sacramento, CA 95819-6109, telephone: (916) 278-6504, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Buena Vista Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, may proceed after that date if no additional claimants come forward.

California State University, Sacramento, is responsible for notifying the Buena Vista Rancheria of Me-Wuk Indians of California; Cortina Indian Rancheria of Wintun Indians of California; Ione Band of Miwok Indians of California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; Wilton Rancheria, California; and Yocha Dehe Wintun Nation, California, as well as the non-federally recognized Indian groups of the El Dorado Miwok Tribe and Nashville-El Dorado Miwok that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5875 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

[2253-665]

**Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Land Management, White River Field Office, Meeker, CO and Colorado State University, Laboratory of Public Archaeology, Fort Collins, CO**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Land Management, White River Field Office, Meeker, CO, and in the possession of the Colorado State University, Laboratory of Public Archaeology, Fort Collins, CO. The human remains were removed from the Canyon Pintado National Historic District, Rio Blanco County, CO.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Bureau of Land Management, White River Field Office, and Colorado State University professional staff, in consultation with representatives of the Hopi Tribe of Arizona; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Navajo Nation, Arizona, New Mexico & Utah; Ohkay Owingeh, New Mexico; Paiute Indian Tribe of Utah; Pueblo of Pojoaque, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of San Ildefonso, New Mexico; Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho; Shoshone Tribe of the Wind River Reservation, Wyoming; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah (hereinafter referred to as "The Tribes").

In 1977, human remains representing a minimum number of one individual were removed from site 5RB699, in Rio Blanco County, CO, on public lands administered by the Bureau of Land Management, White River Field Office. The remains are represented by a single human tooth that was recovered from an excavation trench during excavations conducted by the Colorado State University, Laboratory of Public Archaeology. No known individual was identified. No associated funerary objects are present.

In 1977, human remains representing a minimum number of one individual were removed from site 5RB761, in Rio Blanco County, CO, on public lands administered by the Bureau of Land Management, White River Field Office. The remains are represented by a partial skeleton and associated hide and cordage that were recovered from a rock crevice burial during excavations conducted by the Colorado State University, Laboratory of Public Archaeology. No known individual was identified. The two associated funerary objects are a hide and cordage.

In 2009, Colorado State University, Laboratory of Public Archaeology, located the two sets of remains in their holdings and informed the Bureau of Land Management. Subsequently, the Bureau of Land Management moved the human remains and associated funerary objects from the Colorado State University, Laboratory of Public Archaeology facility to more secure storage at the Bureau of Land Management's Federal collections depository at the Museum of Western Colorado pending repatriation.

The Bureau of Land Management has determined that the preponderance of evidence shows that the human remains are Native American and have Ute cultural affiliation. Visual inspection by Colorado State University, Laboratory of Public Archaeology, of the skeletal morphology of the burial individual from site 5RB761 demonstrated tooth wear likely associated with Native Americans. Rock crevice burials are strongly associated with Native American practices, in particular with Ute tribes. Also, the burial was located directly underneath a rock art panel that is consistent with the Early Ute Historic Style of rock art found in the region. Site 5RB699 dated Fremont and Ute occupations. Finally, both site 5RB761 and site 5RB699 are located within lands that were traditionally occupied by the Ute band that is now represented by the Ute Indian Tribe of the Uintah & Ouray Reservation, Utah.

Officials of the Bureau of Land Management, White River Field Office,



and Colorado State University, Laboratory of Public Archaeology, have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Bureau of Land Management, White River Field Office, and the Colorado State University, Laboratory of Public Archaeology, have also determined, pursuant to 25 U.S.C. 3001(3)(A), that the two objects described above are reasonably believed to have been placed with or near individual human remains at the time of death. Lastly, officials of the Bureau of Land Management, White River Field Office, and Colorado State University, Laboratory of Public Archaeology, have determined pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ute Indian Tribe of the Uintah & Ouray Reservation, Utah.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dan Haas, State Archaeologist, Bureau of Land Management, Colorado State Office, 2850 Youngfield St., Lakewood, CO 80215-7076, telephone (303) 239-3647 before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Ute Indian Tribe of the Uintah & Ouray Reservation, Utah, may proceed after that date if no additional claimants come forward.

The Bureau of Land Management is responsible for notifying The Tribes that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5874 Filed 3-14-11; 8:45 am]

BILLING CODE 4312-50-P

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## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Inventory Completion: California State Department of Transportation (Caltrans), Sacramento, CA, and California State University, Sacramento, CA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves

Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the California Department of Transportation (Caltrans), Sacramento, CA, and in the possession of California State University, Sacramento, CA. The human remains and associated funerary objects were removed from Site CA-SJO-91, also known as French Camp Slough Site, San Joaquin County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by California State University, Sacramento, and Caltrans professional staff in consultation with representatives of the Buena Vista Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; and Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the Tachi Yokut Tribe), as well as the non-Federally recognized Indian groups: The Southern Sierra Miwoks of California, Northern Valley Yokuts, and Tubatulabals of Kern Valley. The Chicken Ranch Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Wilton Rancheria, California, were also contacted, but did not participate in consultation about the human remains and associated funerary objects described in this notice.

In 1970, human remains representing 498 individuals were removed from CA-SJO-91 on private property, in San Joaquin County, CA, during a salvage excavation project. Faculty and students from what was then Sacramento State College (now California State University, Sacramento) were brought in by the California Division of Highways (now California Department of Transportation [Caltrans]) to conduct salvage excavations. No known individuals were identified. The 4,667 associated funerary objects are 3,967 beads, 16 bifaces, 4 pieces of charcoal, 1 chert fragment, 1 silicate core, 2 lots of debitage, 490 faunal bones, 2 flake tools, 61 tule mat impressions, 20 modified bones, 1 modified shell, 2

modified stones, 20 pieces of ochre, 14 ornaments, 3 pestles, 20 projectile points, 35 quartz crystals and pebbles, 6 soil samples, and 2 whistles. In addition, there are 187 missing associated funerary objects (156 beads, 1 piece of charcoal, 1 igneous core, 15 lots of debitage, 5 faunal bones, 1 flake tool, 1 modified bone, 1 quartz rock, 1 steatite ring, and 5 bone whistles).

Multiple lines of evidence were used to determine the cultural affiliation of the CA-SJO-91 collection. Archeological evidence indicates that the site was occupied from the Early Horizon through the Late Horizon. Most of the burials were in two cemeteries that were located 60 meters apart. Other burials were located between the two cemeteries or are of uncertain horizontal provenience due to construction activities. Cemetery I was radiometrically dated to between 1845±90 and 2985±160 years B.P. The burial patterns and artifact types in Cemetery I correspond to a transitional time period between the Early Horizon and Middle Horizon time periods. Cemetery II was not radiometrically dated. Based on mode of interment and artifact types, Cemetery II burials date slightly earlier to the Early Horizon, although there are similarities in constituents between the two cemeteries. A Late Horizon component (1500 B.P. to European contact) at CA-SJO-91 was essentially removed by construction activities before salvage excavations began.

Biological, archeological, and linguistic evidence indicate that population movement occurred between the Early and Middle Horizon in the French Camp Slough area. It may be that the individuals buried in the Early Horizon Cemetery II represent an earlier, Utian speaking people (linguistic evidence supports a relationship of shared group identity between early Utian speaking peoples and contemporary Miwok tribes), while the individuals in the Middle Horizon Cemetery I may represent a more recent pre-Yokut speaking people. Historical and geographical lines of evidence indicate that CA-SJO-91 lies on the border of the traditional territory of the Plains Miwok and the Northern Valley Yokuts. At the time of first contact with Spanish missionaries in the early 19th century, the area is thought to have been occupied by the Passasime, a Northern Valley Yokuts people who were also related to the Plains Miwok. Oral and documentary evidence provided by representatives of Indian tribes during consultation demonstrates an inter-relationship between Northern Valley Yokuts and Plains Miwok tribes.

Based on the geographic, linguistic, archeological, and ethnographic evidence, as well as oral and documentary evidence presented during consultations, Caltrans and California State University, Sacramento, including the University's College of Social Sciences and Interdisciplinary Studies Committee on Native American Graves Protection and Repatriation Act Compliance (SSIS NAGPRA Committee), reasonably believe that the cultural affiliation of CA-SJO-91 is to the Plains Miwok and Northern Valley Yokuts.

Officials of California State University, Sacramento, and Caltrans have determined pursuant to 25 U.S.C. 3001(9), that the human remains described above represent a minimum of 498 individuals of Native American ancestry. Officials of California State University, Sacramento, and Caltrans also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the 4,667 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of California State University, Sacramento, and Caltrans have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the Tachi Yokut Tribe); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, as well as to the non-Federally recognized Indian groups: the Southern Sierra Miwoks of California and Northern Valley Yokuts.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Tina Biorn, Caltrans, P.O. Box 942874 (M.S. 27), Sacramento, CA 94274-0001, telephone (916) 653-0013,

or Charles Gossett, Dean of the College of Social Sciences and Interdisciplinary Studies, California State University Sacramento, CA, 95819-6109, telephone (916) 278-6504, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the Tachi Yokut Tribe); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; United Auburn Indian Community of the Auburn Rancheria of California; and/or Wilton Rancheria, California, may proceed after that date if no additional claimants come forward.

California State University, Sacramento is responsible for notifying the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Rancheria of Me-Wuk Indians of California; Picayune Rancheria of the Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (also known as the Tachi Yokut Tribe); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; United Auburn Indian Community of the Auburn Rancheria of California; and Wilton Rancheria, California, as well as the non-Federally recognized Indian groups: the Southern Sierra Miwoks of California, Northern Valley Yokuts, and Tubatulabals of Kern Valley, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5871 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Intent To Repatriate Cultural Items: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA; Correction

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice; correction.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the total number of unassociated funerary objects from four to five described in a Notice of Intent to Repatriate Cultural Items (72 FR 48677-48678, August 24, 2007). Since publication, an additional funerary object was found for one of the two sites in the notice.

In the **Federal Register** (72 FR 48677-48678, August 24, 2007), paragraph three is corrected by substituting the following paragraph:

The five cultural items are three brass sheet fragments, one lot of elk teeth pendants and white discoidal beads, and one vial of shell and glass bead fragments.

Paragraph four is corrected by substituting the following paragraph:

In 1903, four cultural items were recovered from the Silverheels site in Brant, Erie County, NY, during a Peabody Museum of Archaeology and Ethnology expedition led by M. R. Harrington and A. C. Parker. Museum documentation indicates that the cultural items were interred with human remains. The human remains that were originally associated with these items were published in the **Federal Register** in a Notice of Inventory Completion (66 FR 51060-51062, October 5, 2001), and have since been transferred to the culturally affiliated groups. Therefore, the cultural items are now unassociated funerary

objects. The four unassociated funerary objects are three brass sheet fragments and one lot of elk teeth pendants and white discoidal beads.

Paragraph nine is corrected by substituting the following paragraph:

Officials of the Peabody Museum of Archaeology and Ethnology have determined, pursuant to 25 U.S.C. 3001(3)(B), that the five cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of Native American individuals.

Officials of the Peabody Museum of Archaeology and Ethnology also have determined, pursuant to 24 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York (hereinafter referred to as "The Tribes").

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Patricia Capone, Repatriation Coordinator, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-3702, before April 14, 2011. Repatriation of the unassociated funerary objects to The Tribes may proceed after that date if no additional claimants come forward.

The Peabody Museum of Archaeology and Ethnology is responsible for notifying The Tribes that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5867 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

[2253-665]

**Notice of Inventory Completion: University of Wyoming, Anthropology Department, Human Remains Repository, Laramie, WY**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession and control of the University of Wyoming Anthropology Department, Human Remains Repository, Laramie, WY. The human remains and associated funerary objects were removed from the Upper Sunshine Reservoir area of northwest Wyoming.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by University of Wyoming, Anthropology Department, Human Remains Repository, professional staff in consultation with representatives of the Crow Tribe of Montana.

In 1973, human remains representing a minimum of two individuals were removed from a cliff ledge on private ground near the Upper Sunshine Reservoir area of northwest Wyoming by University of Wyoming personnel. The burial location had been discovered by recreational rock climbers. The remains have been at the University of Wyoming since that time (HR019 and HR020). No known individuals were identified. The 985 associated funerary objects are 944 small glass trade beads, 6 large white glass trade beads, 11 large blue glass trade beads, 4 medium blue glass trade beads, 6 dentalim shell beads, 3 brass buttons, 2 metal loops (earrings?), 1 metal bracelet, 3 shell hair pipe beads, 1 carved wooden bowl, 1 lot of numerous cloth fragments representing a trade blanket, 1 lot of a trade coat in fragments with brass braid and brass buttons, 1 lot of a bison robe in fragments, and 1 lot of miscellaneous leather.

The historic associated funerary objects suggest a burial date in the early 1800s. The University of Wyoming, Anthropology Department, Human Remains Repository, determined that the human remains are Native American based on the presence of platymeric femoral morphology, toothwear patterns, the presence of shovel shaped incisors, interorbital observations, and distinctive cranial morphology. Based on craniometrics, burial location, artifacts, and hair styles, officials of the Human Remains Repository reasonably believe that these remains represent individuals related to the Crow Tribe of Montana. In addition, the Crow Tribe, based upon the burial location within the aboriginal homelands of the tribe and review of the information from the Human Remains Repository, claims a shared group identity.

Officials of the University of Wyoming, Anthropology Department, Human Remains Repository, have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the University of Wyoming, Anthropology Department, Human Remains Repository, have also determined, pursuant to 25 U.S.C. 3001(3)(A), that the 985 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of a death rite or ceremony. Lastly, officials of the University of Wyoming, Anthropology Department, Human Remains Repository, have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Crow Tribe of Montana.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Rick L. Weathermon, NAGPRA Contact at the University of Wyoming, Department 3431, Anthropology, 1000 E. University Ave., Laramie, WY 82071, telephone (307) 766-5136, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Crow Tribe of Montana may proceed after that date if no additional claimants come forward.

The University of Wyoming Anthropology Department, Human Remains Repository, is responsible for notifying the Crow Tribe of Montana that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5865 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

[2253-665]

**Notice of Inventory Completion:  
Fremont County Coroner, Riverton, WY**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession and control of the Fremont County Coroner, Riverton, WY. The human remains and associated funerary objects were removed from Fremont County, WY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Fremont County Coroner professional staff in consultation with representatives of the Shoshone Tribe of the Wind River Reservation, Wyoming.

On June 7, 2010, human remains representing one individual were removed from the Sinks Canyon Site, Fremont County, WY. The remains were found along a hiking trail that was undergoing maintenance for the summer hiking season. No known individual was identified. The 373 associated funerary objects are 2 fragments of freshwater clam shells, 32 dentalia shell beads, 2 bird bone beads, 8 chokecherry seed beads, 162 bone heishi-style beads, 158 lignite heishi-style beads, 5 fragmentary bone heishi-style beads, 1 shell bead, and 3 chert microflakes.

The Sinks Canyon site is located on what was originally part of the Wind River Reservation, but subsequently transferred and is no longer reservation land. The area of the Wind River Reservation is the traditional land of the Eastern Shoshone, now the Shoshone Tribe of the Wind River Reservation,

Wyoming. The land was chosen by Chief Washakie as the reservation for his tribe as set forth in the Fort Bridger Treaty of 1868. Although the Arapahoe Tribe also reside on the Wind River Reservation, they were moved onto it at a later date after the Treaty of 1868.

After discovery, the remains were submitted to Rick L. Weathermon, Osteoarchaeologist, University of Wyoming, for examination. The examination determined that the human remains are those of a Native American female between 50 and 70 years of age. Some traits and associated funerary objects suggest that the remains are from the Fremont Culture that inhabited the central Wyoming area over 600 years ago. Based on consultation with a Shoshone tribal representative, there is a shared group relationship between the Shoshone Tribe of the Wind River Reservation, Wyoming, and the Fremont Culture, the identifiable earlier group, based on oral history.

Officials of the Fremont County Coroner's Office have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Fremont County Coroner's Office also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the 373 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Fremont County Coroner's Office have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Shoshone Tribe of the Wind River Reservation, Wyoming.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Edward R. McAuslan, Fremont County Coroner, 322 North 8th West, Riverton, WY 82501, telephone (307) 856-7150, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Shoshone Tribe of the Wind River Reservation, Wyoming, may proceed after that date if no additional claimants come forward.

The Fremont County Coroner is responsible for notifying the Shoshone Tribe of the Wind River Reservation, Wyoming, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5864 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

[2253-665]

**Notice of Inventory Completion:  
University of Wyoming, Anthropology  
Department, Human Remains  
Repository, Laramie, WY**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession and control of the University of Wyoming Anthropology Department, Human Remains Repository, Laramie, WY. The human remains were removed from the east side of the Big Horn Mountains in the Buffalo-Sheridan area from unknown status lands in Wyoming.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by University of Wyoming, Anthropology Department, Human Remains Repository, professional staff in consultation with representatives of the Crow Tribe of Montana.

In the 1960s or 1970s, human remains representing one individual were removed from beneath a tree scaffold burial by a private individual from the east side of the Big Horn Mountains in the Buffalo-Sheridan area from unknown status lands in Wyoming. The remains were sent to the University of Wyoming in the mid-1980s and have been at the University of Wyoming since that time (HR218d). No known individual was identified. No associated funerary objects are present.

Notes transferred with the human remains indicate that the burial was that of a Crow individual and probably dates after the 1870s. The University of Wyoming, Anthropology Department,

Human Remains Repository, determined that the human remains are Native American based on the notes that accompanied the transfer. Based on the notes and the burial location, officials of the Human Remains Repository reasonably believe that the remains represent an individual related to the Crow Tribe of Montana. The Crow Tribe presented evidence that showed the burial location is within their tribal homeland as defined by the Treaty of Fort Laramie (1851), Indian Claims Commission (3 Ind. Cls. Comm. 147), and U.S. Court of Claims (284 F.2c 361 (1960)).

Officials of the University of Wyoming, Anthropology Department, Human Remains Repository, have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the University of Wyoming, Anthropology Department, Human Remains Repository, have also determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Crow Tribe of Montana.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Rick L. Weathermon, NAGPRA Contact at the University of Wyoming, Department 3431, Anthropology, 1000 E. University Ave., Laramie, WY 82071, telephone (307) 766-5136, before April 14, 2011. Repatriation of the human remains to the Crow Tribe of Montana may proceed after that date if no additional claimants come forward.

The University of Wyoming Anthropology Department, Human Remains Repository, is responsible for notifying the Crow Tribe of Montana that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5863 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Inventory Completion: Bureau of Land Management, Casper Field Office, Casper, WY, and University of Wyoming, Laramie, WY

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Interior, Bureau of Land Management, Casper Field Office, has completed an inventory of human remains, in consultation with the appropriate Indian Tribes, and has determined that there is no cultural affiliation between the remains and any present-day Tribe. Representatives of any Indian Tribe that believes itself to be culturally affiliated with the human remains may contact the Bureau of Land Management, Casper Field Office. Disposition of the human remains to the Indian Tribe stated below may occur if no additional requestors come forward.

**DATES:** Representatives of any Indian Tribe that believes it has a cultural affiliation with the human remains should contact the Bureau of Land Management, Casper Field Office, at the address below by April 14, 2011.

**ADDRESSES:** Ranel Stephenson Capron, Bureau of Land Management, Wyoming State Office (930), 5353 Yellowstone Rd., Cheyenne, WY 82009, telephone at (307) 775-6108 or e-mail [Ranel\\_Capron@blm.gov](mailto:Ranel_Capron@blm.gov).

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of Native American human remains in the control of the U.S. Department of the Interior, Bureau of Land Management, Casper Field Office, WY, and in the possession of the University of Wyoming, Human Remains Repository, Laramie, WY. The human remains were removed from two adjoining sites (48GA07 and 48GA48), in Goshen County, WY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

#### Consultation

A detailed assessment of human remains was made by Bureau of Land Management professional staff in consultation with representatives of the Arapahoe Tribe of the Wind River Reservation, Wyoming; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne and Arapaho Tribes, Oklahoma; Crow Tribe of Montana; Northern Cheyenne Tribe of

the Northern Cheyenne Indian Reservation, Montana; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; and the Ute Indian Tribe of the Uintah & Ouray Reservation, Utah (hereinafter referred to as "The Tribes"). In addition, The Tribes have nominated and do not object to the Arapahoe Tribe of the Wind River Reservation, Wyoming, as the lead contact for disposition of the human remains.

#### History and Description of the Remains

In 1963, human remains representing a minimum of nine individuals were removed from the Huntley-Table Mountain Site (48GO07), in Goshen County, WY. Numerous human skeletons were discovered during construction of a waterfowl pond by the Wyoming State Game and Fish Department, four miles west of Huntley, WY. The individuals were apparently buried close to each other in shallow graves or laid on the ground and covered with dirt in what may have been a mound-like configuration. Over 40 carloads of interested townspeople and souvenir collectors from as far away as Cheyenne, WY, and Scottsbluff, NE, converged upon the site almost immediately after the bones were discovered, taking human skeletal remains and grave goods. On September 23, 1963, Dr. William Mulloy, University of Wyoming Anthropologist, and Dr. Paul McGrew, University of Wyoming Paleontologist, collected fragments of seven individuals that had been left by vandals. The general assemblage is highly fragmented, and includes the remains of three adult females, two adult males, one indeterminate adult, and one child. Subsequently in 1963, a skull from an adult male was given to Dr. Mulloy by Ted Miller of Gering, NE, which had been removed from the site. In 1994, additional fragmentary bone representing a minimum of one individual that had been collected from the site in 1963, was brought by Grant Willson of Cheyenne, WY, to the university. The human remains are curated at the University of Wyoming Human Remains Repository. No known individuals were identified. No associated funerary objects are present.

In 1963, human remains representing a minimum of one individual were removed from the Table Mountain Fence Site (48GO48), in Goshen County, WY. The remains, which consist of a skull, were found and collected by Grant Willson of Cheyenne, WY, while hiking in the vicinity of the Huntley-Table Mountain burial site. Willson gave the skull to Dr. George Gill,

University of Wyoming Anthropologist, who brought it to the university in 1986. The human remains are curated at the University of Wyoming Human Remains Repository. No known individual was identified. No associated funerary objects are present.

#### **Determinations Made by the Bureau of Land Management, Casper Field Office**

Officials of the Bureau of Land Management, Casper Field Office, have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains represent 10 individuals of Native American ancestry, based on archeological and radiocarbon evidence. However, based on this information and other available lines of evidence, a relationship of shared group identity can not be reasonably traced to any specific Federally-recognized Indian Tribe.

- The Native American human remains were removed from the land determined to be the aboriginal land of the Arapahoe Tribe of the Wind River Reservation, Wyoming; Cheyenne and Arapaho Tribes, Oklahoma; and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana, according to the Indian Claims Commission Docket 329A–D, and illustrated on the “Indian Land Areas Judicially Established,” prepared by the United States Geological Survey in 1989, which is based on information provided by the Indian Claims Commission.

- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.

- Pursuant to 43 CFR 10.11(c)(1), the disposition is to the Arapahoe Tribe of the Wind River Reservation, Wyoming.

#### **Additional Requestors and Disposition**

Representatives of any Indian Tribe that believes itself to be culturally affiliated with the human remains or any other Indian Tribe that believes it satisfies the criteria in 43 CFR 10.11(c)(1) should contact Ranel Stephenson Capron, Bureau of Land Management, Wyoming State Office (930), 5353 Yellowstone Rd., Cheyenne, WY 82009, telephone at (307) 775–6108 or e-mail [Ranel\\_Capron@blm.gov](mailto:Ranel_Capron@blm.gov), before April 14, 2011. Disposition of the human remains to the Arapahoe Tribe of the Wind River Reservation, Wyoming, may proceed after that date and if no additional claimants come forward.

The Bureau of Land Management is responsible for notifying The Tribes that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011–5861 Filed 3–14–11; 8:45 am]

**BILLING CODE 4312–50–P**

## **DEPARTMENT OF THE INTERIOR**

### **National Park Service**

[2253–665]

#### **Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and U.S. Department of the Interior, National Park Service, Mesa Verde National Park, Mesa Verde, CO**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the U.S. Department of the Interior, National Park Service, Mesa Verde National Park, Mesa Verde, CO. The human remains and associated funerary objects were removed from sites on the Ute Mountain Ute Reservation, CO.

This notice is published as part of the National Park Service’s administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service National NAGPRA Program is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Mesa Verde National Park and Bureau of Indian Affairs professional staff in consultation with representatives of the Hopi Tribe of Arizona; Navajo Nation, Arizona, New Mexico & Utah; Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa

Clara, New Mexico; Pueblo of Santo Domingo, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah; Ysleta Del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico (hereinafter referred to as “The Tribes”).

In 1927, human remains representing a minimum of one individual were removed by the National Park Service from Hoot Owl House (5MV1012), a site located on the Ute Mountain Ute Reservation, CO, and outside the boundaries of the Mesa Verde National Park. No known individual was identified. No associated funerary objects are present.

Based on architectural features (6 rooms, 10 grinding bins, a tower, and toeholds), archeological context, dendrochronology, and a physical anthropology examination, the site (5MV1012) and human remains are dated to the Pueblo I (A.D. 700–900) and Pueblo III (A.D. 1100–1300) periods.

In 1927, human remains representing a minimum of one individual were removed from Bone Awl House, a site located on the Ute Mountain Ute Reservation, CO, and outside the boundaries of the Mesa Verde National Park, during a National Park Service field collection project. No known individual was identified. The 24 associated funerary objects are unfired sherds.

Based on architectural features (cliff dwelling), archeological context, dendrochronology, and a physical anthropology examination, the Bone Awl House site, human remains, and the associated funerary objects are dated to the Pueblo III period (A.D. 1100–1300).

In 1959, human remains representing a minimum of one individual were removed by the National Park Service from Pulpit House (5MV1237), a site located on the Ute Mountain Ute Reservation, CO, and outside the boundaries of the Mesa Verde National Park. No known individual was identified. No associated funerary objects are present.

Based on architectural features (8 rooms, a rubble mound, a possible kiva, and terraces), archeological context, a physical anthropology examination, and ceramic analysis, the site (5MV1237) and human remains are dated to the Pueblo III period (A.D. 1100–1300).

As outlined in a published Notice of Inventory Completion (64 FR 46936–46949, August 27, 1999), geographical,

kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, and expert opinion evidence was used by Mesa Verde National Park to determine cultural affiliation for human remains and associated funerary objects removed from Mesa Verde National Park, which borders the Ute Mountain Ute Reservation. Officials of the Bureau of Indian Affairs and Mesa Verde National Park considered this information, and also considered the historical and geographical evidence for these human remains and associated funerary objects, and reasonably determined that a broader cultural affiliation exists. Therefore, upon examination of the historical and geographical information, officials of the Bureau of Indian Affairs and Mesa Verde National Park have determined that the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe share a historic and continuing cultural affiliation with the lands on the Ute Mountain Ute Reservation.

Officials of the Bureau of Indian Affairs and Mesa Verde National Park have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of three individuals of Native American ancestry. Officials of the Bureau of Indian Affairs and Mesa Verde National Park have also determined, pursuant to 25 U.S.C. 3001(3)(A), that the 24 associated funerary objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, the officials of the Bureau of Indian Affairs and Mesa Verde National Park have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and The Tribes.

Representatives of any other Indian Tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Cliff Spencer, Superintendent, Mesa Verde National Park, PO Box 8, Mesa Verde, CO 81330, telephone (970) 529-4600, before April 14, 2011. Repatriation of the human remains and associated funerary objects to The Tribes may proceed after that date if no additional claimants come forward.

The Bureau of Indian Affairs and Mesa Verde National Monument are responsible for notifying The Tribes this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5860 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Inventory Completion: Denver Museum of Nature & Science, Denver, CO

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The Denver Museum of Nature & Science has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes, and has determined that there is no cultural affiliation between the remains and associated funerary objects and any present-day Indian tribe. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact the museum. Disposition of the human remains and associated funerary objects to the Indian tribes stated below may occur if no additional requestors come forward.

**DATES:** Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains should contact the Denver Museum of Nature & Science at the address below by April 14, 2011.

**ADDRESSES:** Dr. Chip Colwell-Chanthaphonh, Denver Museum of Nature & Science, 2001 Colorado Blvd., Denver, CO 80205, telephone (303) 370-6378.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Denver Museum of Nature & Science, Denver, CO. The human remains and associated funerary objects were removed from Miami-Dade County and possibly Monroe County, FL.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human

remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

#### Consultation

A detailed assessment of the human remains was made by the Denver Museum of Nature & Science professional staff in consultation with representatives of the Miccosukee Tribe of Indians of Florida, Seminole Nation of Oklahoma, and the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations) (hereinafter referred to as "The Tribes").

#### History and Description of the Remains

In 1964, human remains representing a minimum of two individuals were removed from a burial context at an unknown mound site in the Upper Keys of Miami-Dade County, FL, by Jerry Ellis and Dr. David Milliman. On July 21, 1964, Francis V. and Mary W.A. Crane obtained the human remains from Mr. Ellis. The Cranes donated the remains to the museum in 1968 and they were accessioned into the collections (AC.8315A (CUI 68) and AC.8315B (CUI 69)). The remains include partial cranial fragments representing two adult males. Catalogue records suggested a possible affiliation of Calusa. No known individuals were identified. The six associated funerary objects are one clam shell mortar and pestle, one shell drill, one shell pendant, and two shell scrapers (DMNS catalogue numbers AC.8316A-B; AC.8317; AC.8318; AC.8319; and AC.8320).

Between 1957 and 1958, human remains representing a minimum of one individual were reportedly removed from a burial context at the Tallman Site on Plantation Key, Monroe County, FL, by Hugh and Hilda Davis, Dan Laxson, and George B. Stevenson. Additional catalogue records, however, indicate that the same human remains may have been removed from the DuPont Plaza Site in Miami-Dade County, FL. In 1959, Stevenson and Laxson donated the remains and various other materials excavated from the site to the Southeast Museum of the American Indian (a private museum founded by Francis V. and Mary W.A. Crane). In 1968, the Cranes donated their collection to the Denver Museum of Nature & Science (then the Denver Museum of Natural History) (AC.9248A (CUI 70)). No known individual was identified. The 100 associated funerary objects are 94 animal bones, 1 potsherd, 3 coral fragments, 1 shell fragment, and 1 bag of dirt and unsorted animal skeletal material (DMNS catalogue number AC.9248B).

These remains and other materials were catalogued as 9248 within the Crane Collection. The majority of the Crane American Indian Collection was accessioned into the collections with the same catalogue number assigned by the Cranes, but preceded by AC. However, the human remains and other material excavated from Plantation Key, FL, were accessioned into the archeology collection as A558 instead of AC.9248. It appears that the human remains were stored in a separate box within the rest of the archeological material from the Plantation Key excavation. In 1998, that box was removed from the archeology collections and assigned catalogue number AC.9248. The contents of the box were sorted into two distinct groups, the human remains and 100 associated funerary objects. Several hundred objects from the Plantation Key excavation remain in the archeology collections and are still catalogued as A558, and the museum is working in consultation with the Miccosukee Tribe of Indians of Florida to deaccession the remaining portion of the Plantation Key and DuPont Plaza materials (DMNS catalogue number A558).

#### **Determinations Made by the Denver Museum of Nature & Science**

Officials of the Denver Museum of Nature & Science have determined that:

- Based on non-destructive physical analysis and catalogue records, the human remains are Native American.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian tribe.
- According to final judgments of the Indian Claims Commission, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Seminole Nation of Oklahoma and the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations).
- Multiple lines of evidence, including treaties, Acts of Congress, and Executive Orders, indicate that the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations).
- Other credible lines of evidence, obtained through consultation with tribal representatives, indicate that the land from which the Native American human remains and associated funerary

objects were removed is the aboriginal land of The Tribes.

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 106 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains is to The Tribes.

#### **Additional Requestors and Disposition**

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains or any other Indian tribe that believes it satisfies the criteria in 43 CFR 10.11(c)(1) should contact Dr. Chip Colwell-Chanthaphonh, Denver Museum of Nature & Science, 2001 Colorado Blvd., Denver, CO 80205, telephone (303) 370-6378, before April 14, 2011. Disposition of the human remains and associated funerary objects to The Tribes may proceed after that date if no additional requestors come forward.

The Denver Museum of Nature & Science is responsible for notifying The Tribes that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5857 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## **DEPARTMENT OF THE INTERIOR**

### **National Park Service**

[2253-665]

#### **Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and University of Wyoming, Anthropology Department, Human Remains Repository, Laramie, WY**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the possession of the University of Wyoming,

Anthropology Department, Human Remains Repository, Laramie, WY. The human remains and associated funerary objects were removed from within the boundaries of the Crow Reservation, Yellowstone County, MT.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by University of Wyoming, Anthropology Department, Human Remains Repository, professional staff in consultation with representatives of the Crow Tribe of Montana.

In the 1930s or early 1940s, human remains representing a minimum of one individual were removed from a rock walled burial cyst by members of the Montana Archaeological Survey on the Crow Reservation, Yellowstone County, MT. The remains have been at the University of Wyoming since the 1960s, but possibly earlier (HR015). No known individual was identified. The two associated funerary objects are one small glass trade bead and a fragment of cloth.

Human Remains Repository notes indicate that the burial was associated with other burial cysts and probably dates after the 1860s. The University of Wyoming, Anthropology Department, Human Remains Repository, determined that the human remains are Native American based on cranial morphology and tooth form. Based on the notes and the burial location, officials of the Human Remains Repository reasonably believe that the remains represent an individual related to the Crow Tribe of Montana. The Crow Tribe presented evidence that showed the burial location is within their tribal homeland as defined by the Treaty of Fort Laramie (1851), Indian Claims Commission (3 Ind. Cls. Comm. 147), and U.S. Court of Claims (284 F.2c 361 (1960)).

Officials of the Bureau of Indian Affairs and the University of Wyoming, Anthropology Department, Human Remains Repository, have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Bureau of Indian Affairs and the University of Wyoming, Anthropology Department, Human Remains Repository, have also



determined, pursuant to 25 U.S.C. 3001(3)(A), that the two objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of a death rite or ceremony. Lastly, officials of the Bureau of Indian Affairs and the University of Wyoming, Anthropology Department, Human Remains Repository, have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Crow Tribe of Montana.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Rick L. Weathermon, NAGPRA Contact at the University of Wyoming, Department 3431, Anthropology, 1000 E. University Ave., Laramie, WY 82071, telephone (307) 766-5136, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Crow Tribe of Montana may proceed after that date if no additional claimants come forward.

The University of Wyoming, Anthropology Department, Human Remains Repository, is responsible for notifying the Crow Tribe of Montana that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5856 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### Notice of Inventory Completion: University of Colorado Museum, Boulder, CO

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The University of Colorado Museum has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes, and has determined that there is no cultural affiliation between the remains and any present-day Indian tribe.

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact the University of Colorado Museum.

Disposition of the human remains and associated funerary objects to the Indian tribe stated below may occur if no additional requestors come forward.

**DATES:** Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains and associated funerary objects should contact the University of Colorado Museum at the address below by April 14, 2011.

**ADDRESSES:** Steve Lekson, Curator of Anthropology, University of Colorado Museum, in care of Jan Bernstein, NAGPRA Consultant, Bernstein & Associates, 1041 Lafayette St., Denver, CO 80218, telephone (303) 894-0648.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the University of Colorado Museum, Boulder, CO. The human remains and associated funerary objects were removed from Catron, Grant, Lea, and Otero Counties, NM.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

#### Consultation

A detailed assessment of the human remains and associated funerary objects was made by University of Colorado Museum professional staff in consultation with representatives of the Fort Sill Apache Tribe of Oklahoma; Hopi Tribe of Arizona; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Pueblo of Acoma, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Zia, New Mexico; San Carlos Apache of the San Carlos Reservation, Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico. There are no objections by the Indian tribes whose aboriginal lands are within Catron, Grant, Lea, and Otero Counties, NM, and all tribes agree to the disposition of the human remains and associated funerary objects to the Pueblo of Acoma, New Mexico.

#### History and Description of the Remains

In 1962, human remains representing a minimum of one individual were removed from Catron County, NM, by an unknown individual. No known individual was identified. No associated funerary objects are present.

The remains of this individual are five teeth. At least one tooth suggests the use of teeth as tools and is consistent with an archeological Native American diet. The remains may have been removed from the Gila National Forest or the Gila Cliff Dwellings National Monument both of which are within Catron County, but due to lack of sufficient evidence, the U.S. Department of Agriculture, Forest Service, deferred NAGPRA compliance responsibility to the University of Colorado Museum.

On an unknown date, human remains representing a minimum of one individual were removed from Silver City, Grant County, NM, by an unknown individual. No known individual was identified. No associated funerary objects are present.

The remains of this individual are two teeth. The morphology of one tooth and the wear of at least one tooth are consistent with an archeological Native American diet. In 1901, the remains were purchased by Jesse H. Sherman, in Silver City, NM. In 1939, the remains were donated to the museum by Mrs. J.H. Sherman.

On an unknown date, human remains representing a minimum of one individual were removed from the Tomas Dominquez Ranch, three quarters of a mile north of Gila, Grant County, NM, by Mrs. Marilyn Moore. No known individual was identified. The three associated funerary objects are a ceramic bowl, a ceramic jar, and one lot of stone flakes.

The ceramic jar contains lightly charred/burned bones, as well as a handful of bone dust, and the stone flakes. The bowl was the lid for the ceramic jar and is decorated with a brown and white geometric design. The remains are Mogollon based on the associated funerary objects. The human remains and associated funerary objects were bequeathed to the museum in January 1974.

On an unknown date, human remains representing a minimum of one individual were removed from 29LE1, Lea County, NM, by an unknown individual. No known individual was identified. The three associated funerary objects are one lot of shell beads, a projectile point, and a possible pendant made of stone or a marine-type of material.

The remains are three teeth. The remains are likely Native American

based on the morphology of one tooth, as well as the associated funerary objects and the archeological context. 29LE1 has been identified as Jornada Mogollon. The human remains and associated funerary objects were found in the museum collection on November 6, 2007, during an inventory/computerization project.

In 1960, human remains representing a minimum of one individual were removed from 29OT3 (Hatchet Site), Tularosa Basin, Otero County, NM, by Eugene McCluney. No known individual was identified. No associated funerary objects are present.

The remains are Native American based on the archeological site context. 29OT3 has been identified as Jornada Mogollon. McCluney excavated the remains as a part of his graduate work at the University of Colorado. The remains were transferred to the museum in 1960.

#### **Determinations Made by the University of Colorado Museum**

Officials of the University of Colorado Museum have determined that:

- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian tribe.

- According to Indian Land Claims Commission decisions, as well as oral tradition, Catron, Grant, Lea, and Otero Counties, NM, are within the aboriginal land of the Fort Sill Apache Tribe of Oklahoma and the Mescalero Apache Tribe of the Mescalero Reservation, New Mexico.

- Based on oral tradition, Catron, Grant, Lea, and Otero Counties, NM, are within the aboriginal land of the Hopi Tribe of Arizona; Pueblo of Acoma, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Zia, New Mexico; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

- Based on oral tradition of the San Carlos Apache of the San Carlos Reservation, Arizona, Catron, Grant, Lea, and Otero Counties, NM, were aboriginal gathering places for them, but these counties are the aboriginal land of the Chiricahua (Fort Sill Apache Tribe of Oklahoma and the Mescalero Apache Tribe of the Mescalero Reservation, New Mexico).

- Pursuant to 25 U.S.C. 3001(9), the human remains described above represent the physical remains of five individuals of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(3)(A), the six objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects is to the Pueblo of Acoma, New Mexico.

#### **Additional Requestors and Disposition**

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects or any other Indian tribe that believes it satisfies the criteria in 43 CFR 10.11(c)(1) should contact Steve Lekson, Curator of Anthropology, University of Colorado Museum, in care of Jan Bernstein, NAGPRA Consultant, Bernstein & Associates, 1041 Lafayette St., Denver, CO 80218, telephone (303) 894-0648, before April 14, 2011. Disposition of the human remains and associated funerary objects to the Pueblo of Acoma, New Mexico, may proceed after that date if no additional claimants come forward.

The University of Colorado Museum is responsible for notifying the Fort Sill Apache Tribe of Oklahoma; Hopi Tribe of Arizona; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Pueblo of Acoma, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Zia, New Mexico; San Carlos Apache of the San Carlos Reservation, Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5853 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## **DEPARTMENT OF THE INTERIOR**

### **National Park Service**

[2253-665]

#### **Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC and Arizona State Museum, University of Arizona, Tucson, AZ**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human

remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ. The human remains and associated funerary objects were removed from sites within the boundaries of the Fort Apache Indian Reservation, Gila and Navajo Counties, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Arizona State Museum professional staff in consultation with representatives of the Hopi Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico (hereinafter referred to as "The Tribes").

In 1979, fragmentary human remains representing a minimum of 18 individuals were removed from the Hilltop Ruin Site, AZ P:14:12(ASM), Navajo County, AZ, during a legally authorized survey conducted by the University of Arizona Archaeological Field School under the direction of Madeleine Hinkes. A report prepared by Hinkes describes the presence of at least 45 unauthorized excavation pits at this site. The human remains were collected from these pits or adjacent backdirt piles. There is no record in Arizona State Museum files regarding the accession of these human remains. However, the collection likely entered the museum in the same year as other collections from the summer field school. No known individuals were identified. No associated funerary objects are present.

The Hilltop Ruin is a pueblo site of 75 to 100 rooms. The ceramic types indicate that the village was occupied during the period A.D. 1300 to 1400. These characteristics are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1979, fragmentary human remains representing a minimum of 106 individuals were removed from the Brush Mountain Pueblo Site, AZ P:14:13(ASM), Navajo County, AZ, during a legally authorized survey conducted by the University of Arizona

Archaeological Field School under the direction of Madeleine Hinkes. A report prepared by Hinkes describes the presence of 65 unauthorized excavation pits at this site. The human remains were collected from these pits.

There is no record in Arizona State Museum files regarding the accession of these human remains. However, the collection likely entered the museum in the same year as other collections from the summer field school. No known individuals were identified. The two associated funerary objects are one ceramic sherd and one turquoise fragment.

The Brush Mountain Pueblo site contains about 150 rooms. The ceramic types indicate that the village was occupied during the period A.D. 1300 to 1400. These characteristics are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

At an unknown date, human remains representing a minimum of eight individuals were removed from the Martinez Ranch Site, AZ P:14:17(ASM), Navajo County, AZ. The site card was filed in the summer of 1965, during the University of Arizona Archaeological Field School, and it is possible that the human remains were removed during this survey of the site. There is no record in Arizona State Museum files regarding the accession of these human remains, although the label on the box in which the human remains were found is dated 1983. No known individuals were identified. No associated funerary objects are present.

The Martinez Ranch Site contains the remains of a building with one to four rooms. Ceramics found on the surface indicate that the site dates to the Puebloan period, approximately A.D. 900 to 1400.

During the years 1976 to 1989, legally authorized excavations were conducted at the site of Chiwodistás, AZ P:14:24(ASM), Navajo County, AZ, by the University of Arizona Archaeological Field School under the direction of J. Jefferson Reid. No human burials were intentionally excavated during this project. Archeological collections from the site were brought to the museum at the end of each field season, but no accession number was assigned to them. In 2009 and 2010, Arizona State Museum staff found fragmentary human remains representing a minimum of 16 individuals intermingled with animal bone collections from this site. The animal bones are not considered to be associated funerary objects. No known individuals were identified. No associated funerary objects are present.

The Chiwodistás site is a small pueblo of about 20 rooms arranged around a plaza. Based on ceramic styles, the site has been dated to the period from A.D. 1263 to 1295. The ceramic and architectural forms are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1979, fragmentary human remains representing a minimum of seven individuals were removed from the Pinnacle Site, AZ P:14:71(ASM), Navajo County, AZ, during a legally authorized survey conducted by the University of Arizona Archaeological Field School under the direction of Madeleine Hinkes. A report prepared by Hinkes describes the presence of five unauthorized excavation pits at this site. The human remains were collected from these pits or elsewhere downslope. There is no record in Arizona State Museum files regarding the accession of these human remains. However, the collection likely entered the museum in the same year as other collections from the summer field school. No known individuals were identified. No associated funerary objects are present.

The Pinnacle Site contains a pueblo of about 10 rooms. It is dated to the period from A.D. 1275 to 1400 on the basis of the ceramic assemblage. The ceramic and architectural forms are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1978, legally authorized excavations were conducted at site AZ P:14:176(ASM), Navajo County, AZ, by the University of Arizona Archaeological Field School under the direction of Brian Byrd. No human burials were intentionally excavated during this project. Archeological collections from the site were brought to the museum at the end of each field season, but no accession number was assigned. In 2009 and 2010, Arizona State Museum staff found fragmentary human remains representing a minimum of two individuals intermingled with animal bone collections from this site. No known individuals were identified. No associated funerary objects are present.

Site AZ P:14:176 is a small pithouse site located in the vicinity of Chiwodistás. Based on the ceramic assemblage and architectural forms, the site has been dated to the early Mogollon period, approximately A.D. 500 to 1000. These characteristics are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1979, fragmentary human remains representing a minimum of 74

individuals were removed from an unnamed site, AZ P:14:281(ASM), Navajo County, AZ, during a legally authorized survey conducted by the University of Arizona Archaeological Field School under the direction of Madeleine Hinkes. A report prepared by Hinkes describes the presence of at least 70 unauthorized excavation pits at this site. The human remains were collected from these pits or adjacent backdirt piles. There is no record in Arizona State Museum files regarding the accession of these human remains. However, the collection likely entered the museum in the same year as other collections from the summer field school. No known individuals were identified. The three associated funerary objects are two modified animal bones and one bone bead.

Site AZ P:14:281 contains a pueblo of about 31 rooms with additional stone alignments. Based on the ceramic assemblage, the site is dated to the period from A.D. 1275 to 1400. The ceramic and the architectural forms are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1929, human remains representing six individuals were removed from Canyon Creek Ruin, AZ C:2:8(GP)/AZ V:2:1(ASM), Gila County, AZ, during legally authorized excavations conducted by the Gila Pueblo Foundation, under the direction of Emil Haury. In 1950, the Gila Pueblo Foundation closed and the collections were transferred to the Arizona State Museum. No known individuals were identified. The 69 associated funerary objects are 1 basketry artifact, 9 pieces of botanical material, 1 piece of cotton roving, 2 cradleboards, 1 gourd bottle, 1 gourd dipper, 2 gourd scoops, 1 hair bundle, 3 ceramic bowls, 1 cotton manta, 1 basketry bowl, 1 basketry mat, 7 basketry mat fragments, 1 basketry tump strap, 1 reed-grass bundle, 2 sandals, 1 wood spindle, 2 cotton spindle sticks, 27 textile fragments, 1 torch, 1 yucca fiber apron, 1 yucca fiber quid, and 1 lot of yucca fiber yarn.

In 1979, human remains representing a minimum of one individual were removed from Canyon Creek Ruin, AZ C:2:8(GP)/AZ V:2:1(ASM), Gila County, AZ, during a legally authorized survey conducted by the University of Arizona Archaeological Field School under the direction of Madeleine Hinkes. The purpose of this project was to survey vandalism at Canyon Creek Ruin and other sites in the vicinity and to recover human remains that had been disturbed by unauthorized excavations. No known individual was identified. No associated funerary objects are present.

Canyon Creek Ruin is a cliff dwelling site of approximately 140 rooms. Based on ceramic and perishable artifact assemblage, the site is dated to A.D. 1300 to 1400. The ceramic and the architectural forms are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1980, a collection survey was conducted at the Hole Canyon Ruin Site, AZ V:2:5(ASM), in Gila County, AZ, under the auspices of the University of Arizona Archaeological Field School under the direction of David Tuggle. No human burials were intentionally excavated during this project.

Archeological collections from the site were brought to the museum at the end of each field season, but no accession number was assigned. In 2007, Arizona State Museum staff found fragmentary human remains representing a minimum of one individual intermingled with the perishable items collections from this site. No known individual was identified. No associated funerary objects are present.

Hole Canyon Ruin is a cliff dwelling with approximately 19 rooms. Based on the ceramic assemblage, the site may be dated to the period A.D. 1300 to 1400. The ceramic and the architectural forms are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

In 1969, human remains representing a minimum of two individuals were removed from site AZ V:2:12(ASM), Gila County, AZ, during legally authorized salvage activities conducted by the University of Arizona Archaeological Field School under the direction of David Tuggle. The site had previously been extensively vandalized, and the objective of the University of Arizona archeologists was to recover human remains that had been disturbed. Archeological collections from the site were brought to the museum at the end of each field season, but no accession number was assigned. No known individuals were identified. No associated funerary objects are present.

Site AZ V:2:12 consists of a small pueblo of about 10 to 20 rooms and is associated with late Puebloan ceramics. On this basis, the site may be dated to A.D. 1275 to 1400. These characteristics are consistent with the archeologically described Upland Mogollon or prehistoric Western Pueblo traditions.

A detailed discussion of the basis for cultural affiliation of archeological sites in the region where the above sites are located may be found in "Cultural Affiliation Assessment of White Mountain Apache Tribal Lands (Fort Apache Indian Reservation)", by John R.

Welch and T.J. Ferguson (2005). To summarize, archeologists have used the terms Upland Mogollon or prehistoric Western Pueblo to define the archeological complexes represented by the 10 sites listed above. Material culture characteristics of these traditions include a temporal progression from earlier pit houses to later masonry pueblos, villages organized in room blocks of contiguous dwellings associated with plazas, rectangular kivas, polished and paint-decorated ceramics, unpainted corrugated ceramics, inhumation burials, cradleboard cranial deformation, grooved stone axes, and bone artifacts. The combination of the material culture attributes and a subsistence pattern, which included hunting and gathering augmented by maize agriculture, helps to identify an earlier group. Archeologists have also remarked that there are strong similarities between this earlier group and present-day tribes included in the Western Pueblo ethnographic group, especially the Hopi Tribe of Arizona and the Zuni Tribe of the Zuni Reservation, New Mexico. The similarities in ceramic traditions, burial practices, architectural forms, and settlement patterns have led archeologists to believe that the prehistoric inhabitants of the Mogollon Rim region migrated north and west to the Hopi mesas, and north and east to the Zuni River Valley. Certain objects found in Upland Mogollon archeological sites have been found to have strong resemblances to ritual paraphernalia that are used in continuing religious practices by the Hopi and Zuni. Some petroglyphs on the Fort Apache Indian Reservation have also persuaded archeologists of continuities between the earlier identified group and current-day Western Pueblo people. Biological information from the site of Grasshopper Pueblo, which is located in close proximity to the ten sites listed above, supports the view that the prehistoric occupants of the Upland Mogollon region had migrated from various locations to the north and west of the region.

Hopi and Zuni oral traditions parallel the archeological evidence for migration. Migration figures prominently in Hopi oral tradition, which refers to the ancient sites, pottery, stone tools, petroglyphs, and other artifacts left behind by the ancestors as "Hopi Footprints." This migration history is complex and detailed, and includes traditions relating specific clans to the Mogollon

region. Hopi cultural advisors have also identified medicinal and culinary plants at archeological sites in the region. Their knowledge about these plants was passed down to them from the ancestors who inhabited these ancient sites. Migration is also an important attribute of Zuni oral tradition, and includes accounts of Zuni ancestors passing through the Upland Mogollon region. The ancient villages mark the routes of these migrations. Zuni cultural advisors remark that the ancient sites were not abandoned. People returned to these places from time to time, either to reoccupy them or for the purpose of religious pilgrimages—a practice that has continued to the present-day. Archeologists have found ceramic evidence at shrines in the Upland Mogollon region that confirms these reports. Zuni cultural advisors have names for plants endemic to the Mogollon region that do not grow on the Zuni Reservation. They also have knowledge about traditional medicinal and ceremonial uses for these resources, which has been passed down to them from their ancestors. Furthermore, Hopi and Zuni cultural advisors have recognized that their ancestors may have been co-resident at some of the sites in this region during their ancestral migrations.

There are differing points of view regarding the possible presence of Apache people in the Upland Mogollon region during the time that these ancient sites were occupied. Some Apache traditions describe interactions with Ancestral Puebloan people during this time, but according to these stories, Puebloan people and Apache people were regarded as having separate identities. The White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, does not claim cultural affiliation with the human remains and associated funerary objects from these 10 ancestral Upland Mogollon sites. As reported by Welch and Ferguson (2005), consultations between the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, and the Navajo Nation, Arizona, New Mexico & Utah; Pueblo of Acoma, New Mexico; and Pueblo of Laguna, New Mexico, have indicated that none of these tribes wish to pursue claims of affiliation with sites on White Mountain Apache Tribal lands. Finally, the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, supports the repatriation of human remains and associated funerary objects from these 10 ancestral Upland Mogollon sites and is ready to assist the Hopi Tribe of Arizona and Zuni Tribe of the Zuni

Reservation, New Mexico, in their reburial on tribal land.

Officials of the Bureau of Indian Affairs and Arizona State Museum have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of 241 individuals of Native American ancestry. Officials of the Bureau of Indian Affairs and Arizona State Museum also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the 74 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Bureau of Indian Affairs and Arizona State Museum have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Hopi Tribe of Arizona and Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626-2950, before April 14, 2011. Repatriation of the human remains and associated funerary objects to the Hopi Tribe of Arizona and Zuni Tribe of the Zuni Reservation, New Mexico, may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying The Tribes that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5888 Filed 3-14-11; 8:45 am]

BILLING CODE 4312-50-P

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Inventory Completion: University of Massachusetts, Department of Anthropology, Amherst, MA and Nantucket Historical Association, Nantucket, MA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act

(NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary object in the possession of the University of Massachusetts, Department of Anthropology, Amherst, MA, and the Nantucket Historical Association, Nantucket, MA. The human remains and associated funerary object were removed from the Marshall Site, Nantucket County, MA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by University of Massachusetts, Department of Anthropology, professional staff in consultation with representatives of the Wampanoag Repatriation Confederation, representing the Mashpee Wampanoag Tribe, Massachusetts; Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts; and the Assonet Band of the Wampanoag Nation, Massachusetts, a non-Federally recognized Indian group.

In 1966, human remains representing a minimum of three individuals were removed from the Marshall Site, Nantucket, Nantucket County, MA, during an archeological field school conducted by Professor William Harrison of the University of Massachusetts. It is believed that the two grave shafts were originally one multiple interment that was disturbed by the repeated digging of shallow fire pits. No known individuals were identified. The one associated funerary object is a pottery vessel. In 1989, the vessel was transferred to the Nantucket Historical Association for permanent curation and is no longer in the control of the University of Massachusetts, Department of Anthropology, instead it is in the control of the Nantucket Historical Association.

Based on excavation records, condition of the human remains, the associated funerary object and burial methods, the individuals have been identified as Native American. Material culture and site features indicate that the Marshall Site was utilized for short-term, sporadic occupations from the late Archaic/early Woodland period into the 19th century. The human remains most likely date to the late Woodland Period or later (post-A.D. 1000).

Ethnohistoric documents, including European colonial maps, missionary accounts and Wampanoag oral history, indicate that the Wampanoag people and their allies, through marriage and war pacts (e.g. 1675 King Phillip's War), were occupants of Massachusetts and Rhode Island at the time of contact and European colonization. Wampanoag oral history indicates a maintained, long-term occupation of the region to which can be traced a common ancestry to a "first Mother," predating the colonization of the area including the Marshall Site. The present-day Indian tribes and group that are most closely affiliated with members of the Wampanoag Nation are the Mashpee Wampanoag Tribe, Massachusetts; Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts; and the Assonet Band of the Wampanoag Nation, Massachusetts, a non-Federally recognized Indian group.

Officials of the University of Massachusetts, Department of Anthropology, have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of three individuals of Native American ancestry. Officials of the University of Massachusetts, Department of Anthropology, and Nantucket Historical Association also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the University of Massachusetts, Department of Anthropology, and Nantucket Historical Association have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the associated funerary object and the Mashpee Wampanoag Tribe, Massachusetts; Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts; and the Assonet Band of the Wampanoag Nation, Massachusetts, a non-Federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact either Robert Poynter, Repatriation Committee Chair, telephone (413) 545-2221, or Rae Gould, Repatriation Coordinator, telephone (413) 545-2702, University of Massachusetts, Department of Anthropology, 201 Machmer Hall, 240 Hicks Way, Amherst, MA 01003, and any representatives of any other Indian tribe that believes itself to be culturally

affiliated with the associated funerary object should contact Ben Simons, Chief Curator, Nantucket Historical Association, P.O. Box 1016, Nantucket, MA 02554, telephone (508) 228-1894, ext. 303, before April 14, 2011.

Repatriation of the human remains and associated funerary object to the Wampanoag Repatriation Confederation on behalf of the Mashpee Wampanoag Tribe, Massachusetts; Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts; and the Assonet Band of the Wampanoag Nation, Massachusetts, a non-Federally recognized Indian group, may proceed after that date if no additional claimants come forward.

The University of Massachusetts, Department of Anthropology, and Nantucket Historical Association are responsible for notifying the Mashpee Wampanoag Tribe, Massachusetts; Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts; and Assonet Band of the Wampanoag Nation, Massachusetts, a non-Federally recognized Indian group, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5887 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Sequoia National Forest, Porterville, CA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession and control of the U.S. Department of Agriculture, Forest Service, Sequoia National Forest, Porterville, CA. The human remains and associated funerary objects were removed from Kern County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and

associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Sequoia National Forest professional staff in consultation with representatives of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), and the Tule River Indian Tribe of the Tule River Reservation, California.

In 1948, human remains representing a minimum of three individuals were removed from CA-KER-14, in Kern County, CA, by two archeologists conducting river basin surveys for the Smithsonian Institute. The two sets of human remains and a single tooth from a third individual and their associated artifacts were transferred to the Phoebe Hearst Museum of Anthropology, University of California at Berkeley, Berkeley, CA, for research and storage. While conducting NAGPRA inventories for the Sequoia National Forest, it was discovered that the CA-KER-14 collection was still in storage at the Phoebe Hearst Museum and it was subsequently transferred to the Sequoia National Forest. Examination of the remains by Phoebe Hearst Museum staff indicated that one set of human remains was from an adult male between 35 and 50 years of age. The second set of human remains was from a female between 21 and 25 years of age. The single tooth from a third individual was of indeterminate age and sex. No known individuals were identified. The 23 associated funerary objects are 4 obsidian points, 1 olivella shell bead, 1 lot of abalone shell fragments, 1 scraper manufactured from a historic brown glass whiskey bottle, 1 bone sewing awl (non-human bone), 1 scapula bone tool scraper (non-human bone), 4 obsidian scrapers, 1 quartzite scraper, 1 green chert point, 2 pottery sherds, 1 steatite bead, 1 chopper, 1 thin chalcedony knife base with hafting adhesive attached, 1 large obsidian bifacial knife, 1 steatite bowl fragment, and 1 large grinding metate.

The presence of a flaked scraper made from a historic brown whiskey bottle would suggest a proto-historic or historic age for the remains. Tubatulabal occupation for this time frame in the vicinity of CA-KER-14 is well documented through tribal oral tradition and formal ethnographic study.

Ethnographic data places the CA-KER-14 site close to the village hamlets of the Tubatulabal (Voegelin 1938). The habitation sites of the Tubatulabal once spanned the drainage area of the Kern and South Fork Kern rivers from near Mount Whitney to just below the

junction of the two rivers in Kern County, CA. Three discrete bands, the Pahkanapil (living along the South Fork Kern riverbanks), the Palagewan (situated in the Kern River valley) and the Bankalachi (living a few miles west of the Palagewan in Yokut territory) compose the Tubatulabal (Smith 1978). Burial customs based on ethnographic data illustrated that the dead were buried in shallow graves approximately  $\frac{1}{8}$  mile from the living quarters on rocky hillsides under shelving rocks (Voegelin 1938). Geographic proximity of CA-KER-14 to the various village hamlets noted in Voegelin's work, and the archeological evidence that this burial site was located in a rock shelter and close to another extensively used site, indicates the strong possibility of a settlement correlation.

Historical documentation, based on early European travel accounts, tell of contact between the Tubatulabal and Francisco Garces when Garces journeyed to the lower reaches of the Kern Valley in 1776 (Smith 1978). Contacts with the Euro-Americans expanded in the form of trading trips when the native people would travel to the coast to trade with the coastal tribes and came into contact with the Spaniards at the missions. Between 1850 and 1858, white settlers moved into the Kern Valley to seek gold and established mining camps and towns, and when the gold rush ended, ranching became the next wave of economic development. With the intrusion into the Tubatulabal territory by white settlers, some of the Pahkanapil moved from the Hot Springs Valley to the eastern end of the South Fork Kern Valley (Smith 1978). In 1863, a group of about 40 Tubatulabal men were massacred by American soldiers following white ranchers' complaints that their cows were being stolen by the local tribe (Smith 1978). By 1875, most of the Tubatulabal men worked for white ranchers, and by 1893, the surviving Palagewan and Pahkanapil bands were allotted land in the Kern and South Fork Kern Valleys (Theodoratus 2009). From 1900 to 1972, many Tubatulabal moved to adjacent tribes. Adjacent tribes with cultural affiliation to these remains include the Tule River Indian Reservation (established in 1873), north of the Kern Valley region; the Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony (Bishop Tribe), east of the Kern Valley Region; and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), west of the Kern Valley (Smith 1978).

Ethnohistorical and official documents link the inhabitants of the Kern and South Fork Kern river drainages to the Tule River Indian Reservation; Tachi Yokut Tribe and the Bishop Tribe. Based on the intrusion of white settlers in the valley of the Kern River, which brought diseases and loss of native cultures, many Tubatulabal left their land and sought refuge with the other native groups, such as the Yokuts at the Tule River Indian Reservation and Tachi Tribe, as well as the Paiute of the Bishop Tribe. It can be reasonably concluded that the Tubatulabal intermarried with the Yokut and Paiute in the Kern County region. Descendants of these Yokuts and Paiutes are members of the Federally-recognized Tule River Indian Tribe of the Tule River Indian Reservation, California; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; and Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe). Finally, representatives of all three tribes provided documentation including oral tradition that supported cultural affiliation.

Officials of the Sequoia National Forest have determined, pursuant to 25 U.S.C. 3001(9), that the human remains described above represent the physical remains of three individuals of Native American ancestry. Officials of the Sequoia National Forest also have determined, pursuant to 25 U.S.C. 3001(3)(A), that the 23 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Sequoia National Forest also have determined, pursuant to 25 U.S.C. 3001(2), that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Tule River Indian Tribe of the Tule River Reservation, California; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe).

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Karen Miller, Forest Archeologist, Sequoia National Forest, 1839 South Newcomb St., Porterville, CA 93257, telephone (559) 784-1500, before April 14, 2011. Repatriation of the human remains and associated

funerary objects to the Tule River Indian Tribe of the Tule River Reservation, California; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe), may proceed after that date if no additional claimants come forward.

The Sequoia National Forest is responsible for notifying the Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe); and the Tule River Indian Tribe of the Tule River Reservation, California, that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011-5878 Filed 3-14-11; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[2253-665]

#### **Notice of Inventory Completion: Office of the State Archaeologist, Michigan Historical Center, Lansing, MI**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The Office of the State Archaeologist, Michigan Historical Center has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes, and has determined that there is no cultural affiliation between the remains and associated funerary objects and any present-day Indian Tribe. Representatives of any Indian Tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact the Office of the State Archaeologist, Michigan Historical Center. Disposition of the human remains to the Indian Tribe stated below may occur if no additional requestors come forward.

**DATES:** Representatives of any Indian Tribe that believes it has a cultural affiliation with the human remains and/or associated funerary objects should contact the Office of the State Archaeologist, Michigan Historical Center at the address below by April 14, 2011.

**ADDRESSES:** Scott M. Grammer, Michigan State Historic Preservation

Office, P.O. Box 30740, 702 W. Kalamazoo St., Lansing, MI 48909-8240, telephone (517) 373-4765.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Office of the State Archaeologist, Michigan Historical Center, Lansing, MI. The human remains and associated funerary objects were removed from Fayette Historic State Park (20DE19), Delta County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

### Consultation

A detailed assessment of the human remains was made by the Office of the State Archaeologist professional staff in consultation with representatives of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Bois Forte Band (Nett Lake) of the Minnesota Chippewa Tribe, Minnesota; Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana; Fond du Lac Band of the Minnesota Chippewa Tribe, Minnesota; Grand Portage Band of the Minnesota Chippewa Tribe, Minnesota; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians, Michigan; Leech Lake Band of the Minnesota Chippewa Tribe, Minnesota; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Menominee Indian Tribe of Wisconsin; Mille Lacs Band of the Minnesota Chippewa Tribe, Minnesota; Minnesota Chippewa Tribe, Minnesota; Ottawa Tribe of Oklahoma; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; St. Croix Chippewa Indians

of Wisconsin; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians of Michigan; Sokaogon Chippewa Community, Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and White Earth Band of the Minnesota Chippewa Tribe, Minnesota (hereinafter referred to as "The Tribes").

On October 21, 2010, the Office of the State Archaeologist received a letter from the Sault Ste. Marie Tribe of Chippewa Indians requesting disposition of the human remains and associated funerary objects from Fayette Historic State Park. However, the associated funerary objects are not part of this disposition. The Little Traverse Bay Bands of Odawa Indians expressed interest in the remains, but had no objections to the disposition to the Sault Ste. Marie Tribe of Chippewa Indians and did not submit a request for disposition. No objections or other disposition requests from the Indian Tribes that have Delta County, MI, as their aboriginal land have been received.

#### History and Description of the Remains

In 1972, human remains representing a minimum of seven individuals were removed from Fayette State Historic Park, in Delta County, MI, by Dr. Marla Buckmaster, an archeologist at Northern Michigan University, in cooperation with State park officials. In 1993, Dr. Buckmaster transferred the remains and entire assemblage, except for some potsherds, to the Office of the State Archaeologist, which manages cultural resources on State-owned lands. No known individuals were identified. No associated funerary objects are being transferred.

Prior to 1972, a cranium at the base of a cliff found by a visitor to the Fayette State Historic Park was sent to the University of Michigan; this cranium is not part of the Office of the State Archaeologist's collection. Later, park officials determined that human remains were eroding out of a small cave in the cliff, about 20 feet above the shoreline of Snailshell Harbor. Dr. Buckmaster found that the human remains were incomplete secondary burials covered with a layer of rocks. The mandibles were lying together in a niche at the back of the shallow cave. It is likely that part of the cave and some of the human remains were destroyed either by erosion or by quarrying that took place on the cliff in the 19th century. The use of caves for burial was a practice of Native Americans in the Upper Peninsula of Michigan for at least 2,000 years. A Middle Woodland camp is located across the harbor from the

burial cave at Fayette State Historic Park. The types of funerary objects found in the cave are consistent with the Middle Woodland period (circa 100 B.C. to circa 400 A.D.). In 1994, David Barondess, physical anthropologist at Michigan State University, examined the remains and found that some of the teeth were shovel-shaped incisors.

In 1986, human remains representing a minimum of one individual were removed from Fayette State Historic Park, in Delta County, MI. The remains were limited to a few fragments that were unearthed while archeologists from the Office of the State Archaeologist were looking for the former porch foundations on the mid-19th century Supervisor's House, a historic building in the park. In 2001, one additional bone was found while working on the foundation of House 3, another historic structure close to the Supervisor's House. It is uncertain if these remains are from the same individual, but the single additional bone may be associated with the 1986 fragments based on its proximity to them. Therefore, the park believes that the 1986 fragments and 2001 bone belong to one individual. No known individual was identified. No associated funerary objects are present.

The earliest known Euro-American settlement in this location dates to the mid-19th century. The bones were included in soil that had been disturbed when the foundation of the Supervisor's House was built in the 1860s. This suggests that house construction had damaged all or part of an older grave. The condition of the bones suggested great age. A Middle Woodland camp was located on this side of the park, and Middle Woodland burials were found in a cave across the harbor. It seems likely that the human remains around the two houses date to the same period, and, therefore, are Native American. At the time the human remains were removed, the land was the property of the State of Michigan.

#### Determinations Made by the Office of the State Archaeologist

Officials of the Office of the State Archaeologist have determined that:

- For the human remains removed in 1972, the burial practices, types of funerary objects, and the shovel-shaped incisors are all indicative of Native American remains. For the human remains removed in 1986 and 2001, based on the manner of disturbance, age of the remains, proximity and location, the remains are believed to represent one Native American individual.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity

cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.

- At the time the remains were removed, the sites were on State-owned land within the aboriginal territory of The Tribes, as indicated by 19th-century treaties (see "Present-Day Tribes Associated with Indian Land Cessions 1784–1894" database on the National Park Service's National NAGPRA Program Web site.)

- Pursuant to 25 U.S.C. 3001(9), the human remains described above represent the physical remains of a minimum of eight individuals of Native American ancestry.

- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains is to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan.

#### Additional Requestors and Disposition

Representatives of any Indian Tribe that believes itself to be culturally affiliated with the human remains and/or associated funerary objects, or any other Indian Tribe that believes it satisfies the criteria in 43 CFR 10.11(c)(1) should contact the Office of the State Archaeologist's representative, Scott M. Grammer, Michigan State Historic Preservation Office, P.O. Box 30740, 702 W. Kalamazoo St., Lansing, MI 48909–8240, telephone (517) 373–4765, before April 14, 2011. Disposition of the human remains to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan may proceed after that date if no additional requestors come forward.

The Office of the State Archaeologist is responsible for notifying The Tribes that this notice has been published.

Dated: March 9, 2011.

**Sherry Hutt,**

*Manager, National NAGPRA Program.*

[FR Doc. 2011–5866 Filed 3–14–11; 8:45 am]

**BILLING CODE 4312–50–P**

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#### INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–722]

**In the Matter of Certain Automotive Vehicles and Designs Therefore; Notice of Commission Issuance of Limited Exclusion Order and Cease and Desist Orders Against Infringing Products of Respondents Found in Default; Termination of Investigation**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

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**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has terminated the above-captioned investigation under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and has issued the following remedial orders against respondents previously found in default: a cease and desist order against infringing products of Vehicles Online, Inc. ("Vehicles") of Charlotte, North Carolina, and a limited exclusion order and a cease and desist order against infringing products of Shanghai Tandem Industrial Co., Ltd. ("Shanghai Tandem") of China.

**FOR FURTHER INFORMATION CONTACT:** Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on June 17, 2010, based on a complaint filed by Chrysler Group LLC ("Chrysler") of Auburn Hills, Michigan. 75 FR 34483-84 (June 17, 2010). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain automotive vehicles and designs therefor by reason of infringement of U.S. Patent No. D513,395 ("the '395 patent"). The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named several respondents including Vehicles, Boat N RV Supercenter ("Boat N RV") of Rockwood, Tennessee, and Shanghai Tandem.

On July 7, 2010, Chrysler moved, pursuant to 19 CFR 210.16, for: (1) An order directing respondents Vehicles and Boat N RV to show cause why they

should not be found in default for failure to respond to the complaint and notice of investigation as required by 19 CFR 210.13, and (2) the issuance of an initial determination ("ID") finding Vehicles and Boat N RV in default upon their failure to show cause. On July 19, 2010, the ALJ issued Order No. 8, which required Vehicles and Boat N RV to show cause no later than August 2, 2010, as to why they should not be held in default and judgment rendered against them pursuant to § 210.16. Boat N RV responded to Order No. 8, but no response was received from Vehicles.

The presiding administrative law judge ("ALJ") issued an ID on August 11, 2010, finding Vehicles in default, pursuant to §§ 210.13 and 210.16, because Vehicles did not respond to the complaint and notice of investigation or to Order No. 8's instruction to show cause. On September 9, 2010, the Commission issued notice of its determination not to review the ALJ's ID finding Vehicles in default.

On August 19, 2010, Chrysler moved, pursuant to § 210.16, for: (1) An order directing respondent Shanghai Tandem to show cause why it should not be found in default for failure to respond to the complaint and notice of investigation as required by § 210.13, and (2) the issuance of an ID finding Shanghai Tandem in default upon its failure to show cause. On August 31, 2010, the ALJ issued Order No. 12, which required Shanghai Tandem to show cause no later than September 14, 2010, as to why it should not be held in default and judgment rendered against it pursuant to § 210.16.

The ALJ issued an ID on September 22, 2010, finding Shanghai Tandem in default, pursuant to §§ 210.13 and 210.16, because Shanghai Tandem did not respond to the complaint and notice of investigation or to Order No. 12's instruction to show cause. On October 14, 2010, the Commission issued notice of its determination not to review the ALJ's ID finding Shanghai Tandem in default.

On October 29, 2010, complainant Chrysler filed declarations requesting immediate relief against the defaulting respondents. On November 15, 2010, the Commission determined not to review an ID (Order No. 17) terminating the last remaining respondents, including Boat N RV, on the basis of a consent order. On November 29, 2010, the Commission issued a Notice that requested briefing from interested parties on remedy, the public interest, and bonding with respect to respondents found in default. 75 FR 75184-85 (Dec. 2, 2010).

Chrysler and the Commission investigative attorney submitted briefing responsive to the Commission's request on December 6 and 14, 2010, respectively. Each proposed a cease and desist order directed to Vehicles' infringing products, and a limited exclusion order and a cease and desist order directed to Shanghai Tandem's infringing products. Neither party requested bonding during the period of Presidential review.

The Commission found that the statutory requirements of section 337(g)(1)(A)-(E) (19 U.S.C. 1337(g)(1)(A)-(E)) were met with respect to the defaulting respondents. Accordingly, pursuant to section 337(g)(1) (19 U.S.C. 1337(g)(1)) and Commission rule 210.16(c) (19 CFR 210.16(c)), the Commission presumed the facts alleged in the complaint to be true. The Commission has determined that the appropriate form of relief is the following: (1) Cease and desist orders prohibiting Vehicles and Shanghai Tandem from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for automotive vehicles and designs therefor that infringe the '395 patent; and (2) a limited exclusion order prohibiting the unlicensed entry of automotive vehicles and designs therefore that infringe the '395 patent, which are manufactured abroad by or on behalf of, or are imported by or on behalf of, Shanghai Tandem, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or its successors or assigns.

The Commission has further determined that the public interest factors enumerated in section 337(g)(1) (19 U.S.C. 1337(g)(1)) do not preclude issuance of the limited exclusion order or the cease and desist orders. Finally, the Commission has determined that no bond is required during the period of Presidential review (19 U.S.C. 1337(j)). The Commission's orders were delivered to the President and to the United States Trade Representative on the day of their issuance.

The Commission has terminated this investigation. The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.16(c) and 210.41 of the Commission's Rules of Practice and Procedure (19 CFR 210.16(c) and 210.41).

By order of the Commission.

Issued: March 10, 2011.  
**William R. Bishop,**  
*Hearings and Meetings Coordinator.*  
 [FR Doc. 2011-5999 Filed 3-14-11; 8:45 am]  
**BILLING CODE 7020-02-P**

**DEPARTMENT OF JUSTICE**

**National Institute of Justice**

**Office of Justice Programs**

[OMB Number 1121-NEW]

**Agency Information Collection  
 Activities: Proposed Collection;  
 Comments Requested**

**ACTION:** 60-Day Notice of Information Collection Under Review: Teen Dating Relationships: Opportunities for Youth To Define What's Healthy and Unhealthy.

The Department of Justice (DOJ), National Institute of Justice (NIJ) and Office of Justice Programs (OJP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until May 16, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Carrie Mulford, National Institute of Justice, 810 7th Street NW., Washington, DC 20531.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira\_submission@omb.eop.gov* or fax them to 202-395-7285. All comments should reference the 8 digit OMB number for the collection or the title of

the collection. If you have questions concerning the collection, please call Carrie Mulford at 202-307-2959 or the DOJ Desk Officer at 202-395-3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Teen Dating Relationships: Opportunities for Youth To Define What's Healthy and Unhealthy.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 3312.1 and ATF F 3312.2. National Institute of Justice, Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Youth, ages 11-22 and adult practitioners, advocates and researchers in professions related to youth and youth relationships. A recent review of the teen dating violence research indicated that youth are rarely involved in research designed to better understand this issue. The purpose of this data collection is to better

understand how youth conceptualize healthy and unhealthy dating relationships by intentionally involving youth in the research process. In the first phase of the study, concept mapping will be used to create a visual representation of the ways youth and adults perceive teen dating relationships. Concept mapping is a well-documented method of applied research that makes explicit, implicit theoretical models that can be used for planning and action. The process requires respondents to brainstorm a set of statements relevant to the topic of interest ("brainstorming" task), individually sort these statements into piles based on perceived similarity ("sorting" task), rate each statement on one or more scales ("rating" task), and interpret the graphical representation that result from several multivariate analyses. The collection of data for all concept mapping activities will be facilitated via a dedicated project Web site. The second phase of the study includes a series of eight face-to-face facilitated discussions with relevant stakeholder groups, practitioners, researchers and youth. Guiding questions and discussion prompts, derived from the concept mapping results, will be used to gather information from the respondents on the meaning and potential use of the concept mapping results. This input will be aggregated and linked to the emerging conceptual framework that will result in a better understanding of adolescent relationship features, including the range of healthy, unhealthy, and abusive characteristics, from the standpoint of youth, and determine how prevention and intervention efforts can effectively target relationship characteristics related to abusive behavior.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 400 respondents total will participate in the concept mapping phase of this collection, and that 80 respondents total will participate in the facilitated discussions. The table below shows the estimated number of respondents for each portion of the collection:

Task	Preteens (11-13)	Teens (14-18)	Young adults (19-22)	Adults	Total task target
<b>Concept Mapping Participation Targets</b>					
Brainstorming .....	50	100	100	150	400
Sorting .....	0	25	25	50	100
Rating .....	0	125	125	150	400

Task	Preteens (11–13)	Teens (14–18)	Young adults (19–22)	Adults	Total task target
<b>Total group target</b> .....					<b>400</b>
Suggested location	Preteens (11–13)	Teens (14–18)	Young adults (19–22)	Adults	Total regional target
<b>Facilitated Discussion Participation Targets</b>					
Washington, DC .....	0	10	10	20	40
Atlanta .....	0	10	10	20	40
Chicago or Kansas City .....	0	10	10	20	40
San Francisco .....	0	10	10	20	40
<b>Total group target</b> .....	<b>0</b>	<b>40</b>	<b>40</b>	<b>80</b>	<b>160</b>

The brainstorming task will take respondents 5–10 minutes to complete. The sorting task will take respondents approximately 30–60 minutes to complete. The rating task will take respondents approximately 30 minutes to complete. None of these tasks will require participants to complete in one sitting; rather, participants can return to work on task completion as often as they chose, until the task deadline. Respondents will have approximately 4 weeks to brainstorm and approximately 6 weeks to sort and rate. Facilitated discussions will require approximately 4 hours of respondents' time.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 686 annual total public burden hours associated with this collection.

*If additional information is required contact:* Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution Square, ON, 145 N Street, Suite 808, NE., Washington, DC 20530.

Dated: March 9, 2011.

**Lynn Murray,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2011–5964 Filed 3–14–11; 8:45 am]

**BILLING CODE 4410–18–P**

**DEPARTMENT OF JUSTICE**

**Office of Justice Programs**

[OMB Number 1121–0102]

**Agency Information Collection**

**Activities: Existing Collection; Comments Requested**

**ACTION:** 60-Day Notice of Information Collection Under Review: Extension and revision of existing collection; Prison Population Reports: Summary of Sentenced Population Movement—National Prisoner Statistics.

The Department of Justice (DOJ), Office of Justice Programs, will be submitting the following information collection to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for “sixty days” until May 16, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially regarding the estimated public burden and associated response time, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Paul Guerino by e-mail at [paul.guerino@usdoj.gov](mailto:paul.guerino@usdoj.gov) or at (202) 307–0349.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov) or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Paul Guerino at 202–307–0349 or the DOJ Desk Officer at 202–395–3176.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the

collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection:* Extension and minor revision currently approved collection.

(2) *Title of the Form/Collection:* Summary of Sentenced Population Movement—National Prisoner Statistics.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form number: NPS–1B. Office of Justice Programs, U.S. Department of Justice.

(4) *Affected public who will be asked to respond, as well as a brief abstract:* For the NPS–1B form, 51 central reporters (one from each and the Federal Bureau of Prisons) responsible for keeping records on inmates will be asked to provide information for the following categories:

(a) As of December 31, the number of male and female inmates within their custody and under their jurisdiction with maximum sentences of more than one year, one year or less; and unsentenced inmates;

(b) The number of inmates housed in privately operated facilities, county or other local authority correctional facilities, or in other state or Federal facilities on December 31;

(c) *Prison admission information in the calendar year for the following categories:* New court commitments,

parole violators, other conditional release violators returned, transfers from other jurisdictions, AWOLs and escapees returned, and returns from appeal and bond;

(d) *Prison release information in the calendar year for the following categories:* Expirations of sentence, commutations, other conditional releases, probations, supervised mandatory releases, paroles, other conditional releases, deaths by cause, AWOLs, escapes, transfers to other jurisdictions, and releases to appeal or bond;

(e) Number of inmates under jurisdiction on December 31 by race and Hispanic origin;

(f) Number of inmates in custody classified as non-citizens and/or under 18 years of age;

(g) Testing of incoming inmates for HIV; and HIV infection and AIDS cases on December 31; and

(h) The aggregate rated, operational, and design capacities, by sex, of each State's correctional facilities at year-end.

The Bureau of Justice Statistics uses this information in published reports and for the U.S. Congress, Executive Office of the President, practitioners, researchers, students, the media, and others interested in criminal justice statistics.

5) *An estimate of the total number of respondents and the amount of time needed for an average respondent to respond to both forms:* 51 respondents each taking an average 6.5 total hours to respond to the NPS-1B. Burden hours are down by 76 hours since the last clearance because we are eliminating the NPS-1A midyear counts to reduce redundancy. We plan to establish a series of rotating short forms to replace the NPS-1A which will collect data on special topics, such as mental health, medical problems, and reentry, but these forms are in the working stages. A supplemental approval and burden adjustment will be sought through OMB when the materials are ready for review.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 332 annual burden hours.

*If additional information is required contact:* Mrs. Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E-808, Washington, DC 20530.

Dated: March 9, 2011.

**Lynn Murray,**

*Department Clearance Officer, PRA,  
Department of Justice.*

[FR Doc. 2011-5966 Filed 3-14-11; 8:45 am]

**BILLING CODE 4410-18-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. L-11641]

#### Notice of Proposed Amendment to Prohibited Transaction Exemption (PTE) 2010-08 Involving Ford Motor Company, Located in Detroit, MI

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of proposed amendment.

This document contains a notice of pendency (the Notice) before the Department of Labor (the Department) of a proposed amendment to PTE 2010-08 (75 FR 14192, March 24, 2010), an individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act or ERISA). The transactions involve the UAW Ford Retirees Medical Benefits Plan (the Ford VEBA Plan) and its funding vehicle, the UAW Retiree Medical Benefits Trust (the VEBA Trust), (collectively the VEBA).<sup>1</sup> The proposed amendment, if granted, would affect the VEBA, and its participants and beneficiaries.

**DATES: Effective Date:** If granted, this proposed amendment will be effective as of December 31, 2009, except with respect to Section I(a)(7), which will be effective as of June 25, 2010.

**DATES:** Written comments and requests for a public hearing on the proposed amendment should be submitted to the Department within 51 days from the date of publication of this **Federal Register** Notice.

**ADDRESSES:** All written comments and requests for a public hearing concerning the proposed amendment should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210, *Attention:* Application No. L-11641. Interested persons are also invited to submit comments and/or

<sup>1</sup> Because the Ford VEBA Plan is not qualified under section 401 of the Code, there is no jurisdiction under Title II of the Act pursuant to section 4975 of the Code. However, there is jurisdiction under Title I of the Act.

hearing requests to the Department by facsimile to (202) 219-0204 or by electronic mail to *Blinder.Warren@dol.gov* by the end of the scheduled comment period. The application pertaining to the proposed amendment and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210. Comments and hearing requests will also be available online at <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, at no charge.

*Warning:* If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

**FOR FURTHER INFORMATION CONTACT:** Mr. Warren Blinder, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8553. (This is not a toll-free number.)

#### SUPPLEMENTARY INFORMATION: <sup>2</sup>

This document contains a notice of proposed exemption that, if granted, would amend PTE 2010-08, which relates to the Ford VEBA Plan and the VEBA Trust. Specifically, PTE 2010-08, which is effective as of December 31, 2009, provides exemptive relief from the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2) and 407(a) of ERISA for (a) the acquisition by the Ford VEBA Plan and the VEBA Trust of the Securities,<sup>3</sup> transferred by Ford and deposited in the Ford Employer Security Sub-Account of the Ford

<sup>2</sup> The Notice incorporates by reference information contained in the Notice of Proposed Individual Exemption Involving Ford Motor Company Located in Detroit, MI, 74 FR 64716, December 8, 2009 (the Proposed PTE) and PTE 2010-08. For ease of reference, unless otherwise specified herein, all capitalized terms used in this Summary have the meaning set forth in PTE 2010-08.

<sup>3</sup> The term "Securities" includes New Note A and New Note B, the Warrants, the LLC Interests, any Payment Shares received under New Note B, and any additional shares of Ford Common Stock acquired in accordance with other transactions described in Sections I(a)(2) and (3) of the proposed exemption, as such terms are defined in Section VII of the proposed exemption.

Separate Retiree Account of the VEBA Trust; (b) the acquisition by the Ford VEBA Plan of Payment Shares; (c) the acquisition by the Ford VEBA Plan of shares of Ford Common Stock pursuant to (i) the Independent Fiduciary's exercise of all or a pro rata portion of the Warrants, and (ii) an adjustment, substitution, conversion, or other modification of Ford Common Stock in connection with a reorganization, restructuring, recapitalization, merger, or similar corporate transaction, provided that each holder of Ford Common Stock is treated in an identical manner; (d) the holding by the Ford VEBA Plan of the Securities in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust; (e) the deferred payment of any amounts due under New Note B by Ford pursuant to the terms thereunder; and (f) the disposition of the Securities by the Independent Fiduciary.

In addition, PTE 2010–08 provides relief from the restrictions of sections 406(a)(1)(A), 406(b)(1), and 406(b)(2) of ERISA for the sale of Ford Common Stock or Warrants held by the Ford VEBA Plan to Ford in accordance with the Right of First Offer or a Ford self-tender under the Securityholder and Registration Rights Agreement.

Furthermore, PTE 2010–08 provides relief from the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA, for (a) the extension of credit or transfer of assets by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan in payment of a benefit claim that was the responsibility and legal obligation of one of the other aforementioned parties; (b) the reimbursement by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan, of a benefit claim that was paid by another of the aforementioned parties, which was not legally responsible for the payment of such claim, plus interest; (c) the retention of an amount by Ford until payment to the Ford VEBA Plan resulting from an overaccrual of pre-transfer expenses attributable to the TAA or the retention of an amount by the Ford VEBA Plan until payment to Ford resulting from an underaccrual of pre-transfer expense attributable to the TAA; and (d) the Ford VEBA Plan's payment to Ford of an amount equal to any underaccrual by Ford of pre-transfer expenses attributable to the TAA or the payment by Ford to the Ford VEBA Plan of an amount equal to any overaccrual by Ford of pre-transfer expenses attributable to the TAA.

Finally, PTE 2010–08 provides relief from the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA for the return to Ford of assets deposited or transferred to the Ford VEBA Plan by mistake, plus interest.

## Summary of Facts and Representations <sup>4</sup>

### 1. Background

The Department originally granted PTE 2010–08 in response to an application for exemption submitted by Ford on July 24, 2009 (the Application). The Application was an integral part of the wholesale restructuring of retiree health care benefits by the three major domestic car companies, which sought to contain skyrocketing healthcare costs and settle lawsuits brought by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the UAW) and the companies' respective classes of retirees.<sup>5</sup>

Pursuant to a court approved class wide settlement (the 2008 Settlement Agreement) in the case of *Int'l Union, UAW, et al. v. Ford Motor Company*, on January 1, 2010, the Ford VEBA Plan assumed the responsibility for providing post-retirement medical benefits for a class of retirees of Ford (the Class) and a group of Ford active employees (the Covered Group) eligible for retiree benefits.<sup>6</sup> Pursuant to the 2008 Settlement Agreement, the Ford VEBA Plan would be funded by the VEBA Trust, which would be responsible for the payment of post-retirement medical benefits to members of the Class and the Covered Group as of January 1, 2010.<sup>7</sup> Ford agreed to transfer assets to the VEBA Trust on behalf of the Ford VEBA Plan with an estimated worth of \$13.2 billion, based on a present value as of December 31, 2007, designed to provide retiree health benefits for members of the Class and the Covered Group for an indefinite duration.<sup>8</sup>

On July 23, 2009, Ford, the UAW, and counsel for the Class amended the 2008 Settlement Agreement, effective

<sup>4</sup> The Summary of Facts and Representations (the Summary) is based on the Applicant's representations and does not reflect the views of the Department.

<sup>5</sup> See *UAW v. Ford Motor Company*, No. 07–14845, 2008 WL 4104329 (E.D. Mich. August 29, 2008); *UAW v. Gen. Motors Corp.*, No. 07–CV–14074–DT, 2008 WL 2968408 (E.D. Mich. July 31, 2008); *UAW v. Chrysler*, No. 07–CV–14310, 2008 WL 2980046 (E.D. Mich. July 31, 2008).

<sup>6</sup> See *Ford Motor Co.*, 2008 WL 4104329.

<sup>7</sup> For a full description of the VEBA Trust, see pages 64718–64719 of the Proposed PTE.

<sup>8</sup> See *Ford Motor Co.*, 2008 WL 4104329.

November 9, 2009 (as amended, the 2009 Settlement Agreement), to provide that, *inter alia*, Ford could contribute Ford Common Stock to the VEBA Trust to satisfy up to approximately 50% of certain future obligations to the VEBA Trust on behalf of the Ford VEBA Plan.<sup>9</sup> In accordance with the terms of the 2009 Settlement Agreement, on December 31, 2009, Ford transferred the Securities to the Ford Employer Security Sub-Account, the sub-account established and maintained in the Ford Separate Retiree Account of the VEBA Trust to hold Securities on behalf of the Ford VEBA Plan and any proceeds from the disposition of any such Security.<sup>10</sup>

### 2. The New Notes

Among the Securities transferred to the VEBA Trust and held in the Ford Employer Security Sub-Account were the New Notes, consisting of New Note A and New Note B, which were structured to provide a series of payments over 13 years. New Note A was issued in the principal amount of \$6,705,470,000, and New Note B was issued in the principal amount of \$6,511,850,000. The New Notes were to be non-interest bearing and mature on June 30, 2022.<sup>11</sup>

Whereas New Note A was payable only in cash, under the 2009 Settlement Agreement, New Note B was to be payable in either cash or, upon the satisfaction of certain conditions, shares of Ford Common Stock designated as "Payment Shares" of equal value. The number of Payment Shares payable would be determined based on the volume-weighted average selling price per share (VWAP) of Ford Common Stock for the 30 trading-day period ending on the second business day prior to the relevant payment date. In addition, Payment Shares received by the VEBA Trust in lieu of cash pursuant to New Note B would be subject to certain registration rights and transfer restrictions, as described in the Proposed PTE.

<sup>9</sup> See *Int'l Union, UAW, et al. v. Ford Motor Company*, Civil Action No. 07–14845, (E.D. Mich. November 9, 2009) (Doc. # 71, Order and Final J.).

<sup>10</sup> For a full description of the assets transferred to the VEBA Trust under the 2009 Settlement Agreement, see pages 64720–64721 of the Proposed PTE and pages 14195–14197, 14199, and 14200–14201 of PTE 2010–08.

<sup>11</sup> For a full description of the New Notes, see pages 64721–64722 of the Proposed PTE and pages 14195–14196 of PTE 2010–08.

Ford made its first scheduled payments in respect of the New Notes on December 31, 2009, including a

partial prepayment of New Note A in the amount of \$500,000,000.<sup>12</sup> After Ford made such payments, the payment

schedule under the New Notes, beginning with the June 30, 2010 payment date, became the following:

Payment date	Payment of Note A	Payment of Note B
June 30, 2010 .....	\$249.45 million .....	\$609.95 million.
June 30, 2011 .....	\$249.45 million .....	\$609.95 million.
June 30, 2012 .....	\$584.06 million .....	\$654 million.
June 30, 2013 .....	\$584.06 million .....	\$654 million.
June 30, 2014 .....	\$584.06 million .....	\$654 million.
June 30, 2015 .....	\$584.06 million .....	\$654 million.
June 30, 2016 .....	\$584.06 million .....	\$654 million.
June 30, 2017 .....	\$584.06 million .....	\$654 million.
June 30, 2018 .....	\$584.06 million .....	\$654 million.
June 30, 2019 .....	\$22.36 million .....	\$26 million.
June 30, 2020 .....	\$22.36 million .....	\$26 million.
June 30, 2021 .....	\$22.36 million .....	\$26 million.
June 30, 2022 .....	\$22.36 million .....	\$26 million.

As noted above, Ford could prepay in cash either or both of the New Notes in whole or in part. For prepayments in whole, the payment on each payment date would equal the corresponding amounts set forth as a schedule to the applicable New Note. In the event of any partial prepayment, future payments would be determined on a basis that provided the economically equivalent present value and duration to the VEBA Trust using a discount rate of 9% per annum.

### 3. The Holding, Management and Disposition of the Ford Securities Held in the Ford Employer Security Sub-Account

As a condition of the Department's granting relief under PTE 2010-08 for the transactions described above, the Committee of the Ford VEBA Plan was required to retain an Independent Fiduciary to manage the Securities, including the New Notes, held in the Ford Employer Security Sub-Account.<sup>13</sup> To satisfy such condition, and in accordance with the Trust Agreement, the Committee appointed Independent Fiduciary Services, Inc. (IFS) to represent the interests of the Ford VEBA Plan for the duration of the Ford VEBA Plan's holding of the New Notes or any Ford security in the Ford Employer Security Sub-Account of the VEBA Trust.

In accordance with PTE 2010-08, IFS may also authorize the disposition, by the trustee of the VEBA Trust, State Street Bank and Trust Company (the Trustee), of any Securities, including the New Notes, once IFS determines, at the time of the transaction, that the transaction is feasible, in the interest of

the Ford VEBA Plan, and protective of the participants and beneficiaries of the Ford VEBA Plan. Furthermore, IFS must discharge its duties consistent with the terms of the Ford VEBA Plan, the Trust Agreement, and the UAW Retiree Medical Benefits Trust Independent Fiduciary Agreement Relating to Ford Motor Company, dated as of December 1, 2009, between the VEBA Trust and IFS, as amended by Amendment Number 1 thereto effective June 25, 2010 (the Independent Fiduciary Agreement), and any other documents governing the Securities, such as the Securityholder and Registration Rights Agreement, and any successors to those agreements.

As the Independent Fiduciary representing the Ford VEBA Plan's interest in the Ford Employer Security Sub-Account of the VEBA Trust, IFS has had sole discretionary authority relating to the holding, ongoing management and disposition of the Securities pursuant to the Trust Agreement and the Independent Fiduciary Agreement. In that regard, on April 6, 2010, IFS, on behalf of the Ford VEBA Plan, completed the sale in a secondary public offering of all 362,391,305 Warrants held by the VEBA Trust. The offering was priced at \$5.00 per Warrant through a modified Dutch auction that took place on March 30, 2010. The aggregate net proceeds to the VEBA Trust from the offering were approximately \$1.78 billion.

IFS states that, after the sale of the Warrants, it began looking for ways to further reduce the amount of Securities that the Ford VEBA Plan held, which still equaled as much as 42.8% of the assets in the Ford Separate Retiree

Account. Accordingly, IFS met with representatives from leading investment banking firms to discuss possible approaches to the marketing of New Note A and of any shares of Ford Common Stock that the VEBA Trust might receive from Ford on June 30, 2010 in its annual principal payment on New Note B. IFS states that, as the June 30th payment date approached, it was aware that conditions in the credit markets had deteriorated as a result of uncertainties surrounding European nations' sovereign debt and other market factors.

According to IFS, it also approached Ford, in order to inform the company of its desire to monetize the New Notes, particularly New Note A, and prepare for the possibility of receiving the June 30th payment of New Note B in Payment Shares. IFS represents that Ford then indicated that it would be interested in purchasing a substantial portion of New Note A, provided that Ford could obtain additional prepayment rights under New Note B. After considerable negotiation, during which it consulted extensively with its legal counsel, Proskauer Rose LLP (Proskauer Rose), and its financial advisors, including Sutter Securities Incorporated (Sutter), IFS states that it entered into an agreement, dated as of June 25, 2010 (the Note Agreement), by and among Ford, Ford Motor Credit Company LLC (Ford Credit), and the VEBA Trust, under which the VEBA Trust would sell New Note A to Ford and Ford Credit and New Note B would be amended to add provisions permitting Ford to prepay all or a portion of New Note B, in each case under the terms and conditions set forth

<sup>12</sup> Pursuant to the terms of New Note A, Ford's partial pre-payment of New Note A reduced proportionately each future principal payment on

New Note A, beginning with the June 30, 2010 payment.

<sup>13</sup> For a full description of the rights and obligations of the Independent Fiduciary, see pages

64727-64728 of the Proposed PTE and pages 14197-14201 of PTE 2010-08.

therein, described in further detail below.

#### 4. Amendment of PTE 2010-08

Ford, on behalf of IFS, the Trustee, and Ford Credit, has requested a new exemption that would amend PTE 2010-08, effective as of June 25, 2010, which is the effective date of the Note Agreement. The amendment would extend the exemptive relief provided under PTE 2010-08 to (a) the execution of the Note Agreement by and between Ford, Ford Credit, and the VEBA Trust, acting by and through IFS; and (b) the amendment of New Note B to provide for a new prepayment right pursuant to the Note Agreement (the Subject Transactions).

The Applicant states that the VEBA Trust's entering into the Note Agreement with Ford and Ford Credit and simultaneously amending New Note B to provide Ford additional prepayment rights in exchange for Ford's commitment to purchase the outstanding balance under New Note A and to make the June 30, 2010 scheduled principal payment under New Note B in cash, could be viewed as the sale or exchange of property between the Ford VEBA Plan and Ford if the new prepayment right is deemed to be "property" and a "sale or exchange" is deemed to occur for purposes section 406(a)(1)(A) of the Act, which prohibits such transactions. As a result, the Applicant explains that the Subject Transactions could be deemed to be a prohibited exchange of property under section 406(a)(1)(A). To facilitate this relief, the Applicant has requested that the Covered Transactions set forth in Section I(a) of PTE 2010-08 be modified to incorporate the Subject Transactions described above, retroactive to June 25, 2010.

Furthermore, the Applicant is aware that the amendment of New Note B pursuant to the Note Agreement may constitute a material change of New Note B, and as such, New Note B, as amended, may not be covered by PTE 2010-08.<sup>14</sup> Therefore, the Applicant has requested exemptive relief retroactively effective to June 25, 2010 for the holding of New Note B, as amended, by the Ford VEBA Plan. To facilitate this relief, the Applicant has requested that the definition of "New Note B" in PTE 2010-08 be amended to incorporate the terms of the amendment of New Note B

<sup>14</sup> For a more detailed description of the exemptive relief granted for the acquisition and holding of New Note B, refer to pages 64724-64726 of the Proposed PTE and pages 14196-14197 of PTE 2010-08.

pursuant to the Note Agreement, also retroactive to June 25, 2010.

After considering the Applicants' request, the Department has determined to propose an amendment to PTE 2010-08. The proposed amendment has been requested in an application filed by the Ford Motor Company (Ford or the Applicant) pursuant to section 408(a) of ERISA and in accordance with the procedures set forth in 29 CFR 2570, Subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed amendment is being issued solely by the Department.

#### 5. The Note Agreement

On June 25, 2010, Ford and Ford Credit entered into the Note Agreement with the VEBA Trust, acting by and through IFS. The Note Agreement generally provides for Ford's agreement to purchase New Note A and pay the June 30, 2010 principal payment of New Note B in cash, in exchange for the VEBA Trust's agreement to amend New Note B to grant additional prepayment rights for Ford.

Pursuant to the Note Agreement, Ford made the June 30, 2010 New Note A principal payment of \$249,452,786 to the VEBA Trust in cash, as scheduled under the terms of such note and without any discount. Furthermore, the Applicant represents that, in compliance with the Note Agreement, on June 30, 2010, Ford made the scheduled New Note B principal payment of \$609,950,000 to the VEBA Trust in cash and did not elect to make such payment in Payment Shares, as otherwise permitted by the terms of New Note B.<sup>15</sup>

In addition, on June 30, 2010, following Ford's payment of principal under the New Notes, Ford and Ford Credit together purchased the remaining outstanding principal amount of New Note A (\$2,962,066,894 on a present value basis) at a price of 98% of such remaining principal amount.<sup>16</sup> In this regard, Ford purchased

<sup>15</sup> As described above, but for the Note Agreement, the value formula contained in New Note B allows Ford, in a declining market for its equity, to pay its annual principal payments on New Note B at a discount if the payments are made in Payment Shares (see page 64722 of the Proposed PTE).

<sup>16</sup> The Applicant believes such purchase is covered by PTE 2010-08 provided the conditions of the exemption have been satisfied. The Department concurs. Thus, the proposed amendment described herein relates solely to New Note B.

\$1,635,536,281.76 of the present value of the remaining outstanding principal amount for a price of \$1,602,825,556.12 and Ford Credit purchased \$1,326,530,612.24 of the present value of the remaining outstanding principal amount for a price of \$1.3 billion.

The Applicant further represents that, pursuant to the Note Agreement, Section 2(g) of New Note B was amended to provide Ford a three-year right beginning in July 2010 to prepay in cash from time to time, on the last business day of each month except May and June, all or a portion of the present value of the outstanding principal amount of New Note B (\$3,622,050,000 on a present value basis as of June 30, 2010, following Ford's required annual payment of principal)<sup>17</sup> at a 5 percent discount for prepayments made prior to January 1, 2012 and at a 4 percent discount for prepayments made from January 1, 2012 until the last business day in July 2013. Under the terms of New Note B, as amended, Ford must provide 10 days' prior written notice to IFS of its intention to prepay all or a portion of New Note B.<sup>18</sup>

#### 6. Fairness Opinion

The Applicant states that IFS received a fairness opinion, dated June 24, 2010, from Sutter with respect to the transactions. Pursuant to terms of the Note Agreement, under which Ford agreed to pay 50% (but not in excess of \$250,000) of the fee payable to Sutter for preparation of the fairness opinion, Ford paid \$200,000 of the total fee payable to Sutter of \$400,000 and the VEBA Trust paid \$200,000.

#### 7. Other Written Agreements

In addition, in connection with the Note Agreement, Ford and IFS entered into an Indemnification Agreement dated as of June 25, 2010 pursuant to which Ford may be required to

<sup>17</sup> Based on information provided by the Committee to IFS, as of June 30, 2010, the fair market value of New Note B, as amended, was \$3.016 billion, representing approximately 20.7% of the aggregate fair market value of the total assets of the Ford VEBA Plan, or \$14.596 billion. According to the Applicant, the VEBA Trust does not have a recent annual report on which to base the fair market value of the Securities due to the fact that the assets were transferred to the VEBA Trust on behalf of the Ford VEBA Plan on December 31, 2009. As a result, the fair market value is based on the June 30, 2010 payment date under the New Notes, consistent with other references to fair market value of assets held by the VEBA Trust. Similarly, the VEBA Trust does not have a recent financial statement.

<sup>18</sup> As described above, prior to the amendment by the Note Agreement, New Note B, by its terms, permitted Ford, without prior notice, to prepay such note at 100 percent of the scheduled prepayment amount on each annual June 30th scheduled principal payment date.

indemnify IFS for claims arising from Ford's exercise of its prepayment right under New Note B, as amended, if an exemption with retroactive application as of the effective date of the Note Agreement (*i.e.*, June 25, 2010) is not granted. Ford, the VEBA Trust and IFS also entered into a standard Confidentiality Agreement on June 25, 2010 in order to facilitate the transaction and the exchange of certain confidential, nonpublic information related to the transactions contemplated in the Note Agreement.

#### 8. Determinations of the Independent Fiduciary

As noted above, PTE 2010–08 provides that the Independent Fiduciary of the Ford VEBA Plan may authorize the disposition, by the Trustee, of the Securities once it determines that the transaction is feasible, in the interest of the Ford VEBA Plan, and protective of the participants and beneficiaries of the Ford VEBA Plan. In this regard, IFS, as the Independent Fiduciary, with the assistance of Sutter and Proskauer Rose, concluded that the Subject Transactions were administratively feasible, in the interest of, and protective of the Ford VEBA Plan and its participants and beneficiaries. Furthermore, IFS determined that reducing the exposure of the Ford Separate Retiree Account to Ford-specific risk through a fair transaction that would generate cash to be invested in a more diversified portfolio would be consistent with the diversification aspect of prudence set forth in section 404 of the Act.

IFS, together with Sutter, ascertained that the price paid for New Note A (*i.e.*, 98% of par) pursuant to the Note Agreement was at least equal to the net proceeds the VEBA Trust would likely have achieved through a sale of New Note A to unrelated third parties. IFS resolved that there was no way to reliably predict if or when market conditions would improve to the point of allowing the VEBA Trust to realize a better price on New Note A. According to IFS, it realized that, under its original terms, the potential value of New Note A was limited by Ford's right to prepay all or a portion of New Note A at par each June 30.

Furthermore, IFS found that it would be advantageous to the Ford VEBA Plan to secure Ford's agreement to make 100% of the scheduled June 30, 2010 principal payment on New Note B in cash. As described above, under New Note B, Ford could have made its June 30th payment with Payment Shares in an amount based on Ford Common Stock's VWAP for the 30 trading days ending June 28. IFS determined that, in

light of the downward trend during the preceding 30-trading day period in Ford's common stock price, the number of shares that Ford could have delivered would have had a market value (based on the stock's closing price on June 29) significantly less than the amount otherwise due in cash. Thus, by guaranteeing that the June 30, 2010, payment on New Note B was made in cash, IFS effectively saved the VEBA Trust \$79 million.<sup>19</sup> IFS was also cognizant of the fact that Ford's payment of cash allowed the VEBA Trust to avoid the transaction costs and market risk associated with monetizing any Payment Shares that could have been delivered in lieu of cash.

IFS also made a determination that the prepayment discount prices for New Note B payable by Ford during the three-year period ending July 31, 2013 (*i.e.*, 95% of par<sup>20</sup> through 2011 and 96% of par in 2012 and 2013) would likely be equal to, or greater than, the fair market value of New Note B. In this regard, IFS considered the possibility that principal payments of New Note B could be made in Payment Shares with a market value less than the scheduled principal payment if it were made in cash and the fact that, by its terms, New Note B is not transferable without the sole written consent of Ford. Moreover, it was important to IFS that any prepayment of principal would be made in cash, thus allowing the VEBA Trust to avoid the transaction costs and market risk associated with having to monetize shares of Ford Common Stock that could be delivered in payment of future principal payments.

IFS also determined that the amendment of New Note B was protective of the Ford VEBA Plan and its participants and beneficiaries in and of itself. As described above, the newly provided prepayment options for New Note B must be in cash and on designated payment dates, and Ford must give the VEBA Trust advance notice of its intent to make any such prepayments. By contrast, IFS was aware that the original terms of New Note B did not require any advance

<sup>19</sup> Given the VWAP for the 30 trading days ending June 28, 2010 of \$11.35 per share, Ford could have made New Note B's principal installment payment of \$609,950,000 with 53,740,088 shares of Ford Common Stock with a market value based on the stock's June 29, 2010 closing price of \$9.88, of only \$530,952,071, a difference of \$79,000,000. This amount fully offsets the 2% discount on the price that Ford and Ford Credit paid for New Note A.

<sup>20</sup> Pursuant to the Note Agreement, "par" is calculated by discounting the "Prepayment Amount" (as defined in New Note B) payable on the then next scheduled "Payment Date" (as defined in New Note B) at a rate per annum of 9% from the then next scheduled Payment Date back to such prepayment date.

notice of Ford's intent to make a prepayment, nor did they require that any prepayment must be in cash.

Finally, IFS approved of the amendment, because under the new prepayment terms no additional prepayment opportunity could be exercised during the months of May and June, foreclosing the possibility of Ford's "gaming" the VWAP calculation feature of Payment Share calculation to deliver less value to the VEBA Trust upon a prepayment.<sup>21</sup> IFS explains that it did not want to modify the requirement already in New Note B that a prepayment of principal on June 30 be at 100% of the outstanding principal. Thus, IFS notes, by barring Ford from exercising a prepayment right at 95% or 96% once the VWAP calculation period started, it assured that, at that point, Ford could only pay the principal installment due on June 30 at a discount if Ford stock declined during the VWAP calculation period (the discount would be limited to the result produced by the VWAP calculation). According to IFS, this also meant that Ford could not use the 95% or 96% discount available outside the VWAP calculation period to make a discounted prepayment during the calculation period that would have the effect of reducing the principal installment due in cash at 100% on June 30.

#### 9. Appropriateness of Exemptive Relief

Ford suggests that, if exemptive relief is denied, the VEBA Trust would lose the economic benefits relating to the prepayment of New Note B. Ford explains that, under Section 5 of the Note Agreement, if an exemption for the amendment of New Note B is not granted on or prior to December 31, 2011, or such later date as agreed to in writing by the parties, or the Department indicates that the exemption will not be granted, then the amendment of New Note B will be deemed null and void from that date. Although Ford recognizes that the parties, on behalf of the VEBA Trust, could agree in the future to specific prepayment terms, the Note Agreement and the amendment of New Note B, both of which were required in order for the VEBA Trust to receive the benefit of the other provisions of the Note Agreement, created an opportunity for Ford to prepay New Note B in cash on set dates, at a price certain that IFS has

<sup>21</sup> If not for such prohibition, the dates on which such notice of prepayment at the end of May and June would have fallen are within the periods in which the VWAP of Ford stock is calculated for purposes of determining the number of shares Ford would have to pay on the principal installment immediately following June 30.



concluded is equal to, or greater than, the fair market value of New Note B. Thus, according to Ford, a denial of exemptive relief would decrease the likelihood that Ford would make such cash prepayments on New Note B and reduce the VEBA Trust's exposure to Ford-specific risk.

Finally, Ford notes that IFS and its advisors negotiated the Note Agreement on behalf of the VEBA Trust in an adversarial process with Ford. In doing so, IFS states in its analysis that it was able to immediately and significantly reduce the VEBA Trust's exposure to Ford-specific risk and give the VEBA Trust the opportunity to invest the cash proceeds of approximately \$3.76 billion in a diversified portfolio. According to IFS, but for the Subject Transactions, the only cash the VEBA Trust was assured of receiving on June 30, 2010 was approximately \$250 million (the amount of the principal payment due on New Note A), with no assurance of additional cash until June 30, 2011.

#### 10. Description of Revisions to the Operative Language of PTE 2010-08

The proposed amendment generally modifies the operative language of PTE 2010-08 to take into account the execution of the Note Agreement and the amendment of New Note B. Section I(a) of PTE 2010-8 has been amended to add new paragraph (7) as follows: "The amendment of New Note B pursuant to the execution of the Note Agreement." Thus, the modification extends the exemptive relief provided by PTE 2010-08 to the VEBA Trust's execution of the Note Agreement in exchange for Ford's June 30, 2010 prepayment of New Note A and June 30, 2010 payment of New Note B in cash.

In the Definitions, the proposed amendment also makes a modification to the term "New Note B," in relettered Section VII(q), to include the descriptive clauses "unless prepaid," and "as amended by the Note Agreement effective June 25, 2010," in order to ensure that New Note B, as amended by the Note Agreement effective June 25, 2010, is included in the exemptive relief afforded under PTE 2010-08.

Furthermore, Section VII of PTE 2010-08, which sets forth the Definitions, has been modified by inserting new paragraph (h) which defines the term "Ford Credit" as referred to in the Note Agreement; inserting new paragraph (k) which defines the term IFS as referred to in the Note Agreement; inserting new paragraph (r) to define and describe the term "Note Agreement" to reflect changes made to the operative language

of PTE 2010-08; and relettering the remaining paragraphs, accordingly.

Finally, the Effective Date in new Section VIII is modified to provide that the exemption, if granted, will be effective as of December 31, 2009, except for Section I(a)(7), which will be effective as of June 25, 2010, the effective date of the Note Agreement and the amendment of New Note B. In addition, the flush language of Section I(a), (b), (c), and (d) has been modified to omit references to the December 31, 2009 effective date of exemptive relief in order to avoid confusion.

#### Notice to Interested Persons

Notice of the proposed exemption will be mailed by first class mail to each member of the Class and the Covered Group, as such terms are defined in the 2009 Settlement Agreement. Such notice will be given within 21 days of the publication of the notice of pendency in the **Federal Register**. The notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 51 days of the publication of the proposed exemption in the **Federal Register**.

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA does not relieve a fiduciary or other party in interest from certain other provisions of ERISA, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of ERISA;

(2) Before an exemption may be granted under section 408(a) of ERISA, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other

provisions of ERISA, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which is the subject of the exemption.

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), as follows:

##### SECTION I. Covered Transactions

(a) If the exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2) and 407(a) of ERISA shall not apply to the following transactions:

(1) The acquisition by the UAW Ford Retirees Medical Benefits Plan (the Ford VEBA Plan) and its funding vehicle, the UAW Retiree Medical Benefits Trust (the VEBA Trust) of: (i) The LLC Interests; (ii) New Note A; (iii) New Note B (together with New Note A, the New Notes); and (iv) Warrants, transferred by Ford and deposited in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust.

(2) The acquisition by the Ford VEBA Plan of shares of Ford Common Stock pursuant to Ford's right to settle its payment obligations under New Note B in shares of Ford Common Stock (*i.e.*, Payment Shares), consistent with the 2009 Settlement Agreement;

(3) The acquisition by the Ford VEBA Plan of shares of Ford Common Stock pursuant to (i) the Independent Fiduciary's exercise of all or a pro rata portion of the Warrants, consistent with the 2009 Settlement Agreement and (ii) an adjustment, substitution, conversion, or other modification of Ford Common Stock in connection with a reorganization, restructuring, recapitalization, merger, or similar corporate transaction, provided that each holder of Ford Common Stock is treated in an identical manner;

(4) The holding by the Ford VEBA Plan of the aforementioned Securities in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust, consistent with the 2009 Settlement Agreement;

(5) The deferred payment of any amounts due under New Note B by Ford pursuant to the terms thereunder;

(6) The disposition of the Securities by the Independent Fiduciary; and

(7) The amendment of New Note B pursuant to the execution of the Note Agreement.

(b) If the exemption is granted, the restrictions of sections 406(a)(1)(A), 406(b)(1), and 406(b)(2) of ERISA shall not apply to the sale of Ford Common Stock or Warrants held by the Ford VEBA Plan to Ford in accordance with the Right of First Offer or a Ford self-tender under the Securityholder and Registration Rights Agreement.

(c) If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA shall not apply to:

(1) The extension of credit or transfer of assets by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan in payment of a benefit claim that was the responsibility and legal obligation, under the terms of the applicable plan documents, of one of the other parties listed in this paragraph;

(2) The reimbursement by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan, of a benefit claim that was paid by another party listed in this paragraph, which was not legally responsible for the payment of such claim, plus interest;

(3) The retention of an amount by Ford until payment to the Ford VEBA Plan resulting from an overaccrual of pre-transfer expenses attributable to the TAA or the retention of an amount by the Ford VEBA Plan until payment to Ford resulting from an underaccrual of pre-transfer expense attributable to the TAA; and

(4) The Ford VEBA Plan's payment to Ford of an amount equal to any underaccrual by Ford of pre-transfer expenses attributable to the TAA or the payment by Ford to the Ford VEBA Plan of an amount equal to any overaccrual by Ford of pre-transfer expenses attributable to the TAA.

(d) If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA shall not apply to the return to Ford of assets deposited or transferred to the Ford VEBA Plan by mistake, plus interest.

#### *SECTION II. Conditions Applicable to Section I(a) and I(b)*

(a) The Committee appoints a qualified Independent Fiduciary to act on behalf of the Ford VEBA Plan for all purposes related to the transfer of the Securities to the Ford VEBA Plan for the duration of the Ford VEBA Plan's holding of the Securities. Such Independent Fiduciary will have sole discretionary responsibility relating to the holding, ongoing management and disposition of the Securities, except for the voting of the Ford Common Stock. The Independent Fiduciary has determined or will determine, before taking any actions regarding the Securities, that each such action or transaction is in the interest of the Ford VEBA Plan.

(b) In the event that the same Independent Fiduciary is appointed to represent the interests of one or more of the other plans comprising the VEBA Trust (*i.e.*, the UAW Chrysler Retiree Medical Benefits Plan and/or the UAW General Motors Company Retiree Medical Benefits Plan) with respect to employer securities deposited into the VEBA Trust, the Committee takes the following steps to identify, monitor and address any conflict of interest that may arise with respect to the Independent Fiduciary's performance of its responsibilities:

(1) The Committee appoints a "conflicts monitor" to: (i) Develop a process for identifying potential conflicts; (ii) regularly review the Independent Fiduciary reports, investment banker reports, and public information regarding the companies, to identify the presence of factors that could lead to a conflict; and (iii) further question the Independent Fiduciary when appropriate.

(2) The Committee adopts procedures to facilitate prompt replacement of the Independent Fiduciary if the Committee in its sole discretion determines such replacement is necessary due to a conflict of interest.

(3) The Committee requires the Independent Fiduciary to adopt a written policy regarding conflicts of interest. Such policy shall require that, as part of the Independent Fiduciary's periodic reporting to the Committee, the Independent Fiduciary includes a discussion of actual or potential conflicts identified by the Independent Fiduciary and options for avoiding or resolving the conflicts.

(c) The Independent Fiduciary authorizes the trustee of the Ford VEBA Plan to dispose of the Ford Common Stock (including any Payment Shares or any shares of Ford Common Stock

acquired pursuant to exercise of the Warrants), the LLC Interests, the New Notes, or exercise the Warrants, only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the Ford VEBA Plan, and protective of the participants and beneficiaries of the Ford VEBA Plan.

(d) The Independent Fiduciary negotiates and approves on behalf of the Ford VEBA Plan any transactions between the Ford VEBA Plan and any party in interest involving the Securities that may be necessary in connection with the subject transactions (including but not limited to the registration of the Securities contributed to the Ford VEBA Plan).

(e) Any contract between the Independent Fiduciary and an investment banker includes an acknowledgement by the investment banker that the investment banker's ultimate client is an ERISA plan.

(f) The Independent Fiduciary discharges its duties consistent with the terms of the Ford VEBA Plan, the Trust Agreement, the Independent Fiduciary Agreement, and any other documents governing the Securities, such as the Registration Rights Agreement.

(g) The Ford VEBA Plan incurs no fees, costs or other charges (other than described in the Trust Agreement, the 2009 Settlement Agreement, and the Securityholder and Registration Rights Agreement) as a result of the transactions exempted herein.

(h) The terms of any transaction exempted herein are no less favorable to the Ford VEBA Plan than the terms negotiated at arms' length under similar circumstances between unrelated parties.

#### *SECTION III. Conditions Applicable to Section I(c)(1) and I(c)(2)*

(a) The Committee and the Ford VEBA Plan's third party administrator will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the Ford VEBA Plan's independent auditor. The results of this review will be made available to Ford.

(b) Ford and the applicable third party administrator of the Ford Active Health Plan will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the plan's independent auditor. The results of this review will be made available to the Committee.

(c) Interest on any reimbursed mispayment will accrue from the date of

the mispayment to the date of the reimbursement.

(d) Interest will be determined using the applicable 6 month published LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a reimbursement payment, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

*SECTION IV. Conditions Applicable to Section I(c)(3) and I(c)(4)*

(a) Ford and the Committee will cooperate in the calculation and review of the amounts of expense accruals related to the TAA, and the amount of any overaccrual shall be made subject to the review of an independent auditor selected by Ford and the amount of any underaccrual shall be made subject to the review of the Ford VEBA Plan's independent auditor.

(b) Ford must make a claim for any underaccrual to the Committee, and the Committee must make a claim for any overaccrual to Ford, as applicable, within the Verification Time Period, as defined in Section VII(cc).

(c) Interest on any true-up payment will accrue from the date of transfer of the assets in the TAA (or the LLC containing the TAA) for the amount in respect of the overaccrual or underaccrual, as applicable, until the date of payment of such true-up amount.

(d) Interest will be determined using the published six month LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a true-up payment in respect of TAA expenses, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

*SECTION V. Conditions Applicable to Section I(d)*

(a) Ford must make a claim to the Committee regarding the specific deposit or transfer made in error or made in an amount greater than that to which the Ford VEBA Plan was entitled.

(b) The claim is made within the Verification Time Period, as defined in Section VII(cc).

(c) Interest on any mistaken deposit or transfer will accrue from the date of the mistaken deposit or transfer to the date of the repayment.

(d) Interest will be determined using the published six month LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a

mistaken payment, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

*SECTION VI. Conditions Applicable to Section I*

(a) The Committee and the Independent Fiduciary maintain for a period of six years from the date (i) the Securities are transferred to the Ford VEBA Plan, and (ii) the shares of Ford Common Stock are acquired by the Ford VEBA Plan through the exercise of the Warrants or Ford's delivery of Payment Shares in settlement of its payment obligations under New Note B, the records necessary to enable the persons described in paragraph (b) below to determine whether the conditions of this exemption have been met, provided that (i) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Committee and/or the Independent Fiduciary, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest other than the Committee or the Independent Fiduciary shall be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained, or are not available for examination as required by paragraph (b) below; and

(b) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of ERISA, the records referred to in paragraph (a) above shall be unconditionally available at their customary location during normal business hours to:

(1) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(2) The UAW or any duly authorized representative of the UAW;

(3) Ford or any duly authorized representative of Ford;

(4) The Independent Fiduciary or any duly authorized representative of the Independent Fiduciary;

(5) The Committee or any duly authorized representative of the Committee; and

(6) Any participant or beneficiary of the Ford VEBA Plan or any duly authorized representative of such participant or beneficiary.

(c) None of the persons described above in paragraphs (b)(2), (4)–(6) shall be authorized to examine trade secrets of Ford, or commercial or financial information which is privileged or confidential, and should Ford refuse to disclose information on the basis that such information is exempt from disclosure, Ford shall, by the close of

the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*SECTION VII. Definitions*

(a) The term "affiliate" means: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (2) any officer, director, partner, or employee in any such person, or relative (as defined in section 3(15) of ERISA) of any such person; or (3) any corporation, partnership or other entity of which such person is an officer, director or partner. (For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(b) The "Committee" means the eleven individuals consisting of six independent members and five UAW appointed members who will serve as the plan administrator and named fiduciary of the Ford VEBA Plan.

(c) The term "Dispute Resolution Procedure" means the process found in Section 26B of the 2009 Settlement Agreement to effectuate the resolution of any dispute respecting the transactions described in Sections I(c)(1), (c)(2), (c)(3), (c)(4), and (d) herein, and which reads in pertinent part: (1) The aggrieved party shall provide the party alleged to have violated the 2009 Settlement Agreement (Dispute Party) with written notice of such dispute, which shall include a description of the alleged violation and identification of the Section(s) of the 2009 Settlement Agreement allegedly violated. Such notice shall be provided so that it is received by the Dispute Party no later than 180 calendar days from the date of the alleged violation or the date on which the aggrieved party knew or should have known of the facts that give rise to the alleged violation, whichever is later, but in no event longer than 3 years from the date of the alleged violation; and (2) If the Dispute Party fails to respond within 21 calendar days from its receipt of the notice, the aggrieved party may seek recourse to the District Court; provided however, that the aggrieved party waives all claims related to a particular dispute against the Dispute Party if the aggrieved party fails to bring the dispute before the District Court within 180 calendar days from the date of sending the notice. All the time periods in Section 26 of the 2009 Settlement Agreement may be extended by

agreement of the parties to the particular dispute.

(d) The term "Exchange Agreement" means the Security Exchange Agreement among Ford, the subsidiary guarantors listed in Schedule I thereto and the LLC, dated as of December 11, 2009.

(e) The term "Ford" or the "Applicant" means Ford Motor Company, located in Detroit, MI, and its affiliates.

(f) The term "Ford Active Health Plan" means the medical benefits plan maintained by Ford to provide benefits to eligible active hourly employees of Ford and its participating subsidiaries.

(g) The term "Ford Common Stock" means the shares of common stock, par value \$0.01 per share, issued by Ford.

(h) The term "Ford Credit" means Ford Motor Credit Company LLC, a Delaware limited liability company and an indirect, wholly owned subsidiary of Ford.

(i) The term "Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust" means the sub-account established in the Ford Separate Retiree Account of the VEBA Trust to hold Securities on behalf of the Ford VEBA Plan.

(j) The term "Ford Retiree Health Plan" means the retiree medical benefits plan maintained by Ford that provided benefits to, among others, those who will be covered by the Ford VEBA Plan.

(k) The term "IFS" means Independent Fiduciary Services, Inc., a Delaware corporation, appointed by the Committee to be the Independent Fiduciary.

(l) The term "Implementation Date" means December 31, 2009.

(m) The term "Independent Fiduciary" means a fiduciary that is (1) independent of and unrelated to Ford, the UAW, the Committee, and their affiliates, and (2) appointed to act on behalf of the Ford VEBA Plan with respect to the holding, management and disposition of the Securities. In this regard, the fiduciary will be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates if (1) such fiduciary directly or indirectly controls, is controlled by, or is under common control with Ford, the UAW, the Committee or their affiliates, (2) such fiduciary directly or indirectly receives any compensation or other consideration from Ford, the UAW or any Committee member in his or her individual capacity in connection with any transaction contemplated in this exemption (except that an Independent Fiduciary may receive compensation from the Committee or the Ford VEBA Plan for services provided to the Ford

VEBA Plan in connection with the transactions discussed herein if the amount or payment of such compensation is not contingent upon or in any way affected by the independent fiduciary's ultimate decision), and (3) the annual gross revenue received by the fiduciary, in any fiscal year, from Ford, the UAW or a member of the Committee in his or her individual capacity, exceeds 3% of the fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.<sup>22</sup>

(n) The term "LLC" means the Ford-UAW Holdings LLC, established by Ford as a wholly-owned LLC, and subsequently renamed VEBA-F Holdings LLC, established to hold the assets in the TAA and certain other assets required to be contributed to the VEBA under the 2008 Settlement Agreement, as amended by the 2009 Settlement Agreement.

(o) The term "LLC Interests" means Ford's wholly-owned interest in the LLC.

(p) The term "New Note A" means the amortizing guaranteed secured note maturing on June 30, 2022, in the principal amount of \$6,705,470,000, with payments to be made in cash, in annual installments from 2009 through 2022, issued by Ford and referred to in the Exchange Agreement.

(q) The term "New Note B" means the amortizing guaranteed secured note maturing June 30, 2022, in the principal amount of \$6,511,850,000, with payments to be made in cash, Ford Common Stock, or a combination thereof, in annual installments from 2009 through 2022, unless prepaid, issued by Ford and referred to in the Exchange Agreement, and as amended by the Note Agreement, effective June 25, 2010.

(r) The term "Note Agreement" means the Agreement, dated as of June 25, 2010 by and among Ford, Ford Credit, and the VEBA Trust, acting by and through IFS, wherein the VEBA Trust will sell New Note A to Ford and Ford Credit and New Note B is amended to add provisions permitting Ford to prepay all or a portion of New Note B, in each case under the terms and conditions set forth therein.

(s) The term "Payment Shares" means any shares of Ford Common Stock issued by Ford to satisfy all or a portion of its payment obligation under New

Note B, subject to the terms and conditions specified in New Note B.

(t) The term "published six month LIBOR rate" means the Official British Banker's Association Six Month London Interbank Offered Rate (LIBOR) 11:00am GMT "fixing" as reported on Bloomberg page "BBAM".<sup>23</sup>

(u) The term "Securities" means (1) New Note A; (2) New Note B; (3) the Warrants; (4) the LLC Interests, (5) any Payment Shares, and (6) additional shares of Ford Common Stock acquired in accordance with the transactions described in Sections I(a)(2) and (3) of this exemption.

(v) The term "Securityholder and Registration Rights Agreement" means the Securityholder and Registration Rights Agreement by and among Ford and the LLC, dated as of December 11, 2009.

(w) The term "2008 Settlement Agreement" means the settlement agreement, effective as of August 29, 2008, entered into by Ford, the UAW, and a class of retirees in the case of *Int'l Union, UAW, et al. v. Ford Motor Company*, Civil Action No. 07-14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008).

(x) The term "2009 Settlement Agreement" means the 2008 Settlement Agreement, as amended by an Amendment to such Settlement Agreement dated July 23, 2009, effective as of November 9, 2009, entered into by Ford, the UAW, and a class of retirees in the case of *Int'l Union, UAW, et al. v. Ford Motor Company*, Civil Action No. 07-14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008), *Order and Final Judgment Granted*, Civil Action No. 07-14845, Doc. #71, (E.D. Mich. Nov. 9, 2009).

(y) The term "TAA" means the temporary asset account established by Ford under the 2008 Settlement Agreement to serve as tangible evidence of the availability of Ford assets equal to Ford's obligation to the Ford VEBA Plan.

(z) The term "Trust Agreement" means the trust agreement for the VEBA Trust.

(aa) The term "UAW" means the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

(bb) The term "VEBA" means the Ford UAW Retirees Medical Benefits Plan

<sup>22</sup> The Department notes that the preceding conditions are not exclusive, and that other circumstances may develop which cause the Independent Fiduciary to be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates.

<sup>23</sup> LIBOR is calculated by Thomson Reuters and published by the British Bankers' Association after 11 a.m. (and generally around 11:45 a.m.) each day (London time). It is a trimmed average of inter-bank deposit rates offered by designated contributor banks, for maturities ranging from overnight to one year. The rates are a benchmark rather than a tradable rate, the actual rate at which banks will lend to one another continues to vary throughout the day.

(the Ford VEBA Plan) and its associated UAW Retiree Medical Benefits Trust (the VEBA Trust).

(cc) The term "Verification Time Period" means: (1) With respect to each of the Securities other than the payments in respect of the New Notes, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of any such Security to the Ford VEBA Plan) and ending 90 calendar days thereafter; (2) with respect to each payment pursuant to the New Notes, the period beginning on the date of the payment and ending 90 calendar days thereafter; and (3) with respect to the TAA, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of the assets in the TAA to the Ford VEBA Plan) and ending 180 calendar days thereafter.

(dd) The term "Warrants" means warrants issued by Ford to acquire 362,391,305 shares of Ford Common Stock at a strike price of \$9.20 per share, expiring on January 1, 2013. For purposes of this definition, the term "Warrants" includes additional warrants to acquire Ford Common Stock acquired in partial or complete exchange for, or adjustment to, the warrants described in the preceding sentence, at the direction of the Independent Fiduciary or pursuant to a reorganization, restructuring or recapitalization of Ford as well as a merger or similar corporate transaction involving Ford (each, a corporate transaction), provided that, in such corporate transaction, similarly situated warrant holders, if any, will be treated the same to the extent that the terms of such warrants and/or rights of such warrant holders are the same.

#### SECTION VIII. Effective Date

If granted, this proposed amendment to PTE 2010-08 will be effective as of December 31, 2009, except with respect to Section I(a)(7), which will be effective as of June 25, 2010.

Signed at Washington, DC, this 9th day of March 2011.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

[FR Doc. 2011-5912 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Proposed Exemptions From Certain Prohibited Transaction Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: D-11468 & D-11469 The Krispy Kreme Doughnut Corporation Retirement Savings Plan, The Krispy Kreme Profit-Sharing Stock Ownership Plan; D-11632 Millenium Trust Co. LLC, Custodian FBO William Etherington IRA; D-11642 H-E-B Brand Savings & Retirement Plan and H.E. Butt Grocery Company; and L-11625 The International Union of Painters and Allied Trades Finishing Institute.

**DATES:** All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice.

**ADDRESSES:** Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail

to: [moffitt.betty@dol.gov](mailto:moffitt.betty@dol.gov), or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**Warning:** If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

#### SUPPLEMENTARY INFORMATION:

##### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

**The Krispy Kreme Doughnut Corporation Retirement Savings Plan (the Savings Plan) and the Krispy Kreme Profit-Sharing Stock Ownership Plan the KSOP; Together, the Plans or the Applicants)**

Located in Winston-Salem, North Carolina

[Application Nos. D-11468 and D-11469, Respectively]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).<sup>1</sup> If the exemption is granted, the restrictions of section 406(a)(1)(A), (D), (E), section 406(a)(2), section 406(b)(2) and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply, effective January 16, 2007, to (1) the release by the Plans of their claims against Krispy Kreme Doughnut Corporation (KKDC), the sponsor of the Plans and a party in interest, in exchange for cash, shares of common stock (the Common Stock) and warrants (the Warrants) issued by Krispy Kreme Doughnuts, Inc. (KKDI), the parent of KKDC and also a party in interest, in settlement of certain litigation (the Securities Litigation) between the Plans and KKDC; and (2) the holding of the Warrants by the Plans.

This proposed exemption is subject to the following conditions:

(a) The receipt and holding of cash, the Common Stock and the Warrants occurred in connection with a genuine controversy in which the Plans were parties.

(b) An independent fiduciary was retained on behalf of the Plans to determine whether or not the Plans should have joined in the Securities Litigation and accept cash, the Common Stock and the Warrants pursuant to a settlement agreement (the Settlement Agreement). Such independent fiduciary—

(1) Had no relationship to, or interest in, any of the parties involved in the Securities Litigation that might affect the exercise of such person's judgment as a fiduciary;

(2) Acknowledged, in writing, that it was a fiduciary for the Plans with

respect to the settlement of the Securities Litigation; and

(3) Determined that an all cash settlement was either not feasible or was less beneficial to the participants and beneficiaries of the Plans than accepting all or part of the settlement in non-cash assets.

(4) Thoroughly reviewed and determined whether it would be in the best interests of the Plans and their participants and beneficiaries to engage in the covered transactions.

(5) Determined whether the decision by the Plans' fiduciaries to cause the Plans not to opt out of the Securities Litigation was more beneficial to the Plans than having the Plans file a separate lawsuit against KKDC.

(c) The terms of the Settlement Agreement, including the scope of the release of claims, the amount of cash and the value of any non-cash assets received by the Plans, and the amount of any attorney's fee award or any other sums to be paid from the recovery were reasonable in light of the Plans' likelihood of receiving full recovery, the risks and costs of litigation, and the value of claims foregone.

(d) The terms and conditions of the transactions were no less favorable to the Plans than comparable arm's length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.

(e) The transactions were not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

(f) All terms of the Settlement Agreement were specifically described in a written document approved by the United States District Court for the Middle District of North Carolina (the District Court).

(g) Non-cash assets, which included the Common Stock and Warrants received by the Plans from KKDC under the Settlement Agreement, were specifically described in the Settlement Agreement and valued as determined in accordance with a court-approved objective methodology;

(h) The Plans did not pay any fees or commissions in connection with the receipt or holding of the Common Stock and the Warrants.

(i) KKDC maintains, or causes to be maintained, for a period of six years such records as are necessary to enable the persons described in paragraph (j)(1) below to determine whether the conditions of this exemption have been met, except that—

(1) If the records necessary to enable the persons described in paragraph (j)(1) to determine whether the conditions of this exemption have been met are lost,

or destroyed, due to circumstances beyond the control of KKDC, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest with respect to the Plans other than KKDC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if such records are not maintained or are not available for examination as required by paragraph (i).

(j)(1) Except as provided in this paragraph (j) and notwithstanding any provision of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (i) above are unconditionally available at their customary locations for examination during normal business hours by:

(A) Any duly authorized employee, agent or representative of the Department or the Internal Revenue Service, or the Securities and Exchange Commission (SEC);

(B) Any fiduciary of the Plans or any duly authorized representative of such participant or beneficiary;

(C) Any participant or beneficiary of the Plans or duly authorized representative of such participant or beneficiary;

(D) Any employer whose employees are covered by the Plans; or

(E) Any employee organization whose members are covered by such Plans.

(2) None of the persons described in paragraph (j)(1)(B) through (E) shall be authorized to examine trade secrets of KKDC or commercial or financial information which is privileged or confidential.

(3) Should KKDC refuse to disclose information on the basis that such information is exempt from disclosure, KKDC shall, by the close of the thirtieth (30th) day following the request, provide written notice advising that person of the reason for the refusal and that the Department may request such information.

*Effective Date:* If granted, this proposed exemption will be effective as of January 16, 2007.

**Summary of Facts and Representations**

*KKDI and KKDC*

1. KKDI is a branded retailer and wholesaler of doughnuts. KKDI's principal business, which began in 1937, is franchising and owning Krispy Kreme doughnut stores. KKDI's principal, wholly-owned operating subsidiary is KKDC. KKDI Common Stock is publicly traded on the New

<sup>1</sup> For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

York Stock Exchange under the ticker symbol "KKD". Both KKDI and KKDC are located in Winston-Salem, North Carolina.

#### *The Plans*

2. Effective February 1, 1999, KKDC established the KSOP, a defined contribution employee stock ownership plan. Under the terms of this qualified plan, KKDC could contribute a discretionary percentage of each employee's compensation, subject to Code limits, to each eligible employee's account under the KSOP. The contribution could be made in the form of cash or newly-issued shares of the Common Stock. If cash was contributed, the KSOP could acquire the Common Stock on the open market. As of December 31, 2006, the KSOP had total assets, consisting primarily of the Common Stock and having a fair market value of \$4,705,581, and 1,471 participants. The trustee of the KSOP was Branch Banking and Trust Company of Winston-Salem, North Carolina (BB&T).

3. On February 1, 1982, KKDC established the Savings Plan, which is subject to the provisions of section 401(k) of the Code.<sup>2</sup> Under the Savings Plan, employees may contribute up to 100% of their salary and bonus to this plan on a tax-deferred basis, subject to statutory limitations. Effective August 1, 2004, KKDC began matching employee contributions to the Savings Plan in cash. KKDC matches 50% of the first 6% of compensation contributed by each employee. Participants in the Savings Plan are permitted to self-direct the investment of their account balances (including matching account balances) among a number of investment options, including the Krispy Kreme Stock Fund (the Stock Fund) (whose assets consist of the Common Stock and cash). As of December 31, 2006, the Savings Plan had total assets of \$24,529,174 and 4,188 participants. Of the Saving Plan's assets, approximately 3.5% was invested in shares of the Common Stock. The trustee of the Savings Plan was also BB&T.

4. The documents for each Plan provided that KKDC would be the "named fiduciary" for investment purposes, except with respect to the Stock Fund for which U.S Trust Company, N.A. (U.S. Trust) would serve as the independent fiduciary.<sup>3</sup> KKDC's

responsibilities included broad oversight of and ultimate decision-making authority over the management and administration of the Plans' assets, as well as the appointment, removal and monitoring of other fiduciaries of the Plans. KKDC could also exercise its authority as named fiduciary through an eight-member Investment Committee established for the Plans. The Investment Committee selected investment alternatives into which participants in the KSOP and participants in the Savings Plan could diversify their interests in their Participant accounts.

#### *Merger of the Plans and the ERISA Litigation*

5. Effective June 1, 2007, KKDC merged the KSOP into the Savings Plan. The merger occurred due to separate litigation commenced by different plaintiffs on March 3, 2005. The plaintiffs alleged violations of the Act in a class action lawsuit captioned as *Smith v. Krispy Kreme Doughnut Corporation*, M.D.N.C. No. 1:05CV00187 (i.e., the ERISA Litigation), that was brought in the District Court. The plaintiffs' complaint alleged the defendant, KKDC, had breached its fiduciary duty with respect to investment in KKDI stock within the Plans and had caused the Plans to suffer losses. The parties litigated for over two years and ultimately reached a settlement (the ERISA Settlement), which was reviewed and approved by the Department's Atlanta Regional Office and by Independent Fiduciary Services, Inc. (IFS), a qualified independent fiduciary. The ERISA Settlement, which received the District Court's approval on January 10, 2007, required both a monetary recovery of \$4.75 million and structural relief valued at approximately \$3.82 million for the class.<sup>4</sup> Finally, the ERISA Settlement stipulated the merger of the Plans. As of December 31, 2009, the Savings Plan had \$26,986,884 in total assets and 2,491 participants. (Notwithstanding the merger, for convenience of reference, this proposed exemption is meant to cover both the post-merger KSOP and the Savings Plan which are treated as separate plans).

Plan and to sell or to otherwise dispose of all of any portion of the Common Stock held in the Stock Fund; (c) designate an alternate investment fund under the Plans for the investment of any proceeds from any sale or other disposition of the Common Stock; and (d) instruct the Trustees of the Plans with respect to the foregoing matters.

<sup>4</sup> The ERISA Settlement is not the subject of this proposed exemption. It is discussed here as part of the historic background of this proposed exemption.

#### *The Securities Litigation*

6. On May 12, 2004, certain plaintiff investors filed another class action lawsuit in the District Court on behalf of all persons who had purchased securities issued by KKDI between August 21, 2003 and May 7, 2004 (a timeframe that was later extended from March 8, 2001 to April 18, 2005 and referred to herein as the "Class Period"). The class members included the Savings Plan and the KSOP. On October 6, 2004, the District Court appointed the Pompano Beach Police & Firefighters Retirement Systems, the Alaska Electrical Pension Fund, the City of St. Clair Shores Police and Fire Retirement System, the City of Sterling Heights General Employees Retirement System and James Hennessey as the lead plaintiffs (the Class Lead Plaintiffs) to represent the class plaintiffs (the Class Plaintiffs). None of the Class Plaintiffs were parties in interest with respect to the Plans. The District Court also appointed Coughlin Stoia Gellar Rudman & Robbins, LLP as lead counsel (the Class Lead Counsel) for the Class Plaintiffs. The class action defendants (the Class Defendants) included KKDC, PriceWaterhouseCoopers (PwC) and Michael Phalen, who served as the Chief Financial Officer of KKDI and a member of each Plan's committee.

The complaint alleged that the Class Defendants had violated Federal securities laws by issuing materially false and misleading statements throughout the Class Period that had the effect of artificially inflating the market price of KKDI's securities. On June 14, 2004, the class action lawsuit and other related cases were consolidated by the District Court into the Securities Litigation. Newer cases were later consolidated by the District Court in an order dated June 25, 2004.

#### *Settlement Fund Consideration*

7. The Securities Litigation was eventually settled. Pursuant to the Settlement Agreement signed on October 30, 2006, a \$75 million Settlement Fund (the Settlement Fund) comprised of \$39,167,000 in cash, \$17,916,500 in shares of the Common Stock, and \$17,916,500 in KKDI freely tradable Warrants was established for the benefit of the settlement class (the Settlement Class), which included all persons, including the Plans, who had purchased the Common Stock during the Class Period. The District Court designated Class Lead Counsel to manage the Settlement Fund.<sup>5</sup>

<sup>5</sup> The Applicants represent that the Settlement Fund was managed by the Class Lead Counsel for

<sup>2</sup> The Savings Plan and the KSOP were not parties in interest with respect to each other.

<sup>3</sup> In such capacity, U.S Trust was given specific authority and responsibility to: (a) Impose any restriction on the investment of participant accounts in the Stock Fund; (b) eliminate the Stock Fund as an investment option under the Savings

8. Under the District Court-ordered formula, the number of shares of the Common Stock issued to the Settlement Fund was determined by dividing \$17,916,500 by the "Measurement Price." The "Measurement Price" was defined in the Settlement Agreement as "the average of the daily closing prices for each trading day of Common Stock for the ten trading day period commencing on the fifth trading day next preceding the date KKDI filed its Form 10-K" (Annual Report Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934) with the SEC for Fiscal Year 2006 (Ten Day Method). The Settlement Agreement defined the "Closing Price" for each day as the last reported sales price for the Common Stock on the New York Stock Exchange.

Thus, the Measurement Price was established on a ten-day Closing Price average ending November 7, 2006. This date represented five days before and five days after the filing of the KKDI's Form 10-K with the SEC. As a result, a Measurement Price of \$9.77 was selected. The dollar amount of \$17,916,500 was divided by the Measurement Price which yielded 1,833,828 shares of the Common Stock for the Settlement Fund.

9. Pursuant to the Settlement Agreement, the number of Warrants issued to the Settlement Fund was determined by dividing \$17,916,500 by the fair market value of one Warrant, based on an independent valuation analysis as of the last day of the ten-trading day period referred to in Representation 8. This valuation was also based on the Black-Scholes Model<sup>6</sup> and certain assumptions<sup>7</sup> specified in

the benefit of the Settlement Class and ultimately under the direction of the District Court as the entire Settlement Fund was deemed to be in *custodia legis* of the District Court. As approved by the Court, some of the cash portion of the Settlement Fund was used to pay costs and expenses including taxes actually incurred in distributing the Settlement Notice to the Settlement Class members and the administration and distribution of the Settlement Fund.

<sup>6</sup> The Black-Scholes Model is an option pricing model developed by Fischer Black and Myron Scholes using the research of Robert Merton. The Black-Scholes Model assumes that there is a continuum of stock prices, and therefore to replicate an option, an investor must continuously adjust their holding in the stock. The formula also makes several simplifying assumptions including that the risk-free rate of return and the stock price volatility are constant over time and that the stock will not pay dividends during the life of the option.

<sup>7</sup> These assumptions included basing (a) the volatility of the Common Stock on the historical and implied volatilities of the Common Stock and the common stock of companies similar to KKDC; (b) basing the risk free rate of interest on the Treasury bill rate most closely corresponding to the 5-year term of the Warrants; and (c) the dividend yield at 0%. The price per share of the Common Stock utilized in the Black-Scholes Model would be equal to the Measurement Price.

the Settlement Agreement. Under the terms of the Settlement Agreement, the Warrants were required to be listed on the New York Stock Exchange within ten days of their distribution to the Class Lead Plaintiffs. Thus, a generally recognized market for the Warrants would have existed upon distribution to the Plans.

#### *Appraisal of the Warrants*

10. KKDI retained Huron Consulting Group of Chicago, Illinois (Huron), on behalf of all Class Plaintiffs, to provide the fair market value of the Warrants in order to determine how many Warrants to issue the Settlement Fund. Huron represented that its appraisal report, dated for March 12, 2007, which "looked back" to November 7, 2006 (the Huron Appraisal), was made in conformance with the Uniform Standards of Professional Appraisal Practice of The Appraisal Foundation. Huron Managing Director James Dondero, Huron Director John Sawtell CPA, ASA, and Huron Manager Derick Champagne, CPA certified the Huron Appraisal. The Applicants represented that Mr. Dondero has 20 years of experience in financial and economic analysis, corporate finance, valuation and operations. Mr. Dondero also serves on the Appraisal Issues Task Force advising both the Financial Accounting Standards Board and the SEC on valuation-related issues.

Furthermore, in the Huron Appraisal, Huron represented that it had no present or prospective interest in the Warrants that were the subject of its appraisal and no personal interest with respect to the parties involved. Huron also stated that it had no bias with respect to the Warrants or to the parties involved and that its engagement was not contingent upon developing or reporting predetermined results.

Using the Black-Scholes Model and the assumptions described in the footnote references in Representation 9, the Huron Appraisal placed the fair market value of a single Warrant at \$4.17 per share as of November 7, 2006. Based on the settlement amount of \$17,916,500, Huron stated that KKDC could issue 4,296,523 Warrants.

#### *Notice and Effect of the Settlement*

11. A Notice of Pendency and Proposed Settlement of Class Action (the Settlement Notice) was mailed to class members (including the Plans) on November 15, 2006. The Settlement Notice gave class members until January 16, 2007 to exclude themselves from the class and preserve their right to file an individual action. The Plans did not

exclude themselves as class members by the January 16, 2007 deadline.

By operation of the Settlement Agreement, all class members were deemed to fully, finally and forever release all known or unknown claims, demands, rights, liabilities and causes of action, arising out of, relating to, or in connection with the acquisition of KKDI Common Stock and Warrants during the Class Period. Thus, in effect, by failing to exclude themselves from the class, the Plans (like all other class members) were bound by the release contained in the Settlement Agreement. After a hearing, the District Court approved the Settlement Agreement and entered final judgment on February 15, 2007.

#### *Appointment of an Independent Fiduciary*

12. On April 5, 2007, KKDC formally retained IFS, a Delaware corporation based in Washington, DC, and a registered investment adviser under the Investment Advisers Act of 1940, to serve as independent fiduciary to the Plans with respect to the Plans' interest in the Settlement Agreement. In an agreement entitled "Independent Fiduciary Engagement Between Krispy Kreme Doughnut Corporation and Independent Fiduciary Services, Inc." (the IFS Agreement), IFS accepted its independent fiduciary duties and responsibilities as an fiduciary under the Act on behalf of the Plans.

IFS provides fiduciary decision-making and advisory services to institutional investors, including employee benefit plans subject to ERISA. In this capacity, IFS has evaluated potential claims for investment losses suffered by such plans, including claims arising from State and Federal securities laws. More particularly, IFS has served as independent fiduciary under the "Class Exemption for the Release of Claims and Extensions of Credit in Connection with Litigation," (PTE 2003-39, 68 FR 75632, December 31, 2003),<sup>8</sup> to decide whether to grant a release in favor of the plans' parties in interest of securities law claims similar to the claims asserted above in the Securities Litigation. IFS

<sup>8</sup> On June 15, 2010, the Department published an amendment (the Amendment) to PTE 2003-39 at 75 FR 33830. The Amendment modifies PTE 2003-39 and it expands the categories of assets that plans may accept in the settlement of litigation, subject to certain conditions. Among other things, the Amendment permits the receipt by a plan of non-cash assets in settlement of a legal claim (including the promise of future employer contributions) but only in instances where the consideration can be objectively valued. The Amendment is prospectively effective June 15, 2010 and it does not cover the transactions described herein due to the retroactive nature of the submission.



has had no business relationship with KKDC or the Plans other than its service under the IFS Agreement and its service in 2006 pursuant to a separate agreement as independent fiduciary to the Plans pursuant to PTE 2003–39 claims arising under ERISA that were related to the allegations made in the ERISA Litigation. In this regard, the fees IFS derived from KKDC and its affiliates represented less than 1% of IFS' gross revenue for 2006 and less than 1.5% of IFS' gross revenue for 2007.

13. As stated in the IFS Agreement, IFS proposed to attempt, on behalf of the Plans, to obtain an agreement from KKDC, which provided that, in the event IFS should determine that a claim in the class action suit should not be filed on behalf of the Plans, KKDC would waive and forego benefits of any release it had obtained from each of the Plans by virtue of the fact that the Plans did not timely seek exclusion from the settlement class. Moreover, KKDC would support all efforts by the Plans to obtain a reasonable extension of time to file claims on their behalf, including if necessary, an application to the District Court. Thus, IFS had an opportunity to pursue either a class action lawsuit or an individual lawsuit on behalf of the Plans.

14. By letter dated July 25, 2007, (the IFS Letter), IFS stated that it had reviewed the Settlement Agreement and determined, consistent with PTE 2003–39, that the terms and conditions were in substance essentially fair and reasonable from the perspective of the settlement class members, including the Plans. As stated briefly above, PTE 2003–39 provides, in part, exemptive relief for the release by a plan or a plan fiduciary, of a legal or equitable claim against a party in interest in exchange for consideration, given by, or on behalf of, a party in interest to the plan in partial or complete settlement of the plan's or the fiduciary's claim. The relevant conditions of PTE 2003–39 require among other things, that (a) there be a genuine controversy involving the plan, (b) an independent fiduciary authorize the terms of the settlement; (c) the settlement is reasonable and no less favorable to the plan than the terms offered to similarly-situated unrelated parties on an arm's length basis; (d) the settlement is set forth in a written agreement or consent decree; (e) the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest; and (f) the transaction is not described in Section A.I. of PTE 76–1 (relating to delinquent employer contributions to multiemployer and

multiple employer collectively-bargained plans).

In the IFS letter, IFS identified two instances by which the Settlement Agreement's terms would not allow the Plan to take advantage of PTE 2003–39. First, IFS noted that under PTE 2003–39, Section III(c) states that assets other than cash may only be received by a plan from a party in interest in connection with a settlement if: (a) It is necessary to rescind a transaction that is the subject of the litigation; or (b) such assets are securities for which there is a generally recognized market, as defined in section 3(18)(A) of the Act, and which can be objectively valued. IFS stated that the receipt of the Warrants by the Plans did not necessarily comply with Section III(c) of PTE 2003–39, because such receipt was not necessary to rescind any transaction that was the subject of litigation and the Warrants would not become subject to a generally recognized market until after their distribution to the Plans. Additionally, IFS determined that the Warrants were not qualifying employer securities under section 407(d)(5) of the Act.

Secondly, IFS noted that under Section III(d) of PTE 2003–39, to the extent assets, other than cash, are received by a plan in exchange for the release of the plan's or the plan fiduciary's claims, such assets must be specifically described in the written settlement agreement and valued at their fair market value, as determined in accordance with section 5 of the Voluntary Fiduciary Correction (VFC) Program, 67 FR 15062 (March 28, 2002).<sup>9</sup> According to PTE 2003–39, the methodology for determining fair market value, including the appropriate date for such determination, must be set forth in the written settlement agreement. For example, under Section 5 of the VFC Program, the valuation must meet either of the following conditions: (a) If there is a generally recognized market for the property (*e.g.*, the New York Stock Exchange), the fair market value of the asset is the average value of the asset on such market on the applicable date, unless the plan document specifies another objectively determined value (*e.g.* closing price); or (b) if there is no generally recognized market for the asset, the fair market value of the asset must be determined in accordance with generally accepted appraisal standards by a qualified, G73 independent appraiser and reflected in

<sup>9</sup> By amendment, the Department revised and updated the VFC Program at 71 FR 20262 (April 19, 2006).

a written appraisal report signed by the appraiser.

IFS stated that it was not satisfied that the terms of Section III(d) of PTE 2003–39 were met because the terms of the Settlement Agreement provided for a payment to the members of the class consisting of cash, the Common Stock and the Warrants.<sup>10</sup> Moreover, IFS noted that the Settlement Agreement valued the Common Stock over a 10-day period rather than at the closing or average price on a specific day. Also, the documents for each Plan did not specify another objectively determined value for the Common Stock. Accordingly, because the terms of the Settlement Agreement did not meet all of the requirements of PTE 2003–39, IFS could not conclude that the Plans should file claims with respect to the Settlement Notice.

15. Despite the foregoing, IFS represented that the terms of the Settlement Agreement were in substance essentially fair and reasonable and that it would be in the interest of the Plans to obtain consideration equal to their proportionate share of the value of the Settlement Fund in exchange for granting a release to the Class Defendants, including KKDC and Mr. Phalen, and that it would likely not be practical for the Plans to pursue separate litigation against the KKDC and Mr. Phalen to obtain that result.

IFS also suggested three options designed to enable the Plans to receive the appropriate amounts of recovery from the Settlement Fund. The first option involved having the Plans obtain from KKDC, Mr. Phalen, and PwC an agreement to forego the benefits of the release which the Plans could provide by filing a claim with the Settlement Funds, so that the Plans would not be releasing a party in interest to the Plans and therefore the Plans could file such claims, accordingly.

The second option suggested by IFS would be for the Plans to enter into a separate agreement with KKDC, PwC and Mr. Phalen under which KKDC would agree to provide a payment to the Plans equal to the Plans' proportionate share of the Settlement Fund calculated

<sup>10</sup> KKDC represents the noncompliance with Sections III(c) and (d) of PTE 2003–39 did not result in harm to the Plans. Instead of using a measurement "such of a single date" as specified by PTE 2003–39, KKDC used the Ten Day Method. In contrast, had the parties used the January 16, 2007 (*i.e.*, the last day for claimants to exclude themselves from the Securities Litigation) to calculate the Common Stock's share price, the Common Stock's share price of \$11.42 would have been used as the Measurement Price. Consequently, the Settlement Fund would have received 1,568,870 shares of the Common Stock or 250,000 fewer shares. Accordingly, the Ten Day Method did not result in harm to the Plans.

as though the entire settlement payment of \$75 million had been made in cash, rather than a combination of cash, the Common Stock and the Warrants. In consideration of that payment, the Plans could assign/offset to KKDC the value of their respective claims, and the Settling Defendants would receive the releases that would otherwise be associated with the filing of the Plans' claims. Such separate agreement would need to be approved by IFS and otherwise structured to meet the requirements of PTE 2003-39. IFS recommended that under this second option, the separate agreement should be executed and become effective before the Plans filed their claims.

The third option suggested by IFS, would be for KKDC to apply to the Department for an individual exemption to allow the Plans to file a claim with the Settlement Fund and accept cash and non-cash assets as a settling class member, notwithstanding the lack of compliance with Section III(c) and Section III(d) of PTE 2003-39.

16. In an addendum to the IFS letter, IFS explained, that it reached its recommendation for KKDC to exercise the third option based upon a thorough review of the available facts. IFS retained legal assistance from outside counsel. With assistance from outside counsel, IFS reviewed the operative complaint as well as a number of documents, which included motions to dismiss the Securities Litigation, the Class Defendant's mediation statements and damage analysis, the Class Plaintiffs' application for attorneys' fees and the Settlement Agreement. IFS also reviewed records of the Plans' holdings and transactions in the Common Stock, KKDC's insurance policies and it interviewed attorneys for the parties to the Securities Litigation. IFS stated that it took into account the recovery the Plans received from the ERISA Litigation.

Based on its investigation and supported by analysis by outside counsel, IFS concluded that the Settlement Agreement's terms and conditions were in substance essentially fair and reasonable from the perspective of the Plans. IFS also concluded, based on its investigation and analysis, that pursuing separate litigation in lieu of accepting consideration equal to the Plan's proportionate share of the value of the Settlement Agreement "would likely not be practical."

IFS stated that it reached its conclusion in light of the following factors:

- *The Plans Would Receive Small Recoverable Damages as a Result of Their De Minimis Holdings of the*

*Common Stock.* IFS noted that the Plans' relatively small holdings of the Common Stock and in particular the KSOP's de minimis purchases of the Common Stock rendered the Plans' potentially recoverable damages in a separate action relatively small. IFS also represented that even if the Class Plaintiffs' most optimistic projections for the damages totaled \$800 million, the Plans' share would have come to some \$4.8 million, a figure that assumes no offset for the Plans' net cash recovery (i.e., less attorneys' and other fees) from the ERISA Settlement. Significantly, IFS noted that the Settlement Agreement did not require that the Plans reduce their claims based on the proceeds from the ERISA Settlement.

- *KKDC Had Limited Financial Resources to Satisfy a Separate Claim by the Plans.* IFS noted that KKDC had limited financial resources available to satisfy a separate claim by the Plans had such a claim been substantial. Pursuant to the Settlement Agreement, KKDC had released all claims under its applicable insurance policies for payments in excess of what the carriers, who had disputed coverage for the claims in the Securities Litigation. IFS represented that, at the time of its determination, KKDC's most recent SEC Form 10-Q showed that KKDC's total cash assets as of April 29, 2007 were less than \$31 million, down from \$36 million three months earlier.

- *The Plans Would Incur Great Costs in Proving Complex Allegations Against KKDC.* IFS explained that the allegations asserted against KKDC in the Securities Litigation raised complex issues regarding the proper accounting treatment of a series of intricate franchising, financing, leasing and derivative transactions. IFS represented that proving such allegations would have required extensive discovery and costly retention of accounting and other experts. IFS noted that the potential defendants also had significant defenses available to the claims that would have been asserted by the Plans. The Fourth Circuit, where such action would have been brought, would not favor an allegation that the misapplication of accounting principles established the state of mind to support a claim of fraud under Federal securities laws.

- *No Opt Outs or Separate Lawsuits Were Filed by Securities Litigation Class Members.* At the time of its determination in the IFS Letter, IFS stated that it knew of no material opt outs from the Securities Litigation by class members. Moreover, IFS asserted that there were no separate lawsuits outside of the Securities Litigation brought by any party to recover damages

based on the allegations. The only objection, according to IFS, by an institutional investor to the Settlement Agreement addressed the plaintiff's attorney fees which the District Court rejected. The only individual investor who objected to the settlement asserted that investors should not receive anything because equity investors take risks. Thus, IFS stated no party with a financial stake in the matter had asserted that class members would have been better off with more litigation as opposed to the Settlement Agreement.

In light of these factors, IFS represented that pursuing separate litigation in lieu of participating in the Settlement Agreement would have entailed significant expense for the Plans. There would also have been a substantial risk that the Plans would recover little or nothing. In light of the relatively small size of the Plans' potential claims, the fact the Plans had already achieved a material recovery through the ERISA Settlement, and the complexity of the case, IFS concluded that the claims would not be attractive to law firms that litigate securities fraud cases on a contingency fee basis. Finally, IFS stated that the reasonableness of these conclusions is further evidenced by the fact that as of July 2010, no cases had been brought against KKDC outside the Securities Litigation that asserted the claims that were settled.

#### *Request for Exemptive Relief*

17. The Applicants represent that the Plans' decision to grant the release was primarily based on the advice of IFS. Instead of filing by the January 16, 2007 deadline, stipulated in the Settlement Notice, the Plans filed their Proof of Claim and Release with the District Court on August 8, 2007, and subsequently applied for an administrative exemption from the Department.

If granted, the exemption would apply effective January 16, 2007, to (a) the release by the Plans of their claims against KKDC in exchange for cash, the Common Stock and the Warrants in settlement of the Securities Litigation; and (b) the holding of the Warrants by the Plans.<sup>11</sup>

<sup>11</sup> The Department is expressing no opinion herein on whether the cash, the Common Stock and the Warrants that were being held on behalf of the Plans in the Settlement Fund would constitute "plan assets" within the meaning of 29 CFR 2510.3-101. Nevertheless, the Department is providing exemptive relief with respect to the release, by the Plans, of their claims against KKDC in settlement of the Securities Litigation, in exchange for the consideration allocated to the Plans in the Settlement Fund. The Department is also proposing

Section 407(a)(1) of the Act states that a plan may not acquire or hold any “employer security” which is not a “qualifying employer security.” Both the Common Stock and the Warrants are “employer securities” within the meaning of section 407(d)(1) of the Act in that they are “securities issued by an employer of employees covered by the plan, or by an affiliate of such employer.” The Common Stock, but not the Warrants, is also a “qualifying employer security.” Section 407(d)(5) of the Act defines a “qualifying employer security,” as stock, a marketable obligation, or an interest in a publicly-traded partnership (provided that such partnership is an existing partnership as defined in the Code). Moreover, section 406(a)(1)(E) of the Act prohibits the acquisition, on behalf of a plan, of any “employer security” in violation of section 407(a) of the Act. Finally, section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any “employer security” that violates section 407(a) of the Act.

Section 408(e) of the Act provides, in part, a statutory exemption from the provisions of sections 406 and 407 of the Act with respect to the acquisition by a plan of “qualifying employer securities” (1) if such acquisition is for adequate consideration, (2) if no commission is charged with respect thereto, and (3) if the plan is an “eligible individual account plan” (as defined in section 407(d)(3) of the Act, *e.g.*, a profit sharing, stock bonus, thrift, savings plan, an employee stock ownership plan, or a money purchase plan).

It appears that the Plans’ acquisition of the Common Stock from KKDC through the Settlement Fund would not be covered by section 408(e) of the Act because this provision does not cover the acquisition of qualifying employer securities by a plan in exchange for such plan’s release of claims against a party in interest. Additionally, an issue remains as to whether the “adequate consideration” requirement of section 408(e)(1) of the Act was satisfied inasmuch as the Measurement Price for the Common Stock of \$9.77 per share was calculated on the basis of the Ten Day Method. Therefore, the Department has decided to provide exemptive relief with respect to the Plans’ acquisition of such stock from KKDC in connection with the Plans’ release of claims against KKDC.

Furthermore, the Department has decided to propose exemptive relief for

exemptive relief for the holding of the Warrants by the Settlement Fund for the Plans.

the Plans’ acquisition of the Warrants from KKDC through the Settlement Fund because the Warrants are not “qualifying employer securities” and the statutory exemption under section 408(e) of the Act would not be available.

Finally, the Department is providing exemptive relief with respect to the Plans’ holding of the Warrants in the Settlement Fund to the extent such holding violated the provisions of sections 406(a)(2) and 407(a) of the Act. Conversely, the Plans’ holding of the Common Stock in the Settlement Fund does not appear to violate these provisions. Therefore, exemptive relief is limited to the Plans’ holding of the Warrants.

Absent relief, the Applicants state that the Plans’ participation in the Settlement Fund would have to be reversed. This reversal would likely result in the Plans’ losing the economic benefit of the significant appreciation in the value of the settlement proceeds after their sale. Furthermore, the Applicants represent, that based on IFS’ conclusions, it would not be practical for the Plans to pursue separate litigation in this matter. The Applicants conclude that absent exemptive relief, the Plans would risk losing out on their share of the Settlement Fund or having a potential separate settlement diminished by the costs of pursuing separate litigation.

#### *Settlement Fund Consideration Received by the Plans*

18. The 1,833,828 shares of the Common Stock that were held in the Settlement Fund were sold after the January 16, 2007 deadline, approximately in February 2007. Pursuant to the terms of the Settlement Agreement, Class Lead Counsel had “the rights to take any measure they deem[ed] appropriate to protect the overall value of the Krispy Kreme Settlement Stock prior to distribution to Authorized Claimants.” This included the right to sell the Common Stock. Based on representations from Class Lead Counsel, the Applicants represent that all of the Common Stock in the Settlement Fund was sold on the New York Stock Exchange at prices higher than the Measurement Price of \$9.77 per share. The cash proceeds from the sale of the Common Stock was deposited with the cash portion of the Settlement Fund. This amount earned interest while the claims process was in effect. Then, each claimant was entitled to receive a portion of the cash amount (reflecting both the cash and the Common Stock portions of the Settlement Fund) in accordance with the Plan of Allocation.

The Applicants represent that the Plans were entitled to receive approximately 8,675 shares of the 1,833,828 shares of the Common Stock. Following the sale of the Common Stock, the Plans received a total of \$262,097.94 from the Settlement Fund. This amount included unclaimed cash proceeds in addition to proceeds from the sale of Common Stock. Of the total amount, \$101,634.42 was attributable to the Savings Plan and \$160,463.52 was attributable to the KSOP.

With respect to the Warrants, the Applicants state that 4,296,523 Warrants were distributed to the Settlement Fund on February 4, 2009. Of the 20,324 Warrants allocated to the Plans, 12,443 Warrants were allocated to the KSOP and 7,881 Warrants were allocated to the Savings Plan. Although the Plans had acquired and held the Warrants through the Settlement Fund, the Applicants believed they could reduce the likelihood of a prohibited transaction if the Settlement Fund distributed cash instead of the Warrants to the Plans. Therefore, IFS requested Class Lead Counsel sell the 20,324 Warrants and distribute the cash proceeds to the Plans.

Therefore, Gilardi & Co. (Gilardi), the Claims Administrator for the Settlement Fund, agreed to sell the Plans’ Warrants at the direction of Class Lead Counsel. The Claims Administrator sold the Warrants allocated to the Plans on September 16, 2009 for a total price of \$1,300.09, or an average price of \$0.0639 per Warrant. The Applicants represent that the sale was executed on the OTC Bulletin Board at the best available market price. After deducting fees and commissions of \$41.79, Gilardi distributed \$770.37 in cash to the KSOP and \$487.93 to the Savings Plan, or total net proceeds of \$1,258.30 on September 29, 2009.

In addition, the Settlement Fund made several small distributions to the Plans (*i.e.*, \$5,920.66) to the KSOP and \$3,750.03 to the Savings Plan) related to certain unclaimed funds.

After taking into account the Common Stock, cash proceeds, unclaimed funds distribution and the Warrants, the Plans received aggregate proceeds from the Settlement Fund of \$273,026.93. Of this amount, the KSOP received \$105,872.38 and the Savings Plan received \$167,154.55 from the Settlement Fund.

#### *Summary*

19. In summary, it is represented that the transactions satisfied the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The receipt and holding of cash, the Common Stock and the Warrants

occurred in connection with a genuine controversy involving the Plans were parties.

(b) An independent fiduciary retained on behalf of the Plans to determine whether or not the Plans should file claims against KKDC pursuant the Settlement Agreement and accept cash, Common Stock and Warrants —

(1) Had no relationship to, or interest in, any of the parties involved in the Securities Litigation that might affect the exercise of such person's judgment as a fiduciary;

(2) Acknowledged, in writing, that it was a fiduciary for the Plans with respect to the settlement of the Securities Litigation; and

(3) Determined that an all cash settlement was either not feasible or was less beneficial to the participants and beneficiaries of the Plans than accepting all or part of the settlement in non-cash assets.

(4) Thoroughly reviewed and determined whether it would be in the best interests of the Plans and their participants and beneficiaries to engage in the covered transactions.

(5) Determined whether the decision by the Plans' fiduciaries to cause the Plans not to opt out of the Securities Litigation was more beneficial to the Plans than having the Plans file a separate lawsuit against KKDC.

(c) The terms of the Settlement Agreement, including the scope of the release of claims, the amount of cash and the value of any non-cash assets received by the Plans, and the amount of any attorney's fee award or any other sums to be paid from the recovery were reasonable in light of the Plans' likelihood of receiving full recovery, the risks and costs of litigation, and the value of claims foregone.

(d) The terms and conditions of the transactions were no less favorable to the Plans than comparable arm's length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.

(e) The transactions were not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

(f) All terms of the Settlement Agreement were specifically described in a written document approved by the District Court.

(g) Non-cash assets, which included the Common Stock and the Warrants received by the Plans from KKDC under the Settlement Agreement, were specifically described in the Settlement Agreement and valued as determined in accordance with a court-approved objective methodology;

(h) The Plans did not pay any fees or commissions in connection with the receipt or holding of the Common Stock and the Warrants.

(i) KKDC maintains, or causes to be maintained, for a period of six years records as are necessary to enable persons, such as duly authorized employees, agents or representatives of the Department, fiduciaries of the Plans, participants and beneficiaries of the Plans, or any employer whose employees are covered by the Plans, to determine whether the conditions of this exemption have been met.

#### Notice to Interested Parties

Notice of the proposed exemption will be given to interested persons within 10 days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be given to interested persons by first class mail or personal delivery. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 40 days of the publication of the notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Anh-Viet Ly of the Department at (202) 693-8648. (This is not a toll-free number.)

#### William W. Etherington IRA (the IRA)

*Located in Park City, Utah*

[Application No. D-11632]

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847 August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) by the IRA to William W. Etherington and his wife, Paula D. Etherington (the Applicants), disqualified persons with respect to the IRA,<sup>12</sup> of the IRA's 80%

interest (the Interest) in certain residential real property (the Property); provided that:

(a) The terms and conditions of the Sale are at least as favorable to the IRA as those obtainable in an arm's length transaction with an unrelated party;

(b) The Sale is a one-time transaction for cash;

(c) As consideration, the IRA receives the fair market value of the Interest as determined by a qualified, independent appraiser, in an updated appraisal on the date of Sale; and

(d) The IRA pays no real estate commissions, costs, fees, or other expenses with respect to the Sale.

#### Summary of Facts and Representations

##### *Background*

1. The Applicants reside in Park City, Utah. From 1994 through February, 2010, Mr. Etherington owned and managed a construction company, Northland Excavation LLC, which was forced to close as the result of a deep and lengthy downturn in the local building market. In addition, Mrs. Etherington has owned her own retail business, "Changing Hands," a consignment store specializing in the sale of used clothing, since 1992. According to the Applicants, the recent adverse economic conditions have also forced her business into decline and it is winding up its operations.

2. Mr. Etherington is also a retired commercial airlines pilot, who ended work with Delta Airlines (Delta) on December 1, 2004 with full retirement benefits. At the time of his retirement, Mr. Etherington opted to receive 50% of his pension benefit in a lump sum payment, which was invested in an individual retirement account held with Fidelity Investments and held a portfolio comprised of an assortment of long term investments. Delta subsequently terminated its retirement plan as a result of its bankruptcy and the remainder of Mr. Etherington's pension was turned over to the Pension Benefit Guaranty Corporation (PBGC) on December 31, 2006. On May 7, 2010, the PBGC issued a final benefit determination letter to Mr. Etherington, which states that the remainder of his monthly pension benefit is equal to zero.

3. The IRA was established on May 12, 2009 at Millenium Trust Company, LLC (Millenium), located in Oak Brook, Illinois, in the name of William W. Etherington. As of December 11, 2010, the IRA held assets worth \$961,880.17. According to the Applicants, the IRA

<sup>12</sup>Pursuant to 29 CFR 2510.3-2(d), the IRA is not within the jurisdiction of Title I of the Employee Retirement Income Security Act of 1974 (the Act).

However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

was established for the sole purpose of purchasing the Property, located at 67–324 Kaiea Place, Waialua, Hawaii. The Property is legally described as “Lot 717, Kamananui, Wailua, Honolulu County, Oahu, Hawaii, LC App. 1089, Maps 7, 19, and 29.” The Property is situated on an ocean front lot consisting of 7,699 total square feet with a residential building comprised of a gross living area of 1,250 square feet. The residence is a single-level house built in 1985 containing three bedrooms and two baths and a large deck off the back door overlooking the beach. The Property is not located in close proximity to other real property owned by the Applicants.

4. The Applicants represent that the goal of the IRA’s investment in the Property was twofold. First, the Applicants desired to make a long-term investment for appreciation and cash flow by capitalizing on the recent downturn in the Hawaiian real estate market. Second, the Applicants planned to take ownership of the Property through a series of distributions from the IRA.<sup>13</sup> In this regard, the purchase was structured by the Applicants as a co-investment between themselves and the IRA, as tenants in common.<sup>14</sup> The Applicants explain that at a future date, they would begin taking 10% annual distributions of the Interest over a 10 year period, whereupon at the end of the 10 year period they would own the Property outright. At such point, according to the Applicants, they planned to either sell the Property or occupy it as their residence.

5. Accordingly, after setting up the IRA, Mr. Etherington transferred \$940,000 from his tax-qualified

retirement account held with Fidelity to the IRA. The Applicants also set aside additional cash in the amount of \$234,000 from their personal accounts in order to purchase a collective 20% share of the Property to be held in their personal capacities.

6. On June 8, 2009, Mr. Etherington caused the IRA to purchase the Property, as a tenant in common, with his wife and himself, in an all-cash purchase from unrelated parties, Juergen and Hilde Jenss, as Trustees of the Jenss Family Trust. The total price paid for the Property was \$1,174,138.50, including closing costs. The IRA purchased 80% of the Property for a total cash payment of \$939,300.23 (\$936,000 attributable to the Interest and \$3,300.23 attributable to closing costs). Additionally, the Applicants purchased 20% of the Property in their individual capacities, for a total cash payment of \$234,838.27, or \$117,419.14 each (\$234,000 attributable to their 20% ownership interest and \$838.27 attributable to closing costs). The Property has not been subject to any loans or other encumbrances.

#### *Management of the Property*

7. The Applicants note that, since its purchase, the Property has been managed by two unrelated individuals, Vicky Hanby and Greg McCaul. It is attested by the Applicants that neither of these individuals were disqualified persons with respect to the IRA prior to their management of the Property.

8. Mrs. Hanby, the owner and operator of Homes Hawaii Realty LLC, a real estate agency and property management company, was contracted with to provide management services to the Property. As the property manager, Mrs. Hanby was responsible for managing the Property as a long-term rental residence. In this regard, her responsibilities included finding renters, paying bills, remitting rental receipts, and scheduling repairs and maintenance. The Applicants explain that income and expenses were received and/or paid out of a general bookkeeping account which allocated the amounts to either party in accordance with its ownership percentage of the Property.

9. Prior to renting out the Property, Mrs. Hanby arranged for the Property to be repainted in order to prepare it for its initial tenants. In this regard, Mr. Etherington contracted with Mrs. Hanby’s husband, Rick Hanby, for the painting of the interior of the house. The Applicants state that Mrs. Hanby asked her husband to submit a verbal bid to paint the walls of the house, and based on the bid of \$300, the Applicants

accepted because they believed that Mr. Hanby’s bid was the lowest that they would receive. In this regard, the IRA paid \$240 and the Applicants paid \$60 to compensate Mr. Hanby for his services.<sup>15</sup>

10. At the time that the contract was entered into, Mr. Hanby was a disqualified person with respect to the IRA pursuant to section 4975(e)(2)(F) of the Code, because he was the husband of the Property’s manager, Mrs. Hanby. Thus, Mr. Etherington’s entering into the service arrangement with, and the rendering of painting services by, Mr. Hanby constituted a prohibited transaction in violation of sections 4975(c)(1)(C) and (D) of the Code. However, it appears that the arrangement with Mr. Hanby may be covered under the statutory exemption found in section 4975(d)(2) of the Code.<sup>16</sup>

11. In July 2009, the Property was rented out on an annual basis to Major Ian Schneller and his family. Major Schneller is a United States military officer who was stationed in Hawaii at the time. The Applicants represent that the Schnellers are unrelated parties with respect to the IRA. During the period that the Property was leased to the Schnellers, it earned approximately \$41,933.30 in gross receipts, from which it paid out \$23,295.00 in expenses, resulting in \$18,638.30 of net income.

12. The Applicants state that in August 2010, Major Schneller was unexpectedly transferred to California and was not able to renew the lease, thus leaving the Property with a vacancy. Shortly thereafter, Mrs. Hanby announced to the Applicants that it could require several months to find new, suitable long-term tenants willing to pay similar rental fees to those that the Schnellers had paid (\$3,700 per month). Thus, the Applicants explain, the Property was converted to a short-term rental property. Furthermore, the Applicants note that because Mrs. Hanby would not manage the Property as a short-term vacation rental, she was replaced as the Property’s manager by Mr. McCaul.

<sup>15</sup> Additionally, \$79.97 was spent on painting supplies, of which \$63.98 was paid by the IRA and \$15.99 was paid by the Applicants.

<sup>16</sup> Section 4975(d)(2) of the Code and section 54.4975–6 of the United States Treasury Regulations provide exemptive relief from the prohibitions described in sections 4975(c)(1)(C) and (D) of the Code for any contract, or reasonable arrangement, made with a disqualified person for services that are necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid for such services. No relief is proposed herein for either the selection of Mrs. Hanby’s husband or the provision of his painting services.

<sup>13</sup> At 62 years of age, Mr. Etherington is currently eligible to receive distributions from the IRA without incurring an early distribution penalty under section 72(t) of the Code.

<sup>14</sup> With respect to the co-investment arrangement between the Applicants and the IRA, the Department notes that if an IRA fiduciary, such as Mr. Etherington, causes his IRA to enter into a transaction where, by the terms or nature of the transaction, a conflict of interest between the IRA and the IRA fiduciary (or persons in which the IRA fiduciary has an interest) exists or will arise in the future, that transaction would violate section 4975(c)(1)(D) or (E) of the Code. Moreover, the IRA fiduciary must not rely upon and cannot be otherwise dependent upon the participation of the IRA in order for the IRA fiduciary (or persons in which the fiduciary has an interest) to undertake or to continue his share of the investment. Furthermore, even if at its inception the transaction does not involve a violation of the Code, if a divergence of interests develops between the IRA and the IRA fiduciary (or persons in which the fiduciary has an interest), such fiduciary must take steps to eliminate the conflict of interest in order to avoid engaging in a prohibited transaction. See ERISA Advisory Opinion Letter 2000–10A (July 27, 2000). The Department is not proposing relief for any violations that may have arisen in connection with this co-investment arrangement.

13. The Applicants relate that Mr. McCaul is a self-employed business owner with several other properties in the near vicinity of the Property under his management. According to the Applicants, Mr. McCaul assumed full responsibility for advertising, reservations, collections and remittances of payments, and maintenance of the Property, including contracting with third party companies for its cleaning in between rentals. Specifically, in order to prepare the Property for its first vacation rental, at the end of July, 2010, Mr. McCaul purchased several items of furniture from the Schnellers in order to furnish the Property for its short-term rental clients.

14. The Applicants state that, due to the complication of apportioning the proceeds between the IRA and Mr. and Mrs. Etherington in proportion to their respective ownership interests, recordkeeping responsibilities for the Property are shared between Mr. McCaul and Mr. Etherington. In this regard, the Applicants explain that Mr. McCaul collects the rental proceeds and pays for some of the maintenance out of said proceeds, remitting a statement of income and expenses to Mr. Etherington and a rental income check to the IRA's administrator, Millenium Trust, to be deposited in the IRA. The Applicants also note that they are required by U.S. tax law to maintain records related to their personal income tax return on a Schedule E regarding the 20% portion of the Property owned in their personal capacities.

15. Commencing on August 7, 2010, the Property was rented to short-term rental clients. The Applicants state that since its conversion to a daily vacation rental, the Property has had an in-season occupancy rate, including bookings through the end of February, 2011, of approximately 90% at its full nightly rate of \$249. In addition, the Applicants point out that the Property has had an off-season occupancy rate of approximately 80%, with an adjustment in the rental rate to accommodate the slack in demand. As such, the Applicants explain that the Property generates more income as a vacation rental than it would under a long-term lease.

16. The Applicants represent that during the period of time that they and the IRA have owned the Property it has earned a profit. As illustrated by the Property's Statement of Profit and Loss for the period beginning on July 1, 2009 and continuing through December 31, 2010 (the Statement), the Applicants' and the IRA's shares of income were \$13,188.61 and \$52,474.44, respectively.

In addition, their respective shares of expenses were \$6,980.48 and \$27,921.92, paid for items such as taxes, licensing fees, insurance, bank fees, cleaning costs, landscaping, pest control, property management fees, utilities, and costs associated with repairs and maintenance. Thus, the Applicants and the IRA received \$6,208.13 and \$24,552.52, respectively, in net income during the time period from July 1, 2009 through December 31, 2010. Therefore, the IRA's net acquisition and holding costs with respect to the Property equal \$914,747.71 for this time period.

17. The Applicants represent that, since the purchase of the Property, neither they nor any other disqualified person has stayed at the Property or used it for any reason. Further, the Applicants state that neither they nor any family members own any other property in the State of Hawaii. However, since his retirement, Mr. Etherington has been visiting Hawaii approximately once every six weeks for recreational purposes and to perform various management tasks and light maintenance with regard to the Property, but he has not stayed at the Property. Mr. Etherington explains that on these occasions, he visually inspects the Property to assess its condition and periodically performs light lawn cleanup and landscaping maintenance. He also meets in person with Mr. McCaul to discuss his inspections and other issues concerning the Property. However, Mr. Etherington states that he has no input regarding Mr. McCaul's selection of, or interaction with, any of the Property's rental clients. Moreover, Mr. Etherington represents that he has not received any form of compensation for any services provided to the Property.

#### *The Requested Relief*

18. The Applicants have requested an administrative exemption from the Department in order to allow them to purchase the Interest from the IRA in their personal capacities. The Sale would be a one-time cash transaction for no less than the fair market value of the Interest, as determined by a qualified, independent appraiser in an appraisal that would be updated on the date of the Sale. Further, the terms of the Sale would be at least as favorable to the IRA as those obtainable in an arm's length transaction with an unrelated party, and the IRA would pay no real estate commissions, costs, or other expenses in connection with the Sale.

#### *Rationale for the Sale*

19. The Applicants state that, due to a medical condition suffered by Mrs. Etherington, it is necessary that they take full ownership of the Property now rather than wait to receive the Interest in future payouts from the IRA. The Applicants observe that Mrs. Etherington's medical condition causes her to have an acute sensitivity to temperature extremes and limited mobility, both conditions which can be treated by relocating to the Property. In this regard, the Applicants note that they have received advice from a doctor currently treating Mrs. Etherington, which recommends temperature moderation as well as sunlight therapy as an ideal treatment. Because the Property is a single-level structure located in a more temperate climate than Park City, Utah, the Applicants believe that it is a more suitable residence for Mrs. Etherington.

20. The Applicants also assert that the recession has made the Property an unsuitable investment because it is not appreciating in value as they had anticipated. According to the Applicants, the purchase of the Property was made during a perceived downturn in the Hawaiian real estate market, in the hopes of earning significant long-term appreciation and cash flow. Nevertheless, the Applicants point out that the condition of the real estate market has clouded any anticipation of future appreciation. Thus, they explain that would like to reinvest the IRA in stocks, bonds, and other liquid investments in order to take advantage of greater potential appreciation in value.

21. Furthermore, the Applicants assert that the recent loss of Mr. Etherington's pension with Delta and the winding up of Mr. and Mrs. Etherington's respective businesses have left them with no current cash flow, thereby making the need for liquid investments extremely critical. As described above, on May 7, 2010, the PBGC issued a final benefit determination letter to Mr. Etherington informing him that he would not be receiving the remainder of his monthly pension benefit with Delta. At the same time, the Applicants note that their respective businesses have closed or are in the process of winding down. In fact, Mr. Etherington states that his only source of income going forward will be derived from Social Security.

#### *Necessity To Sell Current Residence*

22. The Applicants state that they wish to purchase and occupy the Property as their primary residence. However, the Applicants explain that,

in order to do so, they need to sell their current residence to gain the financial resources to make such purchase. The Applicants' current residence carries no debt and as of October 31, 2010 was listed for sale at \$895,000. In the event that insufficient funds are received from the sale of their current residence, Mr. Etherington has stated that he will use proceeds received from (a) the sale of certain of his taxable savings accounts or other non-IRA investments, (b) the sale of machinery owned by his now defunct excavation company, currently on the market for \$119,000, (c) the sale of the Kamas, Utah business property, currently owned by BRE, LLC, of which Mr. Etherington is a one-third owner/member (and upon which he carries a mortgage of \$368,649), and/or (d) a distribution of funds from his Fidelity IRA.

#### *Appropriateness of Proposed Transaction*

23. The Applicants maintain that the Sale will benefit the IRA because it will allow the IRA to invest in a more diversified portfolio with a greater chance of appreciation. As noted in Representation 3, Mr. Etherington's December 11, 2010 financial statement from Millenium revealed that the IRA held total assets of \$961,880.17, of which the Property constituted approximately 98% or \$939,300.23. The statement also showed that the remaining 2% of the fair market value of the IRA's assets, or \$22,579.94, was invested in cash and cash equivalents.<sup>17</sup>

24. As stated above, after completing the Sale, Mr. Etherington plans to reinvest the IRA's proceeds from the Sale in other investments that are more liquid. The Applicants admit that based on current economic conditions, the original purchase of the Property by the IRA for purposes of taking advantage of depressed real estate prices may have been premature. Given the condition of the real estate market, the Applicants suggest that a broad array of stocks and bonds will have higher returns than the Property, partly because such investments will not have the additional recurring expenses such as real estate taxes, property management fees, insurance costs, and various maintenance outlays.

25. Moreover, the Applicants explain that the Sale would be in the interest of the IRA because no real estate commissions or other fees would be payable by the IRA, nor would the IRA incur any expenses. According to the

Applicants, a sale of the Property to an independent third party would necessitate that the IRA pay its share of the real estate commission, which would be nearly \$60,000. The Applicants represent that the payment of such a fee would create a net loss to the IRA of approximately \$28,000, or 3% of the IRA's initial investment. Alternatively, the Applicants point out that the Sale would yield the IRA a net profit of \$32,000, comprised of \$12,000 attributable to the Property's appreciation and \$20,000 attributable to the Property's income, for a return of 3.4% on its initial investment.

26. The Applicants state that they have not contemplated selling the Interest to an unrelated third party or subdividing the Property. In addition to avoiding fees and commissions, they contend that, under current market conditions, the Sale could take place sooner and at a higher price than a sale to a third party. In this regard, the Applicants note that no real estate in a similar category as the Property has sold in the last year due to poor market conditions. Furthermore, based on the Property's 2011 Real Property Assessment Notice from the State of Hawaii for the tax year July 1, 2011 to June 30, 2012 (the Assessment), provided by the Applicants, the Property's assessed value decreased by approximately 15% in the last year, from \$1,170,900 (its most recent purchase price) to \$993,200. Thus, the Applicants suggest that a sale of the Property to a third party would require more time on the market, and thus sell at a significant discount in price due to the declining price of residential real estate.

#### *The Appraisal*

27. The Applicants retained Mary Mau, of Second Opinion Hawaii, Inc., located in Honolulu, Hawaii, to conduct an appraisal of the Property. Ms. Mau is licensed in the State of Hawaii as a certified residential appraiser. Ms. Mau conducted an appraisal of the Property on February 10, 2010, and issued an appraisal report on the same date (the Appraisal). In the Appraisal, Ms. Mau certified that she is independent of the Applicants and does not have an interest in the Property. In a December 7, 2010 letter (the Letter) to the Department supplementing the Appraisal, Ms. Mau represents that her appraisal firm received less than one percent of its gross income, on a 2009 fiscal year basis, from the Applicants, inclusive of income received for the Appraisal. Furthermore, in the Letter, Ms. Mau indicates that she understands the Appraisal will be used for the

purpose of obtaining an administrative exemption from the Department for the Sale, that she is unaware of any special benefit that the Applicants may derive from the Property, and that a follow-up appraisal will be needed on the date of the Sale.

28. In conducting the Appraisal, Ms. Mau considered the Sales Comparison Approach and the Cost Approach to valuation. According to the Appraisal, the Income Approach was not used to value the Property, as the typical property valued under the Income Approach is owner-occupied, there were insufficient sales of rental properties to compute a reliable GRM,<sup>18</sup> and investors do not typically purchase residential properties for investment purposes due to its less than desired return on the investment.

29. The Sales Comparison Approach and the Cost Approach yielded values of \$1,185,000 and \$1,189,825, respectively. Ms. Mau determined that the greatest reliance should be placed upon the Sales Comparison approach, because sales of similar properties are the best indicator of the current opinion of value for the Property. The Appraisal states that, with recent sales displaying overall similarities and making market reaction adjustments for the physical and other differences, an appraiser used the Sales Comparison Approach can arrive at an estimated value for the subject property. On the other hand, the Cost Approach is most effective in determining values for properties with newer improvements, where estimating physical depreciation is more precise than with older improvements. While the Cost Approach was not relied upon, the Appraisal indicates that it nevertheless was significant in that it supported the final opinion of value.

30. Accordingly, Ms. Mau determined the value of the Property, as of February 10, 2010, to be \$1,185,000. Thus, according to the Applicants, the value of the Interest is approximately \$948,000 (\$1,185,000 × 80%). The appraised value represents an appreciation of \$15,000 over the original purchase price since the time of purchase, \$12,000 of which is allocable to the Interest. Ms. Mau will update the Appraisal on the date of the Sale.

<sup>18</sup> GRM, or "gross rent multiplier," is the ratio of the monthly (or annual) rent divided into the selling price, and is useful for valuations of rental houses and simple commercial properties when used as a supplement to other more well developed methods. If several similar properties have sold in the market recently, then the GRM can be computed for those and applied to the anticipated monthly rent for the subject property.

<sup>17</sup> The cash and cash equivalents are attributable to the IRA's share of rental receipts received on the Property, plus interest.

### Summary

31. The Applicants represent that the proposed transaction will satisfy the statutory criteria for an exemption under section 4975(c)(2) of the Code because:

(a) The terms and conditions of the Sale will be at least as favorable to the IRA as those obtainable in an arm's length transaction with an unrelated party;

(b) The Sale will be a one-time transaction for cash;

(c) The IRA will receive the fair market value of the Interest as determined by a qualified, independent appraiser in an updated appraisal on the date of Sale; and

(d) The IRA will pay no real estate commissions, costs, fees, or other expenses with respect to the Sale.

### Notice to Interested Persons

Because the Applicants are the sole persons with respect to the IRA who have an interest in the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Therefore, comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Warren Blinder of the Department at (202) 693-8553. (This is not a toll-free number.)

### H-E-B Brand Savings and Retirement Plan (the Plan) and H.E. Butt Grocery Company (the Company) (Together, the Applicants)

*Located in San Antonio, Texas*

[Application No. D-11642]

### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

If the proposed exemption is granted the restrictions of section 406(a), section 406(b)(1), and section 406(b)(2) of the Act and the sanctions resulting from the application of 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the sale of real property (the Property) by the Plan to the Company, a party in interest with respect to the Plan; provided the following conditions are satisfied:

(a) The sale of the Property is a one-time transaction for cash;

(b) The Plan will receive from the proceeds of the sale of the Property a sales price in the amount of \$2,762,566, plus an amount equal to \$432,618 (the total of all real estate taxes and expenses incurred by the Plan as a result of holding the Property from the date the Plan purchased the Property through December 31, 2009), plus an additional amount equal to the total of all real estate taxes and expenses from January 1, 2010, to the date of the sale of the Property to the Company;

(c) The terms and conditions of the sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(d) The Plan pays no fees, commissions, or other expenses in connection with the sale of the Property to the Company; and

(e) Prior to entering into the subject transaction, the trustees of the Plan (the Trustees) determine that the sale of the Property is feasible, protective of, and in the interest of the Plan and its participants and beneficiaries.

### Summary of Facts and Representations

1. The Plan is a defined contribution plan incorporating a qualified cash or deferred arrangement. The Plan had approximately 20,454 active participants, as of December 31, 2009. As of December 31, 2009, the Plan had total assets with a fair market value of \$1,262,547,711.

2. The Company has sponsored the Plan since 1956. The Company is a Texas corporation engaged primarily in the retail grocery business in Texas. The following entities which are affiliated with the Company have also adopted the Plan: (a) H.E. Butt Grocery Company, LP; (b) HEBCO Partners, Ltd.; (c) Parkway Distributors, Inc.; (d) Parkway Transport, Ltd.; (e) C.C. Butt Grocery Company; and (f) HiTech Commercial Services, Inc. It is represented that Parkway Distributors, Inc. and Parkway Transport, Ltd. are engaged in the business of intrastate and interstate trucking.

3. The Property which is the subject of this proposed exemption is located at the intersection of Mystic Park Drive and Guilbeau Road in San Antonio, Texas. The Property consists of 5.822 acres of undeveloped real property. The current fair market value of the Property constitutes .0003 percent (.0003%) of the total assets of the Plan.

The Plan owns the subject Property which is adjacent to a shopping center, owned by the Company. A portion of the shopping center is currently occupied by a grocery store which is operated by the Company.

Throughout the Plan's existence, the Trustees for the Plan have consisted of a group of Company officers and employees. The Plan purchased the Property in 1986 from Ray Ellison Industries, Inc., an unrelated third party, for \$1,077,736.25. The transaction was effectuated by William J. Horvath, trustee for the Plan. The Plan has not been able to locate an outside appraisal of the Property that was done at the time of the initial purchase. The acquisition of the Property by the Plan was a cash transaction. It is represented that no lender was involved.

The Property is deed restricted for 55 years against use of the Property for grocery, fuel, and pharmacy product sales. These deed restrictions were applied to a total of 85 acres surrounding the Company's adjacent parcel (7.385 acres) when such adjacent parcel was purchased on November 27, 1985. It is represented that when in 1986 the Plan purchased the Property, it was subject to these restrictions in the deed and that such deed restrictions were reflected in the purchase price of the Property paid by the Plan.<sup>19</sup>

The Plan purchased the Property with the intent of developing a small shopping center. It is represented that the market shifted to the north, and the interest level diminished. No buildings were ever constructed on the Property. The Property has not been leased since its acquisition by the Plan. It is represented that the only costs incurred by the Plan through the Plan's holding of the Property have been the real estate taxes (described, below, in paragraph number 7) and the incidental costs of mowing the Property of approximately \$500 per year.

It is represented that access to the Property from Mystic Park Drive is via a single, concrete curb cut at the northeast corner of the Property paid for by the Company. In addition, the Company paid for the construction of a concrete paved driveway that extends along the north and west boundary of the Property and across the adjacent parcel owned by the Company to Guilbeau Road.

It is represented in the appraisal of the Property, described below, that the primary user of the concrete driveway on the Property is the Company for delivery of merchandise to the adjacent parcel owned by the Company. While the Company acknowledges that it has in the past and is currently using the concrete driveway for east access

<sup>19</sup>The Department, herein, is not providing relief from the general fiduciary provisions of the Act or the Code with regard to the acquisition and holding of the Property by the Plan.



delivery of merchandise, the Company notes that from the adjacent parcel it also has south access for the delivery of merchandise. The Company further maintains that the concrete driveway serves as an improvement (thereby increasing the market value) of both the Property and the Company's adjacent tract.

In addition, the Company represents that it has used an additional portion of the Property (approximately .25 acres) for parking. The Company represents that it paid for the paving of this portion of the Property in 1986 and maintains the parking lot at its cost.

It is represented that the purchase price to be paid by the Company to the Plan for the Property includes compensation for the past and current uses of such Property by the Company, including the Company's use of the concrete driveway across the Property, and Company's use of a portion of the Property for parking.

To the extent that the past and current uses of the Plan's Property by the Company are prohibited transactions, the Department, herein, is not proposing relief for such uses. Further, the Company has represented that within sixty (60) days of the date of the publication in the **Federal Register** of the grant of this proposed exemption, it will file FORM 5330 with the Internal Revenue Service (IRS), and pay to the IRS any applicable excise tax, which is deemed to be due and owing with regard to the past and current uses of the Plan's Property by the Company, including the Company's use of the concrete driveway across the Property, and Company's use of a portion of the Property for parking.

4. The Company desires to purchase the Property, as it owns the adjacent parcel which is improved by a shopping center, including a Company-owned grocery store. In this regard, the Company would like to control the Property for a future parking area and for the possible expansion of its grocery store. Although there are no immediate plans for utilizing the Property other than for parking, it is represented that the Company often acquires adjacent land for future needs. As an employer any of whose employees are covered by the Plan, the Company is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act. Accordingly, the sale of the Property by the Plan to the Company would constitute a prohibited transaction within the meaning of section 406(a)(1)(A), 406(a)(1)(D) and 4975(c)(1)(A), and 4975(c)(1)(D) of the Code. The subject transaction may also constitute a prohibited transaction

within the meaning of sections 406(b)(1) and 406(b)(2) of the Act and 4975(c)(1)(E) of the Code, involving fiduciary conflicts of interest.

5. It is represented that several attempts have been made to sell the Property. The Property has been listed with local real estate brokers who have marketed the Property both for sale and for lease. The Property is currently offered for sale at a sales price of \$887,000. It is represented that there has been no interest in the Property from qualified third party purchasers. Based on the lack of interest, the Trustees of the Plan have determined that further attempts to sell or lease the Property would result in delay and additional expenses to the Plan which could be avoided by effecting the proposed transaction. Further, the Trustees do not believe it likely that any prospective third party purchaser would be willing to pay more for the Property than the value (\$420,000) as reflected in the appraisal, discussed more fully, below, in paragraph number 8.

Accordingly, the Trustees have determined that it would be in the interest of the Plan and its participants and beneficiaries to sell the Property to the Company for the following reasons: (i) The sale price is substantially higher than the fair market value of the Property; and (ii) the Trustees have concluded that alternative investments would be preferable for the Plan. Further, it is represented that in the current real estate market, there are not many retail investors seeking vacant land in the San Antonio area. In this regard, it is represented that an operating retailer, such as the Company, would be willing to pay more for the Property than a residential developer or a speculative retail developer. It is the view of the Company that the proposed sales price would subsume any assemblage premium over the fair market value of the Property which would reasonably be attributed to the Company as a result of owning an improved parcel of real estate that is adjacent to the Property.

6. It is represented that the proposed transaction is feasible in that the sale of the Property by the Plan to the Company will be a one-time cash transaction.

7. It is represented that the proposed transaction is in the interest of the Plan in that the Plan will receive from the proceeds of the sale of the Property a purchase price in the amount of \$2,762,566,<sup>20</sup> plus an amount equal to

<sup>20</sup> In the Department's view the \$2,762,566 amount is intended to reimburse the Plan for the original cost of the Property, plus a reasonable rate of return over the period of time during which the

\$432,618 (the total of all real estate taxes and expenses incurred by the Plan as a result of holding the Property from the date the Plan purchased the Property through December 31, 2009), plus an additional amount equal to the total of all real estate taxes and expenses from January 1, 2010, to the date of the sale of the Property to the Company.

8. The Property was appraised by Richard L. Dugger (Mr. Dugger), MAI, CRE and David H. Thomas III (Mr. Thomas) of Dugger, Canaday, Grafe, Inc. in San Antonio, Texas. After personally inspecting the property, Mr. Dugger and Mr. Thomas determined that the fair market value of the Property based on market comparables is \$420,000, as of May 17, 2010.

By letter dated November 3, 2010, Mr. Dugger indicated that the assemblage premium with reference to the Property is 10 percent (10%) to 20 percent (20%) above the market value for such Property. As referenced in his May 2010 report prepared for the Plan, Mr. Dugger appraised the fair market value of the 5.822 acres of the Property at \$1.65 per square foot or \$420,000. Therefore, according to Mr. Dugger the assemblage premium for the Property is \$1.82 to \$1.98 per square foot or \$462,000 (rounded) to \$502,000 (rounded).

Both Mr. Dugger and Mr. Thomas are independent in that they have no present or prospective interest in or bias with respect to the Property that is the subject of the appraisal. Further, both Mr. Dugger and Mr. Thomas have no personal interest with respect to the parties involved. It is represented that the fees received by the appraisal firm of Dugger, Canaday, Grafe, Inc. from the Company and its affiliates comprise less than one percent (1%) of the total fees collected by Dugger, Canaday, Grafe, Inc. over the past twelve (12) months. It is further represented that Dugger, Canaday, Grafe, Inc. has collected no fees from the Plan during such time.

Both Mr. Dugger and Mr. Thomas are qualified as State certified general real estate appraisers. Further, Mr. Dugger has been engaged in independent fee appraising since 1969, has earned the designations of MAI, and CRE, and has completed the requirements of the continuing education program of the Appraisal Institute.

9. In summary, the Applicants represent that the subject transaction satisfies the statutory criteria of section

Plan held the Property. This amount also includes the compensation for the past and current uses of the Property by the Company, including the Company's use of the concrete driveway across the Property, and the Company's use of a portion of the Property for parking.

408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The sale of the Property will be a one-time transaction for cash;

(b) The Plan will receive from the proceeds of the sale of the Property a sales price in the amount of \$2,762,566, plus an amount equal to \$432,618 (the total of all real estate taxes and expenses incurred by the Plan as a result of holding the Property from the date the Plan purchased the Property through December 31, 2009), plus an additional amount equal to the total of all real estate taxes and expenses from January 1, 2010, to the date of the sale of the Property to the Company;

(c) The terms and conditions of the sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(d) The Plan will pay no fees, commissions, or other expenses in connection with the sale of the Property to the Company; and

(e) Before entering into the proposed transaction, the Trustees must determine that the sale of the Property is feasible, protective of, and in the interest of the Plan and its participants and beneficiaries.

#### Notice to Interested Persons

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include all participants having accounts under the Plan, including but not limited to active employees of the Company and of affiliates of the Company that have adopted the Plan, former employees, beneficiaries of deceased employees, and alternate payees.

It is represented that all interested persons will be notified of the publication of the Notice by first class mail within fifteen (15) days of publication of the Notice in the **Federal Register**.

All first class mailings will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the supplemental statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise all interested persons, of their right to comment and to request a hearing.

All written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angelena C. Le Blanc of the Department,

telephone (202) 693-8540. (This is not a toll-free number.)

#### The International Union of Painters and Allied Trades Finishing Trades Institute (the Plan or the Applicant)

*Located in Hanover, Maryland*

[Application No. L-11625]

#### Proposed Exemption

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Act in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), (C) and (D), 406(b)(1), and 406(b)(2) of the Act shall not apply to the payment for lodging and meals by the Plan to the International Union of Painters and Allied Trades, AFL-CIO (the Union), a party in interest with respect to the Plan, in a residence hall (the Residence Hall) owned by the Union through its wholly-owned entity IUPAT Building Corporation LLC (the Building Corporation), provided that the following conditions are satisfied:

(a) An independent, qualified fiduciary (the I/F), acting on behalf of the Plan, determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of the Plan;

(b) Before the Plan enters into the proposed transaction, the I/F reviews the transaction, ensures that the terms of the transaction are at least as favorable to the Plan as an arm's length transaction with an unrelated party, and determines whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act;

(c) The I/F monitors compliance with the terms and conditions of this proposed exemption, as described herein, and ensures that such terms and conditions are at all times satisfied;

(d) The I/F monitors compliance with the terms of the written agreement (the Agreement) between the Plan and the Union, and takes any and all steps necessary to ensure that the Plan is protected, including, but not limited to, agreeing to extend the Agreement on an annual basis or exercising his authority to terminate the Agreement on 30 days' written notice;

(e) The payments by the Plan for the lodging at the Residence Hall and for the meals provided under the Agreement and under the terms of any subsequent extension of the Agreement

are at no time greater than their fair market value, as determined by the I/F;

(f) The subject transaction is on terms and at all times remains on terms that are at least as favorable to the Plan as those that would have been negotiated under similar circumstances at arm's-length with an unrelated third party;

(g) The Applicant's independent auditor will perform an annual audit for the Plan to verify whether the Plan paid the proper amounts with respect to the subject transaction. In this regard, the written audit report for each year must identify, as applicable, any errors or irregularities relating to such payments, any internal control weaknesses that must be addressed under generally accepted auditing standards, and any recordkeeping matters that would impede the auditor from properly auditing such payments. To the extent there are any discrepancies as to the foregoing matters, the independent auditor will promptly communicate them to the Board of Trustees of the Plan (the Trustees), who will, in turn, promptly notify the I/F about such discrepancies.<sup>21</sup>

(h) The transaction is appropriate and helpful in carrying out the purposes for which the Plan is established or maintained;

(i) The Trustees maintain, or cause to be maintained within the United States for a period of six (6) years in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described, below, in paragraph (j)(1) of this proposed exemption to determine whether the conditions of this proposed exemption have been met; except that—

(1) If the records necessary to enable the persons described, below, in paragraph (j)(1) of this proposed exemption to determine whether the conditions of this proposed exemption have been met are lost or destroyed, due to circumstances beyond the control of the Trustees, then a separate prohibited transaction will not be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the Trustees, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (i) of this proposed exemption; and

<sup>21</sup> To the extent that the independent auditor raises issues with respect to the payments, the Trustees have an obligation to address them in a manner consistent with their fiduciary responsibilities pursuant to section 404 of the Act.

(j)(1) Except as provided, below, in paragraph (j)(2) of this proposed exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (i) of this proposed exemption are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or any other applicable Federal or State regulatory agency;

(B) Any fiduciary of the Plan, or any duly authorized representative of such fiduciary;

(C) Any contributing employer to the Plan and any employee organization whose members are covered by the Plan, or any duly authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described, above, in paragraph (j)(1)(B)–(D) of this proposed exemption are authorized to examine trade secrets or commercial or financial information that is privileged or confidential.

### Summary of Facts and Representations

1. The International Union of Painters and Allied Trades Finishing Trades Institute (the Plan) is an innovative training program which is governed by a board of trustees (the Trustees) consisting of members of the Applicant and its signatory employers. At the International Training Center (the Training Center) operated by the Plan, trainees receive continued education and training, including, but not limited to, skill enhancement and health and safety training.

2. The Plan is a Taft-Hartley and ERISA plan funded by contributions received from employers throughout the United States based on the hours worked by employees in collective bargaining units throughout the country. The Plan represents a workforce of over 110,000 working men and women in the United States and Canada whose members work in the finishing trades as painters, drywall finishers, glaziers, glass workers, floor covering installers, sign makers, display workers, convention and show decorators, and in many other occupations.

3. At the Training Center, instructors learn new innovative training techniques in the finishing industry. Upon return to their respective local apprenticeship training centers, these instructors (the Trainees) can then

provide journey-worker upgrade and apprentice training, enabling those journey-workers and apprentices to progress to the highest wage levels in their industry. The Trainees are all participants in the Plan.

4. The International Union of Painters and Allied Trades, AFL–CIO (the Union), through its wholly-owned entity IUPAT Building Corporation LLC (the Building Corporation), owns the Training Center and other buildings at its Hanover, Maryland campus. The Building Corporation leases training space to the Plan. The Applicant represents that the leasing of the training facility to the Plan is covered by Prohibited Transaction Exemption 78–6 (PTE 78–6, 43 FR 23024, May 30, 1978). In this regard, the Applicant represents that the leasing has satisfied and will continue to satisfy all the conditions contained in PTE 78–6.<sup>22</sup> The Applicant further represents that the leasing of the training facilities is not prohibited under section 406(b) of the Act, as any decisions made with respect to the Plan's leasing of the facilities are made by the Plan's Board of Trustees, which is separate from the Union's Board of Directors. To the extent that any individual trustee sits on both Boards, those individuals recuse themselves from and abstain from any vote by the Plan's Board when decisions are being made by the Plan regarding leasing the training facilities from the Union.

5. One of the challenges that has arisen during the past few years is that the Trainees, most of whom fly to the Training Center, must reside off-campus at area hotels and, therefore, require transportation each day to and from the Training Center. The Plan represents that it incurs significant costs in housing Trainees at off-campus hotels, providing transportation and supplying meals. As a result, the Applicant wishes to begin paying for lodging at a residence hall (the Residence Hall) which is currently under construction. The Residence Hall, which is being built at the Hanover, Maryland campus, will be owned by the Building Corporation.

6. An independent, qualified fiduciary has been retained by the Plan and has conducted a study regarding the proposed transaction. The independent fiduciary is John Ward, of Washington, DC. Mr. Ward is a solo practitioner and former partner at Dow Lohnes & Albertson, PLC. He has focused his professional energies on tax and ERISA matters faced by labor unions and their associated benefit funds. The Applicant

represents that Mr. Ward is, therefore, highly qualified to ascertain whether the proposed transaction would benefit the Plan. The Applicant represents that Mr. Ward has never previously worked directly for either the Applicant or the Union, and that the Plan is paying for his services.

7. Mr. Ward's study has found that the average cost of lodging at five area hotels, including the Embassy Suites, is \$159 per night. This assumes that the Applicant enters into an agreement for a minimum of four thousand room-nights per year, and does not include the cost of transportation to or from the Training Center or the cost of meals other than breakfast. The Union proposes charging the Plan \$156 per night per Trainee for a room, an amount which is less than the average market rate. The Union further proposes charging the Plan \$48.25 per Trainee for lunch, dinner and snacks during the day. This amount is based upon the Federal government meals and incidentals per diem reimbursement rate for the Baltimore County, Maryland area (currently \$61.00), minus \$12.75 to account for the cost of breakfast and incidental expenses that was included in the average cost of lodging calculation. The Union has provided the Applicant with a proposal from P&P Catering, Inc., showing that the actual cost of providing meals to the Trainees would otherwise be \$86.10 per Trainee per day. The Applicant represents that it will therefore be paying less than fair market value for the cost of the Trainees' meals. Thus, based on these rates, the Union proposes charging the Plan \$204.25 per Trainee per day for lodging, meals and snacks during the day.

8. The Plan will realize further savings in terms of transportation costs, as it currently pays approximately \$2 per day per Trainee for transportation between each Trainee's accommodations and the Training Center. Taking this into account along with the below-market room rates and the discounted meals charged at government reimbursement rates, the Plan will benefit from the cost savings. The Applicant estimates that its annual savings on lodging alone would be approximately \$12,000. The Union has represented that it will not be making a profit from charging the Applicant for lodging and meals. The Applicant represents that, in addition, if the Trainees are lodged at the Residence Hall on the same campus as the Training Center, they will have off-hours access to the Training Center's facilities and equipment, which will help develop a sense of unity and will

<sup>22</sup> The Department is expressing no opinion herein as to whether the leasing of the training facilities to the Plan is exempt under PTE 78–6.

enhance the time for interaction between Trainees and trainer, all of which support the Applicant's core mission.

9. In his analysis, Mr. Ward reaches the conclusion that: (1) the proposed combined rate per night of \$204.25 (\$156.00 for lodging and \$48.25 for meal service) which the Union proposes to charge the Plan for each Trainee receiving training at the Training Center is both appropriate and in the best interests of the Plan's participants and beneficiaries; and (2) the terms on which the Union proposes to offer lodging and meal service to Trainees at the Residence Hall are more favorable to the Plan and its participants and beneficiaries than the terms of any similar package would—or could—be offered to the Plan by a combination of one of the comparable local lodging facilities that he investigated and by any restaurant or combination of restaurants located within five miles of the Training Center.

10. As part of his engagement as an independent fiduciary, Mr. Ward will monitor the transaction on an annual basis to ensure that the transaction continues to comply with the requirements for the exemption proposed herein.

11. The subject transaction will be entered into pursuant to a written agreement (the Agreement) between the Union and the Plan. The Agreement is intended to serve as an annual agreement between the Plan and the Union. However, each party shall have the right to withdraw from the Agreement by furnishing the other party with written notice 30 days prior to withdrawing. Either party may withdraw for any reason without further obligations to the other party. However, if the Plan has prepaid for the use of rooms at the Residence Hall for dates that fall after the effective date of withdrawal, the Union shall reimburse the Plan any monies paid for such use.

12. Peter Novak, a certified public accountant with Novak Francella LLP, an independent auditor in Philadelphia, PA, that is paid by the Applicant, has certified that, upon reviewing the estimated cost of renting rooms at the Residence Hall, the Applicant has sufficient income to pay for the proposed transaction on an on-going basis. The Department notes on the financial statements provided by Mr. Novak that the Plan currently has assets in excess of \$13 million. Mr. Novak represents that the annual audit will ensure that there are no discrepancies in the amounts being paid by the Applicant to the Union.

13. In summary, the Applicant represents that the proposed transaction meets the statutory criteria for an exemption under section 408(a) of the Act because: (a) An independent, qualified fiduciary, Mr. Ward, acting on behalf of the Plan, has determined prior to entering into the proposed transaction that the transaction is administratively feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of the Plan;

(b) Mr. Ward has reviewed the transaction to ensure that its terms are at least as favorable to the Plan as an arm's-length transaction with an unrelated party, and has determined to approve the transaction, in accordance with the fiduciary provisions of the Act;

(c) Mr. Ward will monitor compliance with the terms and conditions of this proposed exemption, as described herein, and ensure that such terms and conditions are at all times satisfied;

(d) Throughout the duration of the subject transaction, Mr. Ward will monitor compliance with the terms of the written agreement (the Agreement) pursuant to which the transaction is entered into, and take any and all steps necessary to ensure that the Plan is protected, including, but not limited to, agreeing to extend the Agreement on an annual basis or exercising his authority to terminate the Agreement on 30 days' written notice;

(e) The payments paid by the Plan for lodging and meals under the terms of the Agreement and under the terms of any subsequent extension of the Agreement will at no time be greater than the fair market value of the lodging and meals, as determined by the independent fiduciary;

(f) Under the provisions of the Agreement, the transaction is on terms and at all times remains on terms that are at least as favorable to the Plan as those that would have been negotiated under similar circumstances at arm's-length with an unrelated third party;

(g) The Applicant's independent auditor will perform an annual audit for the Plan to verify whether the Plan paid the proper amounts with respect to the subject transaction. In this regard, the written audit report for each year will identify, as applicable, any errors or irregularities relating to such payments, any internal control weaknesses that must be addressed under generally accepted auditing standards, and any recordkeeping matters that would impede the auditor from properly auditing such payments. To the extent there are any discrepancies as to the foregoing matters, the independent auditor will promptly communicate

them to the Board of Trustees of the Plan (the Trustees), who will, in turn, promptly notify the independent, qualified fiduciary about such discrepancies;

(h) The transaction is appropriate and helpful in carrying out the purposes for which the Plan is established or maintained; and

(i) The Trustees will maintain, or cause to be maintained within the United States for a period of six (6) years in a manner that is convenient and accessible for audit and examination, such records as are necessary to determine whether the conditions of this proposed exemption have been met.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 693-8546 (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of March 2011.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

[FR Doc. 2011-5911 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application Number D-11638]

#### Withdrawal of the Notice of Proposed Exemption Involving Owens & Minor, Inc. (the Applicant), Located in Mechanicsville, VA

In the December 16, 2010 issue of the *Federal Register*, at 75 FR 78772, the Department of Labor published a notice of proposed exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended, and from certain taxes imposed by the Internal Revenue Code of 1986. The notice of proposed exemption, if granted, would have permitted the sale of certain shares in a hedge fund by the Owens & Minor, Inc. Pension Plan to the applicant.

By e-mail dated February 8, 2011, the applicant requested that the application for exemption be withdrawn.

Accordingly, the notice of proposed exemption is hereby withdrawn.

Signed at Washington, DC, this 9th day of March 2011.

**Ivan L. Strasfeld,**

*Director, Office of Exemption Determinations,  
Employee Benefits Security Administration.*

[FR Doc. 2011-5913 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-73,441A]

#### Quad Tech, Inc., Sussex, WI; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated February 7, 2011, a worker requested administrative

reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of Quad Tech, Inc., Sussex, Wisconsin (TA-W-73,441A) (subject firm). The determination was issued on January 4, 2011. The Department's Notice of Determination was published in the *Federal Register* on January 26, 2011 (76 FR 4729). The workers are engaged in activities related to the production of magazines and catalogs. Specifically, the workers of the subject firm provide steel stackers and equipment for printers to affiliated locations.

The negative determination was based on the Department's findings that, with regards to workers covered by TA-W-73,441A, Quad Graphics did not shift to or acquire from a foreign country the production of articles like or directly competitive with those produced by the subject workers; that there were no increased imports of articles like or directly competitive with those produced by the subject firm during the relevant period; and that the workers are not adversely-affected secondary workers.

In the request for reconsideration, the petitioner alleged that "work here decreased from work being sent elsewhere (India)" and "shift from our firm to India with silo work."

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that the Department will conduct further investigation to determine if the petitioning workers meet the eligibility requirements of the Trade Act of 1974, as amended.

#### Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 17th day of February 2011.

**Del Min Amy Chen,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5932 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Proposed Collection of Information for an Evaluation of the Young Parents Demonstration Project (YPDP); Comment Request

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) [44 U.S.C. 3505(c)(2)(A)]. The 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 the collection requirements on respondents can be properly assessed.

The proposed information collection is for an evaluation of the YPDP. The YPDP is sponsored by ETA to test innovative strategies that can improve the skills and education of young parents and, ultimately their employment and earnings.

**DATES:** Written comments must be submitted to the office listed in the addressee's section below on or before May 16, 2011.

**ADDRESSES:** A copy of this proposed information collection request may be obtained by contacting Savi Swick at 202-693-3382 (this is not a toll-free number) or e-mail: [swick.savi@dol.gov](mailto:swick.savi@dol.gov). Comments are to be submitted to Department of Labor/Employment and Training Administration, *Attn:* Savi Swick, 200 Constitution Avenue, NW., (Room N-5641) Washington, DC 20210). Written comments may be transmitted by facsimile to 202-693-2766 (this is not a toll-free number) or e-mailed to [swick.savi@dol.gov](mailto:swick.savi@dol.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The proposed information collection is for an evaluation of the YPDP. The YPDP is sponsored by ETA to test innovative strategies that can improve the skills and education of young parents and, ultimately their employment and earnings.

The YPDP grantees are required to develop a “bump-up” intervention providing an additional level of services above and beyond the existing services currently provided that are specifically intended to increase an individual’s education, job training and employment. A key factor in the bump-up design is having a single, persistent intervention for the treatment group that is substantially different from what the control group receives. Each of the grantees is implementing one of the following two bump-up interventions:

- *Mentoring Models*—Intensive professional staff mentoring specifically for education, employment, and training; and specifically for pregnant and parenting teens and young parents; or
- *Employment/Education/Training Models*—Guided employment, education, training and related supports specifically for pregnant and parenting teens and young parents.<sup>1</sup>

Individuals enrolling in YPDP have a 50/50 chance of receiving this additional level of services. Those individuals not receiving the bump up services receive the existing services offered by the grantee. To evaluate the YPDP bump-up interventions, education, employment, and other outcomes of the two groups will be

compared over time. The evaluation will estimate the success in providing educational and occupational skills training that fosters family economic self-sufficiency to young parents (both mothers and fathers) and expectant parents ages 16–24.

**II. Desired Focus of Comments**

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 submission of responses.

**III. Current Actions**

This proposed information collection will involve (1) collecting participant data from organizations that received grants under the YPDP; (2) conducting semi-structured interviews with key administrators and staff in the demonstration projects to document the structure and implementation of the demonstration intervention; and (3) conducting a follow-up survey of YPDP participants.

*Agency:* Employment and Training Administration.

*Type of Review:* New Collection.

*Title of Collection:* The Evaluation Of The Young Parents Demonstration.

*OMB Control Number:* 1205–ONEW.

*Affected Public:* Young parents, community-based organizations.

*Estimated Number of Respondents:* 9,176.

*Frequency:* Once per application during site visit interviews and follow-up surveys, six times during Participant Tracking System data collection.

*Total Estimated Annual Responses:* 6,711.

*Estimated Average Time per Response:* 38 minutes.

*Estimated Total Annual Burden Hours:* 5,854.

*Total Estimated Annual Cost Burden (excluding hour costs):* \$110,195.

Data collection activity	Number of respondents	Total burden hours	Average hourly wage	Total annualized cost
PTS—Data Collection .....	4,102	4,102	\$18.76	\$76,954
Site Visit Interviews .....	144	108	22.21	2,399
12-Month Survey .....	2,465	822	18.76	15,421
30-Month Survey .....	2,465	822	18.76	15,421
<b>Total .....</b>	<b>9,176</b>	<b>5,854</b>	<b>.....</b>	<b>110,195</b>

Comments submitted in response to this notice will be summarized and may be included in the request for Office of Management and Budget approval of the final information collection request. The comments will become a matter of public record.

Dated: March 9, 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2011–6010 Filed 3–14–11; 8:45 am]

**BILLING CODE 4510–FN–P**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

[TA–W–70,123]

**Electrolux Home Products, Inc.,  
Electrolux Major Appliances Division  
Including On-Site Leased Workers  
From Per Mar Security and Nussbaum  
Transportation; Webster City, IA;  
Amended Certification Regarding  
Eligibility To Apply for Worker  
Adjustment Assistance**

In accordance with Section 223 of the Trade Act of 1974, as amended (“Act”), 19 U.S.C. 2273, the Department of Labor

issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 25, 2009, applicable to workers of Electrolux Home Products, Inc., Electrolux Major Appliances Division, Webster City, Iowa. The workers produce laundry equipment. The notice as published in the **Federal Register** on August 19, 2009 (74 FR 41935). The notice was amended on January 21, 2011 to include on-site leased workers from Per Mar Security. The notice was published in the **Federal Register** on February 2, 2011 (76 FR 5832–5833).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The

<sup>1</sup> U.S. Department of Labor, Employment and Training Administration, “Young Parents Demonstration Program (YPDP) SGA/DFA PY 08–08,” **Federal Register**, Vol. 73, No. 193, October 3,

2008 (available over the Internet at: <http://edocket.access.gpo.gov/2008/pdf/E8–23319.pdf>). This notice also provides additional background on the demonstration effort, grant requirements, and

the structure of the “bump-up” interventions to be offered by YPDP grantees.

company reports that workers leased from Nussbaum Transportation were employed on-site at the Webster City, Iowa location of Electrolux Home Products, Inc., Electrolux Major Appliances Division. The Department has determined that these workers were sufficiently under the control of Electrolux Home Products, Inc., Electrolux Major Appliances Division to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Nussbaum Transportation working on-site at the Webster City, Iowa location of Electrolux Home Products, Inc., Electrolux Major Appliances Division.

The amended notice applicable to TA-W-70,123 is hereby issued as follows:

All workers of Electrolux Home Products, Inc., Electrolux Major Appliances Division, including on-site leased workers from Per Mar Security and Nussbaum Transportation, Webster City, Iowa, who became totally or partially separated from employment on or after May 18, 2008, through June 25, 2011, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 18th day of February 2011.

**Elliott S. Kushner,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5926 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-72,375; TA-W-72,375A]

#### **Commercial Furniture Group, Inc., Including On-Site Leased Workers From Staffing Solutions; Morristown, TN; Commercial Furniture Group, Inc., Chicago, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance**

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 5, 2010, applicable to workers of Commercial Furniture Group, Inc., including on-site leased workers from Staffing Solutions, Morristown, Tennessee. The workers are engaged in employment related to the

production of commercial wood furniture. The Department's Notice was published in the **Federal Register** on May 28, 2010 (75 FR 30070).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm.

New information shows that the Chicago, Illinois location of Commercial Furniture Group, Inc. operates in conjunction with the Morristown, Tennessee location. Both locations experienced worker separations during the relevant time period, declines in sales and/or production, and were impacted by a significant increase in imports of articles like or directly competitive commercial wooden furniture produced by the subject firm.

Accordingly, the Department is amending the certification to include workers of Commercial Furniture Group, Inc., Chicago, Illinois location. The amended notice applicable to TA-W-72,375 is hereby issued as follows:

All workers of Commercial Furniture Group, Inc., including on-site leased workers from Staffing Solutions, Morristown, Tennessee (TA-W-72,375) and Commercial Furniture Group, Inc., Chicago, Illinois (TA-W-72,375A), who became totally or partially separated from employment on or after September 21, 2008, through May 5, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 17th day of February 2011.

**Del Min Amy Chen,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5928 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-74,296]

#### **Meadwestvaco Corporation, Consumer and Office Products Division, Including On-Site Leased Workers From Pro-Tel People, Sidney, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance**

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 22, 2010, applicable to workers of MeadWestvaco

Corporation, Consumer and Office Products Division, including on-site leased workers from Pro-Tel People, Sidney, New York. The notice was published in the **Federal Register** on January 12, 2011 (762146).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of printed dated and undated planning and organizing products.

The review shows that on August 21, 2008, a certification of eligibility to apply for adjustment assistance was issued for all workers of MeadWestvaco, Consumer and Office Products Division, Sidney, New York, separated from employment on or after July 9, 2007 through August 21, 2010. The notice was published in the **Federal Register** on September 3, 2008 (73 FR 51529).

In order to avoid an overlap in worker group coverage, the Department is amending the June 21, 2009 impact date established for TA-W-74,296, to read August 22, 2010.

The amended notice applicable to TA-W-74,296 is hereby issued as follows:

All workers of MeadWestvaco Corporation, Consumer and Office Products Division, including on-site leased workers from Pro-Tel People, Sidney, New York, who became totally or partially separated from employment on or after August 22, 2010, through December 22, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 17th day of February 2011.

**Michael W. Jaffe,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5925 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-72,740; TA-W-72,740A]

#### **Bruss North America; Russell Springs, KY; Bruss North America; Orion, MI; Amended Revised Determination on Reconsideration**

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Revised Determination on Reconsideration on February 2, 2011, applicable to workers of Bruss North

America, Russell Springs, Kentucky. The workers are engaged in the production of automobile parts and component parts. The notice was published in the **Federal Register** on February 10, 2011 (76 FR 7590).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm.

New findings show that worker separations occurred during the relevant time period at the Orion, Michigan location of Bruss North America, Inc. The Orion, Michigan location served as the sales office for the production of automobile parts at the Russell Springs, Kentucky location of Bruss North America. The same factors that led to certification of the Russell Springs, Kentucky facility also led to worker separations at the Orion, Michigan location during the relevant time period. Based on these findings, the Department is amending this revised determination to include workers of the Orion, Michigan location of Bruss North America.

The amended notice applicable to TA-W-72,740 is hereby issued as follows:

All workers of Bruss North America, Russell Springs, Kentucky (TA-W-72,740) and Bruss North America, Orion, Michigan (TA-W-72,740A), who became totally or partially separated from employment on or after October 31, 2008, through February 2, 2013, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 18th day of February 2011.

**Michael W. Jaffe,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5933 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Notice of a Change in Status of an Extended Benefit (EB) Period for Alaska

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice announces a change in benefit period eligibility under the EB program for Alaska.

The following changes have occurred since the publication of the last notice regarding the State's EB status:

- Based on data released by the Bureau of Labor Statistics on January 25, 2011, the three month average, seasonally adjusted total unemployment rate for Alaska met or exceeded the 8.0% threshold to enter a high unemployment period (HUP) in the EB program. As a result, Alaska's payable period in (HUP) began February 13, 2011, and eligibility for claimants has been increased from a maximum potential entitlement of 13 weeks to a maximum potential entitlement of 20 weeks in the EB program.

The trigger notice covering state eligibility for the EB program can be found at: [http://ows.doleta.gov/unemploy/claims\\_arch.asp](http://ows.doleta.gov/unemploy/claims_arch.asp).

#### Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

#### FOR FURTHER INFORMATION CONTACT:

Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S-4231, Washington, DC 20210, telephone number (202) 693-3008 (this is not a toll-free number) or by e-mail: [gibbons.scott@dol.gov](mailto:gibbons.scott@dol.gov).

Signed in Washington, DC, this 9th day of March 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2011-6006 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FW-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Announcement Regarding the Virgin Islands Triggering "Off" Tier Three of Emergency Unemployment Compensation 2008 (EUC08)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** Announcement regarding the Virgin Islands triggering "off" Tier Three of Emergency Unemployment Compensation 2008 (EUC08).

Public Law 111-312 extended provisions in Public Law 111-92 which amended prior laws to create a Third and Fourth Tier of benefits within the EUC08 program for qualified unemployed workers claiming benefits in high unemployment states. The Department of Labor produces a trigger notice indicating which states qualify for EUC08 benefits within Tiers Three and Four and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notice covering state eligibility for the EUC08 program can be found at: [http://ows.doleta.gov/unemploy/claims\\_arch.asp](http://ows.doleta.gov/unemploy/claims_arch.asp).

Based on data published January 25, 2011, by the Bureau of Labor Statistics, the following trigger change has occurred for the Virgin Islands' EUC08 program:

- The seasonally-adjusted total unemployment rate for the 3-month period ending December 2010 for the Virgin Islands fell below the 6.0% threshold to remain "on" Tier Three of the EUC08 program. The payable period for the Virgin Islands in Tier Three of the EUC08 program concluded February 26, 2011. As a result, the maximum potential entitlement of 47 weeks will decrease to a maximum potential entitlement of 34 weeks in the EUC08 program.

#### Information for Claimants

The duration of benefits payable in the EUC program, and the terms and conditions under which they are payable, are governed by Public Laws 110-252, 110-449, 111-5, 111-92, 111-118, 111-144, 111-157, 111-205 and 111-312, and the operating instructions issued to the states by the U.S. Department of Labor. Persons who believe they may be entitled to additional benefits under the EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.



**FOR FURTHER INFORMATION CONTACT:** Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S-4231, Washington, DC 20210, telephone number (202) 693-3008 (this is not a toll-free number) or by *e-mail*: [gibbons.scott@dol.gov](mailto:gibbons.scott@dol.gov).

Signed in Washington, DC, this 9th day of March 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2011-6026 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FW-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Announcement Regarding New Mexico and Colorado Triggering "On" to Tier Four of Emergency Unemployment Compensation 2008 (EUC08)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** Announcement regarding New Mexico and Colorado triggering "on" to Tier Four of Emergency Unemployment Compensation 2008 (EUC08).

Public law 111-312 extended provisions in Public Law 111-92 which amended prior laws to create a Third and Fourth Tier of benefits within the EUC08 program for qualified unemployed workers claiming benefits in high unemployment states. The Department of Labor produces a trigger notice indicating which states qualify for EUC08 benefits within Tiers Three and Four and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notice covering state eligibility for the EUC08 program can be found at: [http://ows.doleta.gov/unemploy/claims\\_arch.asp](http://ows.doleta.gov/unemploy/claims_arch.asp).

Based on data published January 25, 2011, by the Bureau of Labor Statistics, the following trigger changes have occurred for New Mexico and Colorado in the EUC08 program:

The three month average, seasonally adjusted total unemployment rates for New Mexico and Colorado met or exceeded the 8.5% threshold to trigger "on" to Tier Four in the EUC08 program. The payable period in Tier Four for New Mexico and Colorado began February 13, 2011. As a result, the maximum

potential entitlement of 34 weeks will increase to a maximum potential entitlement of 47 weeks in the EUC08 program.

#### Information for Claimants

The duration of benefits payable in the EUC program, and the terms and conditions under which they are payable, are governed by Public Laws 110-252, 110-449, 111-5, 111-92, 111-118, 111-144, 111-157, 111-205 and 111-312, and the operating instructions issued to the states by the U.S. Department of Labor. Persons who believe they may be entitled to additional benefits under the EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

#### FOR FURTHER INFORMATION CONTACT:

Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S-4231, Washington, DC 20210, telephone number (202) 693-3008 (this is not a toll-free number) or by *e-mail*: [gibbons.scott@dol.gov](mailto:gibbons.scott@dol.gov).

Signed in Washington, DC, this 9th day of March 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2011-6025 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FW-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-73,145]

#### The Jewelry Stream; Los Angeles, CA, Notice of Negative Determination on Reconsideration

On November 10, 2010, the Department of Labor (Department) issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of The Jewelry Stream, Los Angeles, California. On November 23, 2010, the Department's Notice of determination was published in the **Federal Register** (75 FR 71455). Workers of The Jewelry Stream are engaged in employment related to the production of jewelry.

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the

determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The termination of investigation (issued on August 20, 2010) was based on information obtained during the initial investigation that the firm identified in the Trade Adjustment Assistance (TAA) petition ("M & L Manufacturing, Inc./The Jewelry Stream, 2520 W. 6th Street, Los Angeles, California") is not one firm but are separate, unaffiliated companies. Therefore, the Department determined that the petition is invalid.

In request for reconsideration, state workforce official stated that the individual on whose behalf the TAA petition was filed believed that the aforementioned companies are one firm. In support of the request for reconsideration, the state workforce official supplied new and additional information provided by the individual who sought assistance from the state workforce official ("I started to work for M & L Manufacturing, Inc. on August of 1990, but for some reason and without notification I started to receive my checks in 2005 under the name of The Jewelry Stream \* \* \* I was under the impression that I had worked for the same company from 1990 to 2008.")

During the reconsideration investigation, the Department received information from the individual on whose behalf the TAA petition was filed regarding his former employer. The individual states that he was not separated from M & L Manufacturing, Inc., but separated from The Jewelry Stream on December 18, 2008.

Therefore, the Department determines that the subject worker group consists of workers and former workers of The Jewelry Stream, Los Angeles, California.

Workers of a firm may be eligible to apply for worker adjustment assistance if they satisfy the criteria of subsection (a), (c) or (f) of Section 222 of the Act, 19 U.S.C. 2272(a), (c), (f). For the Department of Labor to issue a certification for workers under Section 222(a) of the Act, 19 U.S.C. 2272(a), the following three criteria must be met:

I. The first criterion (set forth in Section 222(a)(1) of the Act, 19 U.S.C. 2282(a)(1)) requires that a significant number or proportion of the workers in the workers' firm must have become totally or partially separated or be threatened with total or partial separation.

II. The second criterion (set forth in Section 222(a)(2) of the Act, 19 U.S.C. 2272(a)(2)) may be satisfied in one of two ways:

(A) Increased Imports Path:

(i) sales or production, or both, at the workers' firm must have decreased absolutely, AND

(ii) (I) imports of articles or services like or directly competitive with articles or services produced or supplied by the workers' firm have increased, OR

(II)(aa) imports of articles like or directly competitive with articles into which the component part produced by the workers' firm was directly incorporated have increased; OR

(II)(bb) imports of articles like or directly competitive with articles which are produced directly using the services supplied by the workers' firm have increased; OR

(III) imports of articles directly incorporating component parts not produced in the U.S. that are like or directly competitive with the article into which the component part produced by the workers' firm was directly incorporated have increased.

(B) Shift in Production or Supply Path:

(i)(I) there has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm; OR

(i)(II) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm.

III. The third criterion requires that the increase in imports or shift/acquisition must have contributed importantly to the workers' separation or threat of separation. See Sections 222(a)(2)(A)(iii) and 222(a)(2)(B)(ii) of the Act, 19 U.S.C. 2272(a)(2)(A)(iii), 2272(a)(2)(B)(ii).

Section 222(d) of the Act, 19 U.S.C. 2272(d), defines the terms "Supplier" and "Downstream Producer." For the Department to issue a secondary worker certification under Section 222(c) of the Act, 19 U.S.C. 2272(c), to workers of a Supplier or a Downstream Producer, the following criteria must be met:

(1) a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, 19 U.S.C. 2272(a), and such supply or production is related to the article or service that was the basis for such certification; and

(3) either

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

Workers of a firm may also be considered eligible to apply for worker adjustment assistance if they are publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in a category of determination that is listed in Section 222(f) of the Act, 19 U.S.C. 2272(f).

The group eligibility requirements for workers of a firm under Section 222(f) of the Act, 19 U.S.C. 2272(f), can be satisfied if the following criteria are met:

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Information obtained during the initial investigation confirmed that Criterion II has not been met because The Jewelry Stream did not shift to a foreign country the production of articles like or directly competitive with jewelry produced by the subject worker group and, during the relevant period, did not increase imports of articles like or directly competitive with jewelry produced by the subject worker group. As such, the subject workers have not met the criteria set forth in Section 222(a).

Moreover, The Jewelry Stream did not produce a component part that was used by a firm that both employed a worker group eligible to apply for TAA and directly incorporated the component

part in the production of an article or supply of a service that was the basis for the TAA certification. As such, the subject workers have not met the criteria set forth in Section 222(c).

Further, The Jewelry Stream has not been identified by name in an affirmative finding of injury by the International Trade Commission. As such, the subject workers have not met the criteria set forth in Section 222(f).

### Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Jewelry Stream, Los Angeles, California.

Signed in Washington, DC, on this 14th day of February 2011.

**Del Min Amy Chen,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5930 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-73,301]

#### Shieldalloy Metallurgical Corporation, a Subsidiary of AMG; Newfield, NJ; Notice of Negative Determination on Reconsideration

On October 7, 2010, the Department of Labor (Department) issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Shieldalloy Metallurgical Corporation, a subsidiary of AMG, Newfield, New Jersey (subject firm). The Department's Notice was published in the **Federal Register** on October 25, 2010 (75 FR 65515).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The petition states that the workers' separations occurred between October 2009 and February 2010 and described the service supplied as "aluminum

products (shipped/received) shipping, receiving, customer service.” The petition also states that “production, shipping/receiving, customer service, is being done at a facility in UK.” In an attachment to the petition, the petitioners stated that “(since 2006) the company has had to shift production \* \* \* the (grinding) department suffered from cheaper imports \* \* \* has shut down permanently . \* \* \*”

The initial investigation resulted in a negative determination based on the finding that a shift of production by the subject firm to Canada in 2006 did not contribute importantly to workers’ separations because, during the period of the investigation, the subject firm did not produce an article. Rather, the subject firm supplied storage services for other subsidiaries of AMG (the parent company) and those storage services were shifted to an affiliate domestic facility. Further, the subject firm did not, during the relevant period, increase imports of services like or directly competitive with the storage services supplied by the workers. In addition, the subject firm did not supply services to a firm that both employed a worker group that employed a worker group eligible to apply for Trade Adjustment Assistance (TAA) and used the services supplied by the subject firm in the production of an article or the supply of the service that was the basis for the TAA certification.

In the request for reconsideration, a former worker of the subject firm reiterated that the subject firm shifted operations to various facilities throughout the United States, as well as Canada, Brazil, England, and Mexico.

Information obtained during the reconsideration investigation confirmed that, during the relevant period, workers at the subject firm were engaged in activities related to the supply of storage and shipment services, which consist of receiving finished products from related companies and shipping these products to customers. Information obtained during the reconsideration investigation also confirmed that, during the relevant period, the workers’ firm neither shifted to a foreign country the supply of services like or directly competitive with the services supplied by the subject workers, nor acquired from a foreign country services like or directly competitive with those supplied by the subject workers.

### Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of

Shieldalloy Metallurgical Corporation, a subsidiary of AMG, Newfield, New Jersey.

Signed in Washington, DC, on this 16th day of February 2011.

**Del Min Amy Chen,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5931 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-72,729]

#### **International Paper Company, Pineville Mill Industrial Packaging Group; Pineville, LA; Notice of Negative Determination on Reconsideration**

On October 15, 2010, the Department of Labor (Department) issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of International Paper Company, Pineville Mill, Industrial Packaging Group, Pineville, Louisiana (subject facility). The Department’s Notice was published in the **Federal Register** on October 29, 2010 (75 FR 66795). The subject workers produce containerboard/paperboard (uncoated freesheet containerboard).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

- (1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;
- (2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or
- (3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination based on the findings that neither International Paper Company (subject firm) nor any of its customers imported articles like or directly competitive with uncoated freesheet containerboard produced at the subject facility, and that the subject firm neither shifted production to a foreign country nor acquired from another country articles like or directly competitive with the uncoated freesheet containerboard produced at the subject facility. The initial investigation also revealed that the workers are not eligible to apply for TAA as adversely-impacted secondary workers because the subject facility did not produce a

component part that was used by a firm that both employed a worker group that is currently eligible to apply for TAA and directly incorporated the containerboard in the production of the article that was the basis for the TAA certification.

In the request for reconsideration, a subject firm official provided new information regarding the article produced at the subject facility, possible customer imports, and the possibility that workers are adversely-impacted secondary workers.

During the reconsideration investigation, the Department contacted the subject firm to confirm and clarify previously-submitted information. The Department also reviewed previous International Paper Company certifications to determine whether the subject workers are adversely-impacted secondary workers.

Information obtained during the reconsideration investigation confirmed that the workers at the subject facility were engaged in employment related to the production of containerboard/paperboard.

Information obtained during the reconsideration investigation also confirmed that, during the relevant period, the subject firm did not import either articles like or directly competitive with containerboard/paperboard, or articles directly incorporating foreign-produced component parts which are like or directly competitive with imports of articles incorporating component parts produced by the subject facility.

Information obtained during the reconsideration investigation also confirmed that the subject facility supplies directly to box production plants and that a customer survey is not necessary because the majority of the customers of the subject facility are other subject firm facilities.

Information obtained during the reconsideration investigation also confirmed that the subject facility did not produce and supply a component part that was used by a firm (including an affiliated facility of the subject firm) that both employed a worker group that is currently eligible to apply for TAA and directly incorporated the containerboard/paperboard in the production of that article that was the basis for the TAA certification. Although four subject firm facilities employed workers eligible to apply for TAA, none can be the basis for a secondary impact certification in the case at hand.

**Conclusion**

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of International Paper Company, Pineville Mill, Industrial Packaging Group, Pineville, Louisiana.

Signed in Washington, DC, on this 15th day of February, 2011.

**Del Min Amy Chen,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011-5929 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-FN-P**

**DEPARTMENT OF LABOR****Bureau of Labor Statistics****Proposed Collection, Comment Request**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed extension of the "Current Population Survey (CPS) Volunteer Supplement." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the addresses section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section of this notice on or before *May 16, 2011*.

**ADDRESSES:** Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202-691-5111 (this is not a toll free number).

**FOR FURTHER INFORMATION CONTACT:** Carol Rowan, BLS Clearance Officer, 202-691-7628 (this is not a toll free number). (See **ADDRESSES** section.)

**SUPPLEMENTARY INFORMATION:****I. Background**

The September 2011 CPS Volunteer Supplement will be conducted at the request of the Corporation for National and Community Service. The Volunteer Supplement will provide information on the total number of individuals in the U.S. involved in unpaid volunteer activities, the frequency or intensity with which individuals volunteer, the types of organizations for which they volunteer, the activities in which volunteers participate, and the prevalence of volunteering more than 120 miles from home or volunteering abroad. It will also provide information on civic engagement and charitable donations.

Because the Volunteer Supplement is part of the CPS, the same detailed demographic information collected in the CPS will be available about respondents to the supplement. Thus, comparisons of volunteer activities will be possible across respondent characteristics, including sex, race, age, and educational attainment. It is intended that the supplement will be conducted annually, if resources permit, in order to gauge changes in volunteerism.

**II. Current Action**

Office of Management and Budget clearance is being sought for the CPS Volunteer Supplement. The September 2011 instrument is unchanged since the previously approved collection.

**III. Desired Focus of Comments**

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

*Type of Review:* Extension of a currently approved collection.

*Agency:* Bureau of Labor Statistics.

*Title:* CPS Volunteer Supplement.

*OMB Number:* 1220-0176.

*Affected Public:* Individuals.

*Total Responses:* 63,000.

*Frequency:* Annually.

*Total Responses:* 106,000

*Average Time per Response:* 3 minutes.

*Estimated Total Burden Hours:* 5,300 hours.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintenance):* \$0.

Signed in Washington, DC, this 9th day of March, 2011.

**Kimberley Hill,**

*Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 2011-6008 Filed 3-14-11; 8:45 am]

**BILLING CODE 4510-24-P**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[Notice (11-022)]

**NASA Advisory Council; Science Committee; Astrophysics Subcommittee; Meeting**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Astrophysics Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

**DATES:** Thursday, April 7, 2011, 2 p.m. to 4 p.m., Local Time.

**ADDRESSES:** This meeting will take place telephonically and by WebEx. Any interested person may call the USA toll free conference call number 888-469-

1171 or toll number 630-395-0075, pass code APS, to participate in this meeting by telephone. The WebEx link is <https://nasa.webex.com>, meeting number 990 150 191, and password APSApril7-2011.

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public. The agenda for the meeting includes the following topic:

—Astrophysics Division Update.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Dated: March 9, 2011.

**P. Diane Rausch,**

*Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.*

[FR Doc. 2011-6013 Filed 3-14-11; 8:45 am]

**BILLING CODE 7510-13-P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2011-0006]

### Sunshine Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission. [NRC-2011-0006].

**DATE:** Weeks of March 14, 21, 28, April 4, 11, 18, 2011.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and closed.

#### Week of March 14, 2011

There are no meetings scheduled for the week of March 14, 2011.

#### Week of March 21, 2011—Tentative

*Thursday, March 24, 2011*

9 a.m. Briefing on the 50.46a Risk-Informed Emergency Core Cooling System (ECCS) Rule (Public Meeting). (Contact: Richard Dudley, 301-415-1116).

This meeting will be Webcast live at the Web address—<http://www.nrc.gov>.

#### Week of March 28, 2011—Tentative

*Tuesday, March 29, 2011*

9 a.m. Briefing on Small Modular Reactors (Public Meeting). (Contact: Stephanie Coffin, 301-415-6877).

This meeting will be Webcast live at the Web address—<http://www.nrc.gov>.

*Thursday, March 31, 2011*

2:30 p.m. Discussion of Management Issues (Closed-Ex. 2).

#### Week of April 4, 2011—Tentative

There are no meetings scheduled for the week of April 4, 2011.

#### Week of April 11, 2011—Tentative

There are no meetings scheduled for the week of April 11, 2011.

#### Week of April 18, 2011—Tentative

*Tuesday, April 19, 2011*

9 a.m. Briefing on Source Security—Part 37 Rulemaking—Physical Protection of Byproduct Material (Public Meeting). (Contact: Merri Horn, 301-415-8126).

This meeting will be Webcast live at the Web address—<http://www.nrc.gov>.

\* \* \* \* \*

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415-1292. Contact person for more information: Rochelle Bavol, (301) 415-1651.

\* \* \* \* \*

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/public-involve/public-meetings/schedule.html>.

\* \* \* \* \*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301-415-6200, TDD: 301-415-2100, or by e-mail at [william.dosch@nrc.gov](mailto:william.dosch@nrc.gov). Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

\* \* \* \* \*

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301-415-1969), or send an e-mail to [darlene.wright@nrc.gov](mailto:darlene.wright@nrc.gov).

Dated: March 10, 2011.

**Rochelle C. Bavol,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2011-6125 Filed 3-11-11; 4:15 pm]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2009-0276]

### Notice of Issuance of Regulatory Guide

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance and Availability of Regulatory Guide 1.43, Revision 1, "Control of Stainless Steel Weld Cladding of Low-Alloy Components."

**FOR FURTHER INFORMATION CONTACT:** Gary L. Stevens, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 251-7569 or e-mail [Gary.Stevens@nrc.gov](mailto:Gary.Stevens@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or Commission) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.43, "Control of Stainless Steel Weld Cladding of Low-Alloy Steel Components," was issued with a temporary identification as Draft Regulatory Guide, DG-1221. This guide describes methods that the staff of the NRC considers acceptable for the selection and control of welding processes used for cladding ferritic steel components with austenitic stainless steel to restrict practices that could result in underclad cracking. This guide is limited to forgings and plate material and does not apply to other product forms such as castings and pipe. Adequate resistance to underclad cracking for these latter items should be ensured on a case-by-case basis. This guide applies to light-water-cooled reactors.

##### II. Further Information

In June 2009, DG-1221 was published with a public comment period of 60 days from the issuance of the guide. The public comment period was extended until October 1, 2009. The staff's responses to the comments received are located in the NRC's Agencywide Documents Access and Management

System (ADAMS) under Accession No. ML101670489. Electronic copies of Regulatory Guide 1.43, Revision 1 are available through the NRC's public Web site under "Regulatory Guides" at <http://www.nrc.gov/reading-rm/doc-collections/>. The regulatory analysis may be found under ADAMS Accession No. ML101670471.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852-2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555-0001. The PDR can also be reached by telephone at (301) 415-4737 or (800) 397-4209, by fax at (301) 415-3548, and by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov).

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 7th day of March, 2011.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2011-5967 Filed 3-14-11; 8:45 am]

**BILLING CODE 7590-01-P**

## **NUCLEAR REGULATORY COMMISSION**

**[NRC-2009-0275]**

### **Notice of Issuance of Regulatory Guide**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance and Availability of Regulatory Guide 1.50, Revision 1, "Control of Preheat Temperature for Welding of Low-Alloy Steel."

**FOR FURTHER INFORMATION CONTACT:** Gary L. Stevens, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone: (301) 251-7569 or e-mail [Gary.Stevens@nrc.gov](mailto:Gary.Stevens@nrc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Introduction**

The U.S. Nuclear Regulatory Commission (NRC or Commission) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the

staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.50, "Control of Preheat Temperature for Welding of Low-Alloy Steel," was issued with a temporary identification as Draft Regulatory Guide, DG-1222. This guide describes a method that the staff of the NRC considers acceptable for implementing regulatory requirements related to the control of welding for low-alloy steel components during initial fabrication. This guide applies to light-water-cooled reactors.

##### **II. Further Information**

In June 2009, DG-1222 was published with a public comment period of 60 days from the issuance of the guide. The public comment period was extended until October 1, 2009. The staff's responses to the comments received are located in the NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML101880091. Electronic copies of Regulatory Guide 1.50, Revision 1 are available through the NRC's public Web site under "Regulatory Guides" at <http://www.nrc.gov/reading-rm/doc-collections/>. The regulatory analysis may be found under ADAMS Accession No. ML101870625.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852-2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555-0001. The PDR can also be reached by telephone at (301) 415-4737 or (800) 397-4209, by fax at (301) 415-3548, and by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov).

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 7th day of March, 2011.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2011-5970 Filed 3-14-11; 8:45 am]

**BILLING CODE 7590-01-P**

## **NUCLEAR REGULATORY COMMISSION**

**[NRC-2009-0274]**

### **Notice of Issuance of Regulatory Guide**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance and Availability of Regulatory Guide 1.34, Revision 1, "Control of Electroslag Weld Properties."

**FOR FURTHER INFORMATION CONTACT:** Gary L. Stevens, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 251-7569 or e-mail [Gary.Stevens@nrc.gov](mailto:Gary.Stevens@nrc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Introduction**

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.34, "Control of Electroslag Weld Properties," was issued with a temporary identification as Draft Regulatory Guide, DG-1223. This guide describes methods that the staff of the NRC considers acceptable for implementing requirements about the control of weld properties when fabricating electroslag welds for nuclear components made of ferritic or austenitic materials. This guide applies to light-water reactors.

##### **II. Further Information**

In June 2009, DG-1223 was published with a public comment period of 60 days from the issuance of the guide. The public comment period was extended until October 1, 2009. The staff's responses to the comments received are located in the NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML101670369. Electronic copies of Regulatory Guide 1.34, Revision 1 are available through the NRC's public Web site under "Regulatory Guides" at <http://www.nrc.gov/reading-rm/doc-collections/>. The regulatory analysis may be found in ADAMS under Accession No. ML101670363.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852-2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555-0001. The PDR can also be reached by telephone at (301) 415-4737 or (800) 397-4209, by

fax at (301) 415-3548, and by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov).

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 7th day of March, 2011.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Chief, Regulatory Guide Development Branch,  
Division of Engineering, Office of Nuclear  
Regulatory Research.*

[FR Doc. 2011-5971 Filed 3-14-11; 8:45 am]

**BILLING CODE 7590-01-P**

## **PENSION BENEFIT GUARANTY CORPORATION**

### **Approval of Exemption From the Bond/Escrow Requirement Relating to the Sale of Assets by an Employer Who Contributes to a Multiemployer Plan: Rangers Baseball Express, LLC, and Texas Rangers Baseball Partners**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of approval.

**SUMMARY:** The Pension Benefit Guaranty Corporation has granted a request from Rangers Baseball Express, LLC, for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended, with respect to the Major League Baseball Players Pension Plan. A notice of the request for exemption from the requirement was published on December 28, 2010. The effect of this notice is to advise the public of the decision on the exemption request.

**ADDRESSES:** Copies of public comments are available on PBGC's Web site, <http://www.pbgc.gov>. Copies of the comments may be obtained by writing PBGC's Communications and Public Affairs Department (CPAD) at Suite 1200, 1200 K Street, NW., Washington, DC 20005-4026, or by visiting or calling CPAD during normal business hours (202-326-4040).

**FOR FURTHER INFORMATION CONTACT:** Theresa Anderson, Office of the Chief Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026; telephone 202-326-4020. (For TTY/TDD users, call the Federal Relay Service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4020).

#### **SUPPLEMENTARY INFORMATION:**

#### **Background**

Section 4204 of the Employee Retirement Income Security Act of 1974,

as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("ERISA" or "the Act"), provides that a bona fide arm's-length sale of assets of a contributing employer to an unrelated party will not be considered a withdrawal if three conditions are met. These conditions, enumerated in section 4204(a)(1)(A)-(C), are that:

(A) The purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller was obligated to contribute;

(B) The purchaser obtains a bond or places an amount in escrow, for a period of five plan years after the sale, in an amount equal to the greater of the seller's average required annual contribution to the plan for the three plan years preceding the year in which the sale occurred or the seller's required annual contribution for the plan year preceding the year in which the sale occurred (the amount of the bond or escrow is doubled if the plan is in reorganization in the year in which the sale occurred); and

(C) The contract of sale provides that if the purchaser withdraws from the plan within the first five plan years beginning after the sale and fails to pay any of its liability to the plan, the seller shall be secondarily liable for the liability it (the seller) would have had but for section 4204.

The bond or escrow described above would be paid to the plan if the purchaser withdraws from the plan or fails to make any required contributions to the plan within the first five plan years beginning after the sale. Additionally, section 4204(b)(1) provides that if a sale of assets is covered by section 4204, the purchaser assumes by operation of law the contribution record of the seller for the plan year in which the sale occurred and the preceding four plan years.

Section 4204(c) of ERISA authorizes the Pension Benefit Guaranty Corporation ("PBGC") to grant individual or class variances or exemptions from the purchaser's bond/escrow requirement of section 4204(a)(1)(B) when warranted. The legislative history of section 4204 indicates a Congressional intent that the sales rules be administered in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions. Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations 16 (Comm. Print, April 1980); 128 Cong.

Rec. S10117 (July 29, 1980). The granting of an exemption or variance from the bond/escrow requirement does not constitute a finding by PBGC that a particular transaction satisfies the other requirements of section 4204(a)(1).

Under PBGC's regulation on variances for sales of assets (29 CFR part 4204), a request for a variance or waiver of the bond/escrow requirement under any of the tests established in the regulation (§§ 4204.12 & 4204.13) is to be made to the plan in question. PBGC will consider waiver requests only when the request is not based on satisfaction of one of the three regulatory tests or when the parties assert that the financial information necessary to show satisfaction of one of the regulatory tests is privileged or confidential financial information within the meaning of 5 U.S.C. 552(b)(4) of the Freedom of Information Act.

Under § 4204.22 of the regulation, PBGC shall approve a request for a variance or exemption if it determines that approval of the request is warranted, in that it:

(1) Would more effectively or equitably carry out the purposes of Title IV of the Act; and

(2) Would not significantly increase the risk of financial loss to the plan.

Section 4204(c) of ERISA and § 4204.22(b) of the regulation require PBGC to publish a notice of the pendency of a request for a variance or exemption in the **Federal Register**, and to provide interested parties with an opportunity to comment on the proposed variance or exemption. PBGC received no comments on the request for exemption.

#### **The Decision**

On December 28, 2010, PBGC published a notice of the pendency of a request by Rangers Baseball Express, LLC (the "Buyer") for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) with respect to its purchase of Texas Rangers Baseball Partners (the "Seller"). According to the request, the Major League Baseball Players Pension Plan (the "Plan") was established and is maintained pursuant to a collective bargaining agreement between the professional major league baseball teams (the "Clubs") and the Major League Baseball Players Association (the "Players Association").

According to the Buyer's representations, the Seller was obligated to contribute to the Plan for certain employees of the sold operations. Effective August 12, 2010, the Buyer and Seller entered into an agreement under which the Buyer agreed to purchase substantially all of the assets

and assume substantially all of the liabilities of the Seller relating to the business of employing employees under the Plan. The Buyer agreed to contribute to the Plan for substantially the same number of contribution base units as the Seller. The Seller agreed to be secondarily liable for any withdrawal liability it would have had with respect to the sold operations (if not for section 4204) should the Buyer withdraw from the Plan within the five plan years following the sale and fail to pay its withdrawal liability. The amount of the bond/escrow required under section 4204(a)(1)(B) of ERISA is \$4,068,868. The estimated amount of the unfunded vested benefits allocable to the Seller with respect to the operations subject to the sale is \$34,030,359. While the separate major league clubs are the nominal contributing employers to the Plan, the Major League Central Fund under the Office of the Commissioner receives the revenues and makes the payments for certain common expenses, including each club's contribution to the Plan. In support of the waiver request, the requester asserts that: "[t]he Plan is funded from the Revenues which are paid from the Central Fund directly to the Plan without passing through the hands of any of the Clubs. Therefore, the Plan enjoys a substantial degree of security with respect to contributions on behalf of the Clubs. A change in ownership of a particular Club does not affect the obligation of the Central Fund to fund the Plan out of the Revenues. As such, approval of this exemption request would not significantly increase the risk of financial loss to the Plan."

Based on the facts of this case and the representations and statements made in connection with the request for an exemption, PBGC has determined that an exemption from the bond/escrow requirement is warranted, in that it would more effectively carry out the purposes of Title IV of ERISA and would not significantly increase the risk of financial loss to the Plan. Therefore, PBGC hereby grants the request for an exemption for the bond/escrow requirement. The granting of an exemption or variance from the bond/escrow requirement of section 4204(a)(1)(B) does not constitute a finding by PBGC that the transaction satisfies the other requirements of section 4204(a)(1). The determination of whether the transaction satisfies such other requirements is a determination to be made by the Plan sponsor.

Issued at Washington, DC, on this 7th day of March, 2011.

**Joshua Gotbaum,**  
*Director.*

[FR Doc. 2011-5886 Filed 3-14-11; 8:45 am]

**BILLING CODE 7709-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** [To be announced].

**STATUS:** Closed meeting.

**PLACE:** 100 F Street, NE., Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** March 17, 2011 at 10 a.m.

**CHANGE IN THE MEETING:** Additional item.

The following matter will also be considered during the 10 a.m. closed meeting scheduled for Thursday, March 17, 2011: A litigation matter.

Commissioner Casey, as duty officer, voted to consider the item listed for the closed meeting in closed session, and determined that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551-5400.

Dated: March 11, 2011.

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2011-6132 Filed 3-11-11; 4:15 pm]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, March 17, 2011 at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the

scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, March 17, 2011 will be:

Institution and settlement of injunctive actions; institution and settlement of administrative proceedings; and other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551-5400.

Dated: March 10, 2011.

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2011-6075 Filed 3-11-11; 11:15 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

**[Securities Act of 1933, Release No. 9191/February 24, 2011; Securities Exchange Act of 1934, Release No. 63956/February 24, 2011]**

### Order Regarding Review of FASB Accounting Support Fee for 2011 Under Section 109 of the Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 (the "Act") provides that the Securities and Exchange Commission (the "Commission") may recognize, as generally accepted for purposes of the securities laws, any accounting principles established by a standard setting body that meets certain criteria. Consequently, Section 109 of the Act provides that all of the budget of such a standard setting body shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard setting body, and to provide for an independent, stable source of funding, subject to review by the Commission. Under Section 109(f) of the Act, the amount of fees collected for a fiscal year shall not exceed the "recoverable budget expenses" of the standard setting body. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting



support fee or fees, determined in accordance with Section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board (“FASB”) and its parent organization, the Financial Accounting Foundation (“FAF”), satisfied the criteria for an accounting standard-setting body under the Act, and recognizing the FASB’s financial accounting and reporting standards as “generally accepted” under Section 108 of the Act.<sup>1</sup> As a consequence of that recognition, the Commission undertook a review of the FASB’s accounting support fee for calendar year 2011. In connection with its review, the Commission also reviewed the budget for the FAF and the FASB for calendar year 2011.

Section 109 of the Act also provides that the standard setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB and the Governmental Accounting Standards Board (“GASB”), the FASB’s sister organization, which sets accounting standards used by State and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB nor the GASB accept contributions from the accounting profession.

After its review, the Commission determined that the 2011 annual accounting support fee for the FASB is consistent with Section 109 of the Act. Accordingly,

*It is ordered*, pursuant to Section 109 of the Act, that the FASB may act in accordance with this determination of the Commission.

By the Commission.

**Elizabeth M. Murphy**,  
Secretary.

[FR Doc. 2011–5847 Filed 3–14–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64054; File No. SR–NASDAQ–2011–036]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify NASDAQ Options Market Rules Chapter VII, Various Sections, Dealing With Market Maker Obligations

March 8, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on March 3, 2011, The NASDAQ Stock Market LLC (“NASDAQ”), 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 NASDAQ. 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

NASDAQ proposes to amend Chapter VII, Section 3, Continuing Market Maker Registration, Section 5, Obligations of Market Makers, and Section 6, Market Maker Quotations, of the NASDAQ rulebook for the NASDAQ Options Market (“NOM”) to: (a) Permit market maker assignment by option rather than by series; (b) adopt a \$5 quotation spread parameter; and (c) amend the quoting requirement for Market Makers as explained further below. These changes are scheduled to be implemented on NOM on or about May 31, 2011; the Exchange will announce the implementation schedule by Options Trader Alert, once the rollout schedule, which will be based in part on NOM participants’ readiness, is finalized.

The text of the proposed rule change is available at [nasdaq.cchwallstreet.com](http://nasdaq.cchwallstreet.com), at NASDAQ’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, NASDAQ 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. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of the proposed rule change is to strengthen Market Maker obligations. The NASDAQ Options Market (“NOM”), the options trading facility of The NASDAQ Stock Market LLC, has been fully operational for over two years. During this time, NASDAQ has carefully considered the role of Market Makers in the NOM marketplace and their concomitant obligations.

An Options Market Maker is a Participant<sup>3</sup> registered with NASDAQ as a Market Maker.<sup>4</sup> Market Makers on NOM have certain obligations such as maintaining two-sided markets and participating in transactions that are “reasonably calculated to contribute to the maintenance of a fair and orderly market.”<sup>5</sup> To register as a Market Maker, a Participant must file a written application with Nasdaq Regulation, which will consider an applicant’s market making ability and other factors it deems appropriate in determining whether to approve an applicant’s registration.<sup>6</sup> All Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder.<sup>7</sup> The NOM Rules place no limit on the number of qualifying entities that may become Market Makers.<sup>8</sup> The good standing of a Market Maker may be suspended, terminated, or withdrawn if the conditions for approval cease to be maintained or the Market Maker violates any of its agreements with NASDAQ or any provisions of the NOM Rules.<sup>9</sup>

Currently, a Participant that has qualified as a Market Maker may register to make markets in individual series of

<sup>3</sup> The term “Options Participant” or “Participant” means a firm or organization that is registered with the Exchange pursuant to Chapter II of the NOM Rules for purposes of participating in options trading on NOM as a “Nasdaq Options Order Entry Firm” or “Nasdaq Options Market Maker.”

<sup>4</sup> See NOM Rules, Chapter VII, Section 2.

<sup>5</sup> See NOM Rules, Chapter VII, Section 5(a).

<sup>6</sup> See NOM Rules, Chapter VII, Section 2(a).

<sup>7</sup> See NOM Rules, Chapter VII, Section 2.

<sup>8</sup> See NOM Rules, Chapter VII, Rule 2(c).

<sup>9</sup> See NOM Rules, Chapter VII, Section 4(b).

<sup>1</sup> Financial Reporting Release No. 70.

<sup>15</sup> U.S.C. 78s(b)(1).

<sup>17</sup> CFR 240.19b–4.

options.<sup>10</sup> Instead, NASDAQ proposes to require that Market Makers register by option. Thus, once so registered, a NOM Market Maker is subject to the market making obligations in all series of that option, except Quarterly Options Series, adjusted option series and any options series until the time to expiration for such series is less than nine months.<sup>11</sup> In order to effect this change, NASDAQ proposes to amend various provisions in Sections 3, 5 and 6 of Chapter VII that currently refer to "series." NASDAQ believes that registration by option rather than series should spread the benefits of Market Maker quoting across all series of an option, which should, in turn, result in higher quality markets.

NASDAQ also proposes to adopt quotation spread parameters, also known as bid/ask differentials, which establish the maximum permissible width between a Market Maker's bid and an offer in a particular series. Specifically, NASDAQ proposes to adopt a \$5 wide quote spread parameters for all options.<sup>12</sup> Currently, NOM Market Makers are not subject to quote spread parameters, such that the requirement for a two-sided market can be met with a quotation that is very wide. NASDAQ believes that a \$5 quote spread parameter for NOM Market Makers should result in narrower markets, and thereby, improve the quality of NOM's markets.

Lastly, NASDAQ proposes to amend its quotation requirement for Market Makers. Today, NOM Market Makers are required to make markets on a continuous basis in at least 75% of the options series in which the Market Maker is registered. NASDAQ proposes to change this requirement to 60% of the series; in those series, to satisfy this requirement with respect to quoting a series, a Market Maker must quote such series 90% of the trading day (as a percentage of the total number of minutes in such trading day)<sup>13</sup> or such higher percentage as the Exchange may announce in advance.<sup>14</sup> Nasdaq

Regulation may consider exceptions to the requirement to quote 90% (or higher) of the trading day based on demonstrated legal or regulatory requirements or other mitigating circumstances. Although the proposed 60% requirement is lower than the current 75%, the Exchange is also proposing herein to adopt, for the first time, a quote spread requirement and a requirement to register by option rather than by series, which are considerable changes for Market Makers. NASDAQ believes that this new 60% quoting requirement is needed to balance the proposed, new quotation spread parameters.

Under this proposal, NASDAQ recognizes that certain options series present special challenges for Market Makers, due to nontraditional terms. Accordingly, NASDAQ proposes that Quarterly Option Series, adjusted option series, and any option series until the time to expiration for such series is less than nine months be treated differently. Specifically, under this proposal, Market Makers shall not be subject to the continuous quoting obligation in Section 6(d) of NOM rules in any Quarterly Option Series, any adjusted option series,<sup>15</sup> and any option series until the time to expiration for such series is less than nine months. Accordingly, the requirement to make two-sided markets set forth in 5(a)(i) of NOM Rules shall not apply to Market Makers respecting Quarterly Option Series, adjusted option series, and series with an expiration of nine months or greater.

In addition, if a technical failure or limitation of a system of the Exchange prevents a Market Maker from maintaining, or prevents a Market Maker from communicating to NOM, timely and accurate quotes, the duration of such failure or limitation shall not be included in any of the calculations under this subparagraph (i) with respect to the affected quotes.

As a whole, the proposed amendments are intended to improve the quality of NOM markets, while carefully considering the important role of Market Makers in the NOM marketplace. Adopting quotation spread parameters and requiring registration across the series of an option are intended to encourage market making in more series; at the same time, NASDAQ recognizes the need to balance these

maintained for 386 (rather than 351) minutes out of the total of 390 minutes.

<sup>15</sup> For these purposes, an adjusted option series is an option series wherein one option contract in the series represents the delivery of other than 100 shares of underlying stock or Exchange-Traded Fund Shares.

new, more burdensome obligations with a lower series quoting percentage requirement. This balance of obligations should help to make the market better for all participants. NASDAQ believes that it has crafted a reasonable balance in this proposal.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>16</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>17</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposal is appropriate and reasonable for Market Makers, similar to the rules of other options exchanges (as specified below) and should, at the same time, enhance the quality of the Exchange's options markets.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq 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.

## **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not:

- (i) Significantly affect the protection of investors or the public interest;
- (ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> See NOM Rules, Chapter VII, Section 3(a).

<sup>11</sup> See proposed NOM Rules, Chapter VII, Section 6(d)(i)(2).

<sup>12</sup> See proposed NOM Rules, Chapter VII, Section 6(d)(ii).

<sup>13</sup> For example, on a normal trading day, which lasts 390 minutes (from 9:30 a.m. to 4 p.m.), quoting in a series would need to be maintained for the total of at least 351 minutes in order to meet the 90%-of-the-trading-day threshold. In a shortened trading session, the total number of minutes the quote must be maintained would be lowered proportionately (and the same percentage threshold would apply).

<sup>14</sup> Any such higher percentage would involve an appropriate advance announcement, which would then be available on the Exchange's Web site. In the illustration above, if the Exchange set the threshold, for example, at 99% (rather than 90%), then on a normal trading day, quoting would need to be

Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup>

In particular, NASDAQ notes that the proposed rule change is similar to the rules of other options exchanges in a variety of ways. With respect to registration by series, most options exchanges require registration by option (also called underlying).<sup>20</sup> With respect to quotation spread parameters, most options exchanges currently impose such parameters on market makers; some options exchanges have a \$5 wide requirement for electronic quotes,<sup>21</sup> while others impose \$5 wide parameter in certain situations and narrower parameters in other situations, usually related to the opening and the particular market making category.<sup>22</sup> With respect to the quotation requirement and exception for certain series, the proposal is identical to Phlx Rule 1014(b)(ii)(D)(1) respecting the 60% of series, 90% of the trading day requirement, except certain series.<sup>23</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement. The Exchange previously filed its proposal under Section 19(b)(2) of the Act but subsequently withdrew that proposal and refiled under Section 19(b)(3)(A). See Securities Exchange Act Release No. 63815 (February 1, 2011), 76 FR 6646 (February 7, 2011) (SR-NASDAQ-2011-012).

<sup>20</sup> See NYSEArca Rule 6.35(d) and Phlx Rule 507(b). ISE appoints by class and group. See ISE Rules 100(a)(6) and 802.

<sup>21</sup> See NYSEAmex Rule 925NY(b)(5), which is similar, but not identical, because trading auctions on the NYSE Amex's floor-based exchange are excluded from its rule.

<sup>22</sup> See Phlx Rule 1014(c)(i)(A)(1)(a) and (c)(i)(A)(2) and ISE Rule 803(b)(4).

<sup>23</sup> Phlx Rule 1014(b)(ii)(D)(1) and (4). Securities Exchange Act Release No. 60084 (June 10, 2009) (SR-Phlx-2009-37); see also Securities Exchange Act Release No. 57186 (January 22, 2008), 73 FR 4931 (January 28, 2008) (approving SR-NYSEArca-2007-121).

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2011-036 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-2011-036. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 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-NASDAQ-2011-036 and should be submitted on or before April 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011-5862 Filed 3-14-11; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>24</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64065; File No. SR-NSCC-2011-01]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Modification of Trade Recording Fee for Bonds and Other Technical Rule Changes

March 9, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on February 28, 2011, the National Securities Clearing Corporation ("NSCC") 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 primarily by NSCC. NSCC filed the proposed rule change pursuant to Sections 19(b)(3)(A)(ii) and 19(b)(3)(A)(iii) of the Act<sup>2</sup> and Rules 19b-4(f)(2) and 19b-4(f)(4) thereunder<sup>3</sup> so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change amends Addendum A of the NSCC Rules & Procedures to modify NSCC's fee schedule and to clarify the scope of trade recording fees and the computation of clearance activity fees.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(ii) and 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>3</sup> 17 CFR 240.19b-4(f)(2) and 17 CFR 240.19b-4(f)(4).

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

The purpose of the proposed rule change is to revise NSCC's fee schedule (as set forth in Addendum A of NSCC's Rules and Procedures) to adjust the trade recording fee for bonds to align the fee with the cost of providing the service. NSCC is adjusting the trade recording fee for each side of a bond item entered for settlement but not compared by NSCC from \$0.65 per side to \$0.85 per side.

In addition, NSCC is making technical changes to: (1) Clarify that trade recording fees for equities are incorporated into the Clearance Activity Fee set forth in Section II.A. of the fee schedule and (2) adjust the lettering and numbering of the Clearance Activity Fee as set forth in the fee schedule to provide greater clarity as to how the various components of that fee are summed.

The above fee change took effect on March 1, 2011. The textual changes to NSCC's rules can be found online at [http://www.dtcc.com/downloads/legal/rule\\_filings/2011/nscc/2011-01.pdf](http://www.dtcc.com/downloads/legal/rule_filings/2011/nscc/2011-01.pdf).

NSCC states that the proposed rule change is consistent with the requirements of Section 17A of the Act<sup>4</sup> and the rules and regulations thereunder because it updates NSCC's fee schedule to align the trade recording fee for bonds with the costs of providing the service and makes other technical changes that clarify how fees are calculated. NSCC asserts that the proposed rule change provides for the equitable allocation of fees among its members.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NSCC does not believe that the proposed rule change will have any impact or impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

NSCC has not solicited or received written comments relating to the proposed rule change. NSCC will notify the Commission of any written comments it receives.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Sections

19(b)(3)(A)(ii) and 19(b)(3)(A)(iii) of the Act<sup>5</sup> and Rules 19b-4(f)(2) and 19b-4(f)(4)<sup>6</sup> thereunder because it (a) effects a change in an existing service of a registered clearing agency that does not adversely affect the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service and (b) establishes or changes a due, fee, or other charge applicable only to a member. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an e-mail to [rule-comment@sec.gov](mailto:rule-comment@sec.gov). Please include File No. SR-NSCC-2011-01 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 No. SR-NSCC-2011-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 NSCC's principal office and on NSCC's Web site at [http://www.dtcc.com/legal/rule\\_filings/nscc/2011.php](http://www.dtcc.com/legal/rule_filings/nscc/2011.php). 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 No. SR-NSCC-2011-01 and should be submitted on or before April 5, 2011.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011-5954 Filed 3-14-11; 8:45 am]

**BILLING CODE 8011-01-P**

**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 April 14, 2011. 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*, Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC

<sup>5</sup> *Supra* note 2.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> 17 CFR 200.30-3(a)(12).

<sup>4</sup> 15 U.S.C. 78q-1.

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:** Jacqueline White, Agency Clearance Officer, (202) 205-7044.

**SUPPLEMENTARY INFORMATION:**

*Title:* Small Business Administration (a) Business Development Program Web Survey.

*Frequency:* On Occasion.

*SBA Form Number:* N/A.

*Description of Respondents:* Eligible Small Disadvantaged Businesses.

*Responses:* 1,000.

*Annual Burden:* 500.

**Jacqueline White,**

*Chief, Administrative Information Branch.*

[FR Doc. 2011-5988 Filed 3-14-11; 8:45 am]

**BILLING CODE P**

**SMALL BUSINESS ADMINISTRATION**

**[Disaster Declaration #12467]**

**Arizona Disaster #AZ-00015  
Declaration of Economic Injury**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Economic Injury Disaster Loan (EIDL) declaration for the State of Arizona, dated 02/07/2011.

*Incident:* Rainfall, Flooding and Flash Flooding.

*Incident Period:* 10/03/2010 through 10/06/2010.

*Effective Date:* 03/09/2011.

*EIDL Loan Application Deadline Date:* 11/07/2011.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of an Economic Injury Disaster Declaration for the State of Arizona, dated 02/07/2011 is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Maricopa.

*Contiguous Counties:* Arizona: La Paz, Pima, Pinal, Yuma.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59002)

Dated: March 9, 2011.

**Karen G. Mills,**

*Administrator.*

[FR Doc. 2011-5989 Filed 3-14-11; 8:45 am]

**BILLING CODE 8025-01-P**

**DEPARTMENT OF STATE**

**[Public Notice: 7369]**

**Culturally Significant Objects Imported for Exhibition Determinations: "Assorted Greek and Roman Objects"**

*Summary:* Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236-3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Assorted Greek and Roman Objects" imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY, from on or about April 1, 2011, until on or about April 1, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

*For Further Information Contact:* For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6467). The mailing address is U.S. Department of State, SA-5, L/DP, Fifth Floor (Suite 5H03), Washington, DC 20522-0505.

Dated: March 8, 2011.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011-6014 Filed 3-14-11; 8:45 am]

**BILLING CODE 4710-05-P**

**DEPARTMENT OF STATE**

**[Public Notice: 7370]**

**Culturally Significant Objects Imported for Exhibition Determinations: "Cross References"**

*Summary:* Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236-3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Cross References" imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at Dumbarton Oaks, Washington, DC, from on or about March 24, 2011, until on or about July 31, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

*For Further Information Contact:* For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6467). The mailing address is U.S. Department of State, SA-5, L/DP, Fifth Floor (Suite 5H03), Washington, DC 20522-0505.

Dated: March 10, 2011.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011-6017 Filed 3-14-11; 8:45 am]

**BILLING CODE 4710-05-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**Aviation Rulemaking Advisory Committee Meeting on Transport Airplane and Engine Issues**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces a public meeting of the FAA's Aviation Rulemaking Advisory Committee

(ARAC) to discuss transport airplane and engine (TAE) issues.

**DATES:** The meeting is scheduled for Wednesday, April 13, 2011, starting at 9 a.m. Pacific Daylight Time. Arrange for oral presentations by March 30, 2011.

**ADDRESSES:** FAA—Northwest Mountain Region, Transport Standards Staff conference room, 1601 Lind Ave., SW., Renton, WA 98057.

**FOR FURTHER INFORMATION CONTACT:** Ralen Gao, Office of Rulemaking, ARM-209, FAA, 800 Independence Avenue, SW., Washington, DC 20591, Telephone (202) 267-3168, Fax (202) 267-5075, or e-mail at [ralen.gao@faa.gov](mailto:ralen.gao@faa.gov).

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. app. III), notice is given of an ARAC meeting to be held April 13, 2011.

The agenda for the meeting is as follows:

- Opening Remarks, Review Agenda and Minutes.
- FAA Report.
- Executive Committee Report.
- Transport Canada Report.
- Avionics Harmonization Working Group Report.
- Materials Flammability Working Group Report.
- Action Item Review.

Attendance is open to the public, but will be limited to the availability of meeting room space. Please confirm your attendance with the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than March 30, 2011. Please provide the following information: Full legal name, country of citizenship, and name of your industry association, or applicable affiliation. If you are attending as a public citizen, please indicate so.

For persons participating by telephone, please contact Ralen Gao by email or phone for the teleconference call-in number and passcode. Anyone calling from outside the Renton, WA, metropolitan area will be responsible for paying long-distance charges.

The public must make arrangements by March 30, 2011, to present oral statements at the meeting. Written statements may be presented to the ARAC at any time by providing 25 copies to the person listed in the **FOR FURTHER INFORMATION CONTACT** section or by providing copies at the meeting. Copies of the documents to be presented to ARAC may be made available by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

If you need assistance or require a reasonable accommodation for the

meeting or meeting documents, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Sign and oral interpretation, as well as a listening device, can be made available if requested 10 calendar days before the meeting.

Issued in Washington, DC, on March 10, 2011.

**Pamela Hamilton-Powell,**  
*Director, Office of Rulemaking.*

[FR Doc. 2011-5983 Filed 3-14-11; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2011-0034]

#### Notice of Receipt of Petition for Decision That Nonconforming 2002 Kawasaki Ninja ZX-6R Motorcycles Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 2002 Kawasaki Ninja ZX-6R motorcycles are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2002 Kawasaki Ninja ZX-6R motorcycles that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS) are eligible for importation into the United States because they have safety features that comply with, or are capable of being altered to comply with, all such standards.

**DATES:** The closing date for comments on the petition is 30 days after publication in the **Federal Register**.

**ADDRESSES:** Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202-493-2251.

**Instructions:** Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. 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.

**Privacy Act:** Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://DocketInfo.dot.gov>.

**How to Read Comments Submitted to the Docket:** You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at <http://www.regulations.gov>. Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202-366-3151).

#### SUPPLEMENTARY INFORMATION:

##### Background

Under 49 U.S.C. 30141(a)(1)(B), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS, and has no substantially similar U.S.-certified counterpart, shall be refused admission into the United States unless NHTSA has decided that the motor vehicle has safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

Petitions for eligibility decisions may be submitted by either manufacturers or

importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Skytop Rover, Co. (Skytop) of Philadelphia, Pennsylvania (Registered Importer 06-343) has petitioned NHTSA to decide whether nonconforming 2002 Kawasaki Ninja ZX-6R motorcycles are eligible for importation into the United States. Skytop contends that these vehicles are eligible for importation under 49 U.S.C. 30141(a)(1)(B) because they have safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS.

In its petition, Skytop described the nonconforming 2002 Kawasaki Ninja ZX-6R as the same model as the U.S.-certified 2003 Kawasaki Ninja ZX-6R. Because the Ninja ZX-6R model was introduced in countries other than the U.S. as a new model before the introduction of the U.S.-certified version in 2003, the petitioner acknowledged that it could not base its petition on the substantial similarity of the 2002 Kawasaki Ninja ZX-6R to the U.S.-certified 2003 Kawasaki Ninja ZX-6R motorcycles due to the model year discrepancy and the petitioning requirements of 49 U.S.C.

30141(a)(1)(A), as set forth in 49 CFR part 593. Instead, the petitioner chose to establish import eligibility on the basis that the vehicles have safety features that comply with, or are capable of being modified to comply with, the FMVSS based on destructive test data or such other evidence that NHTSA decides to be adequate as set forth in 49 U.S.C part 30141(a)(1)(B). The petitioner contends that the 2002 Kawasaki Ninja ZX-6R utilizes the same components as the U.S.-certified 2003 Kawasaki Ninja ZX-6R motorcycles in virtually all of the systems subject to the applicable FMVSS.

Specifically, the petitioner claims that 2002 Kawasaki Ninja ZX-6R motorcycles have safety features that comply with Standard Nos. 106 *Brake Hoses*, 116 *Motor Vehicle Brake Fluid*, 119 *New Pneumatic Tires for Vehicles Other than Passenger Cars*, 122 *Motorcycle Brake Systems*, and 205 *Glazing Materials*.

The petitioner further contends that the vehicles are capable of being altered

to comply with the following standards, in the manner indicated:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: inspection of all vehicles and replacement of the following with U.S.-certified components on vehicles not already so equipped: (a) Headlamps; (b) front and rear side-mounted reflex reflectors; (c) rear-mounted reflex reflector; (d) tail lamp assembly (including stoplamp, taillamp, and license plate lamp); and (e) front and rear turn signal lamps.

Standard No. 111 *Rearview Mirrors*: inspection of all vehicles and installation of U.S.-model rearview mirrors on vehicles not already so equipped.

Standard No. 120 *Tire Selection and Rims for Vehicles other than Passenger Cars*: installation of a tire information placard.

Standard No. 123 *Motorcycle Controls and Displays*: (a) installation of a U.S.-model speedometer, or modification of the speedometer so that it reads in miles per hour; and (b) installation of an ignition switch label.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: March 9, 2011.

**Claude H. Harris,**

*Acting Associate Administrator for Enforcement.*

[FR Doc. 2011-5977 Filed 3-14-11; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. DOT-NHTSA-2011-0028, Notice 1]

#### Notice of Receipt of Petition for Decision That Nonconforming 2005-2006 Porsche Carrera (997) Passenger Cars Manufactured Prior to September 1, 2006 Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 2005-2006

Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006 are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2005-2006 Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006, that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2005-2006 Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006), and they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is April 14, 2011.

**ADDRESSES:** Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001

- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- *Fax:* 202-493-2251.

**Instructions:** Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. 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.

**Privacy Act:** Anyone is able to search the electronic form of all comments received into any of our dockets by the

name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78).

*How to Read Comments submitted to the Docket:* You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at <http://www.regulations.gov>.

Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202-366-3151).

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC ("JK"), of Baltimore, Maryland (Registered Importer 90-006) has petitioned NHTSA to decide whether nonconforming 2005-2006 Porsche Carrera (997) passenger

cars manufactured prior to September 1, 2006, are eligible for importation into the United States. The vehicles which JK believes are substantially similar are 2005-2006 Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006, that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified 2005-2006 Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006, to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

JK submitted information with its petition intended to demonstrate that non-U.S. certified 2005-2006 Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006, as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2005-2006 Porsche Carrera (997) passenger cars manufactured prior to September 1, 2006 are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect*, 103 *Windshield Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 106 *Brake Hoses*, 109 *New Pneumatic Tires*, 113 *Hood Latch System*, 116 *Motor Vehicle Brake Fluids*, 124 *Accelerator Control Systems*, 135 *Light Vehicle Brake Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Mounting*, 214 *Side Impact Protection*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, 301 *Fuel System Integrity*, and 302 *Flammability of Interior Materials*.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls Telltales, and Indicators:* Installation of U.S. conforming instrument cluster and cruise control lever, and installation or activation of associated U.S.-version software in the vehicle's computer system.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of the following U.S.-model components on vehicles not already so equipped: (a) Front sidemarker lamps with integral side reflex reflectors; (b) headlamps; (c) integral tail lamp housings that includes rear side marker, rear turn signal, and brake lamps, as well as rear and side reflex reflectors.

Standard No. 110 *Tire Selection and Rims for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection:* Installation of a supplemental key warning buzzer, or installation or activation of U.S.-version software to meet the requirements of this standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* Installation or activation of U.S.-version software in the vehicle's computer system to meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection:* Inspection of all vehicles and replacement of any non U.S.-conforming model seat belts, air bag control units, air bags, and sensors with U.S.-model components on vehicles that are not already so equipped; and (b) installation or activation of U.S.-version software to ensure that the seat belt warning system meets the requirements of this standard.

Standard No. 209 *Seat Belt Assemblies:* Inspection of all vehicles and replacement of any non U.S.-certified model seat belts with U.S.-model components.

Standard No. 225 *Child Restraint Anchorage Systems:* Installation of U.S.-model child restraint anchorage systems components.

Standard No. 401 *Interior Trunk Release:* Installation of U.S.-model interior trunk release components.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR part 565.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal**



**Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: March 9, 2011.

**Claude H. Harris,**

*Acting Associate Administrator for Enforcement.*

[FR Doc. 2011-5982 Filed 3-14-11; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF VETERANS AFFAIRS

### Privacy Act of 1974; System of Records

**AGENCY:** Department of Veterans Affairs (VA).

**ACTION:** Notice of Amendment of Systems of Records Notice "Supervised Fiduciary/Beneficiary and General Investigative Records—VA" (37VA27).

**SUMMARY:** As required by the Privacy Act of 1974 (5 U.S.C. 552a(e)(4)), notice is hereby given that the Department of Veterans Affairs (VA) is updating system of records in its inventory entitled "Supervised Fiduciary/Beneficiary and General Investigative Records—VA" (37VA27). VA is amending the system of records by revising the Purpose(s), System Manager and address, and Routine Uses of Records Maintained in the System. VA is republishing the system notice in its entirety.

**DATES:** Comments on this amended system of records must be received no later than April 14, 2011. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the amended system will become effective April 14, 2011.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to the Director, Regulation Policy and Management (O2REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to 202-273-9026. (This is not a toll free number.) 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 (FDMS) at <https://www.Regulations.gov>.

### FOR FURTHER INFORMATION CONTACT:

Thomas J. Murphy, Director, Compensation and Pension Service, Veterans Benefits Administration (VBA), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, 202-461-9700.

**SUPPLEMENTARY INFORMATION:** This system of records contains guidelines for the administration of benefits in regards to beneficiaries who have been deemed incompetent by medical or legal authority. As required by law this system of records is updated to contain additional routine uses deemed necessary to administer benefits covered under title 38, United States Code, chapter 3, section (501)(a), (b), chapter 55.

The routine uses of records maintained in the system, including categories of users and the purposes of such uses, are being amended to protect the confidentiality and govern the release of VA records subject to 38 U.S.C. 5701, which permits disclosure in accordance with valid routine uses. Routine use numbers 15, 16, 17, 18, 19, 20, and 21 have been added in accordance with this authority.

Routine use number 1 has been revised to require that individuals covered by this system provide written requests for disclosures to be made to members of Congress or their staff. Routine use number 15 was added to allow for the disclosure of information to the National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of chapter 29 of title 44, United States Code. Routine use number 16 was added to allow for the disclosure of information to the Department of Justice (DoJ), either on VA's initiative or in response to DOJ's request for information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of records to the court or administrative body is a use of the information contained in the records

that is compatible with the purpose for which VA collected the records. Routine use number 17 was added to allow for the disclosure of relevant information to individuals, organizations, public or private agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement. Routine use number 18 was added to allow the disclosure of information by VA of any information in the system, except the names and mailing addresses of veterans and their dependents, that is relevant to a suspected violation or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, Tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, rule, regulation or order. Routine use number 19 was added to allow the disclosure of information to Federal agencies to assist such agencies in preventing and detecting possible fraud or abuse in operations and programs. Routine use number 20 was added to allow VA to disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) VA has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the programs (whether maintained by VA or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is made to such agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out VA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use allows disclosures by VA to respond to a suspected or confirmed data breach, including the conduct of any risks analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727. Routine use number 21

was added to allow for the disclosure of the name and mailing address of a VA beneficiary, and other information as is reasonably necessary to identify such a beneficiary, who has been adjudicated as incompetent under 38 CFR 3.353 to the Attorney General of the United States or his/her designee, for use by the Department of Justice in the National Instant Criminal Background Check System (NICS) mandated by the Brady Handgun Violence Prevention Act, Public Law 103-159.

The proposed system reports, as required by 5 U.S.C. 552a (r) of the Privacy Act of 1974, as amended, were submitted to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (61 FR 6427, February 20, 1996).

The notice of amendment and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677, December 12, 2000).

Approved: September 16, 2010.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

### 37VA27

#### SYSTEM NAME:

"VA Supervised Fiduciary/  
Beneficiary and General Investigative  
Records—VA"

#### SYSTEM LOCATION:

Records are maintained at the Department of Veterans Affairs (VA) regional offices, VA Medical Centers, the VA Records Management Center, St. Louis, Missouri, and the Data Processing Center at Hines, Illinois, and at the Corporate Franchise Data Center in Austin, Texas. The regional offices having jurisdiction over the domicile of the claimant generally maintain active records. Address locations are listed in the VA Appendix I. The automated individual employee productivity records are temporarily maintained at the VA data processing facility serving the office in which the employee is located. The paper record is maintained at the VA regional office having jurisdiction over the employee who processed the claim. Records provided to the Department of Housing and Urban

Development (HUD) for inclusion on its Credit Alert Interactive Voice Response System (CAIVRS) are located at a data processing center under contract to HUD in Lanham, Maryland.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The following categories of individuals are covered by this system:

1. VA beneficiaries (*i.e.*, a veteran or a non-veteran adult who receives VA monetary benefits, lacks the mental capacity to manage his or her own financial affairs regarding disbursement of funds without limitation, and is either rated incompetent by VA or adjudged to be under legal disability by a court of competent jurisdiction; or a child who has not reached majority under State law and receives VA monetary benefits);

2. VA supervised fiduciaries (*i.e.*, VA Federal fiduciaries including legal custodians, spouse payees, superintendents of Indian reservations and custodians-in-fact appointed by VA to serve as payee of VA monetary benefits for an incompetent VA beneficiary; or a person or legal entity appointed by a State or foreign court to supervise the person and/or estate of a VA beneficiary adjudged to be under a legal disability. The statutory title of a court-appointed fiduciary may vary from State to State).

3. A chief officer of a hospital treatment, domiciliary, institutional or nursing home care facility wherein a veteran, rated incompetent by VA, is receiving care and who has contracted to use the veteran's VA funds in a specific manner.

4. Supervised Direct Payment (SDP) beneficiaries (*i.e.*, incompetent adults who receive VA monetary benefits, or other individuals for whom an investigation of other than a fiduciary or guardianship matter is conducted for the purpose of developing evidence to enable a VA organizational element to make administrative decisions on benefits eligibility and other issues; or, to develop evidence for further investigations of potential criminal issues).

5. Physicians named in treatment records and financial managers or attorneys who help disperse funds. These individuals' names would be released during the disclosure of an incompetent individual's records.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

The records in the Principal Guardianship Folder (PGF) are the primary records in this system. Social Security Administration (SSA) derived records, as needed, are also contained in

this system. These records as well as secondary files called veterans files and correspondence files may contain the following types of information:

1. Field examination reports (*i.e.*, VA Form 27-4716a or 27-3190, Field Examination Request and Report, which contains a VA beneficiary's name, mailing address, social security number, VA file number, an assessment of the VA beneficiary's ability to handle VA and non-VA funds, description of family relationships, economic and social adjustment data, information regarding activities, and name, mailing address, and assessment of the performance of a VA-supervised fiduciary);

2. Correspondence from and to a VA beneficiary, a VA-supervised fiduciary, and other interested third parties;

3. Medical records (*i.e.*, medical and social work service reports generated in VA, State, local, and private medical treatment facilities and private physicians' offices indicating the medical history of the VA beneficiary including diagnosis, treatment and nature of physical or mental disability);

4. Financial records (*e.g.*, accountings of a fiduciary's management of a VA beneficiary's income and estate, amount of monthly benefits received, amounts claimed for commissions by the VA-supervised fiduciary, certificates of balance on accounts from financial institutions, and withdrawal agreements between VA, financial institutions, and VA-supervised fiduciary);

5. Court documents (*e.g.*, petitions, court orders, letters of fiduciaryship, inventories of assets, and depositions);

6. Contractual agreements to serve as a VA Federal Fiduciary;

7. Photographs of people (incompetent beneficiaries, fiduciaries, and other persons who are the subject of a VA investigation), places, and things;

8. Fingerprint records; and

9. Social Security Administration records containing information about the type and amount of SSA benefits paid to beneficiaries who are eligible to receive benefits under both VA and SSA eligibility criteria, records containing information developed by SSA about SSA beneficiaries who are in need of representative payees, accountings to SSA, and records containing information about SSA representative payees. Also contained in this system are copies of nonfiduciary program investigation records. These records are reports of field examinations or investigations performed at the request of any organizational element of VA about any subject under the jurisdiction of VA other than a fiduciary issue. In addition to copies of the reports, records

may include copies of exhibits or attachments such as photographs of people, places, and things; sworn statements; legal documents involving loan guaranty transactions; bankruptcy; and debts owed to VA; accident reports; birth, death, and divorce records; certification of search for vital statistics documents; and beneficiary's financial statements and tax records; immigration information; and newspaper clippings.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 38, United States Code, Chapter 3, § 501(a), (b), Chapter 55.

**PURPOSE:**

This system will collect a limited amount of personally identifiable information in order to provide authorized individuals access to or interaction with the Department of Veterans Affairs. The information collected by the system will include: name, mailing address, social security number, medical record information, and financial information. The system enables VA to maintain lists of individuals who are considered incompetent for VA purposes for the purpose of providing a wide variety of Federal veteran's benefits administered by VA at VA facilities located throughout the nation. See the statutory provisions cited in "Authority for maintenance of the system." VA gathers or creates these records in order to enable it to administer these statutory benefits programs.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

1. The record of an individual who is covered by this system may be disclosed to a member of Congress, or staff person acting for the member when the member or staff person requests the record on behalf of and at the written request of that individual.

2. The name and mailing address of a veteran, which is relevant to a suspected violation or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, may be disclosed to a Federal agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto, in response to its official request, when that information is for law enforcement investigation purposes, and such request is in writing and otherwise complies with subsection (b)(7) of 5 U.S.C. 552a.

3. The name and mailing address of a veteran, which is relevant to a suspected violation or reasonably imminent violation of law concerning public health or safety, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, may be disclosed to any foreign, State or local governmental agency or instrumentality charged under applicable law with the protection of the public health or safety, if a qualified representative of such organization, agency or instrumentality has made a written request that such name and mailing address be provided for a purpose authorized by law, and, if the information is sought for law enforcement investigation purposes, and the request otherwise complies with subsection (b)(7) of 5 U.S.C. 552a.

4. The name and mailing address of a veteran may be disclosed to any nonprofit organization if the release is directly connected with the conduct of programs and the utilization of benefits under title 38, United States Code (such disclosures include computerized lists of names and mailing addresses).

5. Any information in this system, including name, mailing address, social security number, VA file number, medical records, financial records and field examination reports of a VA beneficiary, and the name, mailing address and information regarding the activities of a VA-supervised fiduciary or beneficiary may be disclosed at the request of a VA beneficiary or fiduciary to a Federal, State, or local agency in order for VA to obtain information relevant to a VA decision concerning the payment and usage of funds payable by VA on behalf of a beneficiary, or to enable VA to assist a beneficiary or VA-supervised fiduciary in obtaining the maximum amount of benefits for a VA beneficiary from a Federal, State, or local agency.

6. Any information in this system, including name, mailing address, social security number, VA file number, medical records, financial records and field examination reports of a VA beneficiary who is in receipt of VA and SSA benefits concurrently, and the name, mailing address and information regarding the activities of a VA-supervised fiduciary may be disclosed to a representative of SSA to the extent necessary for the operation of a VA program, or to the extent needed as indicated by such representative.

7. The name and mailing address of a VA beneficiary, VA rating of incompetency, and the field examination report may be disclosed to a Federal agency, upon its official

request, in order for that agency to make decisions on such matters as competency and dependency in connection with eligibility for that agency's benefits. This information may also be disclosed to a State or local agency, upon its official request in order for that agency to make decisions on such matters as competency and dependency in connection with eligibility for that agency's benefits, if the information pertains to a VA beneficiary who is not a veteran, or if the name and mailing address of the veteran is provided beforehand.

8. Any information in this system, including medical records, financial records, field examination reports, correspondence and court documents may be disclosed in the course of presenting evidence to a court, magistrate or administrative tribunal in matters of guardianship, inquests and commitments, and to probation and parole officers in connection with court required duties.

9. Only so much relevant information, including information in VA records obtained from SSA, and the name and mailing address of a VA beneficiary, fiduciary, or other person under investigation, as is necessary to obtain a coherent and informed response may be released to a third party who may have information bearing on an issue under VA investigation.

10. Any information in this system may be disclosed to a VA or court-appointed fiduciary in order for that fiduciary to perform his or her duties, provided this information will only be released when the disclosure is for the benefit of the beneficiary. Any information in this system may also be disclosed to a proposed fiduciary in order for the fiduciary to make an informed decision with regard to accepting fiduciary responsibility for a VA beneficiary.

11. Any information in this system, including medical records, correspondence records, financial records, field examination reports and court documents may be disclosed to an attorney employed by the beneficiary, or to a spouse, relative, next friend or to a guardian ad litem representing the interests of the beneficiary, provided the name and mailing address of the beneficiary is given beforehand and the disclosure is for the benefit of the beneficiary, and the release is authorized by 38 U.S.C. 7332, if applicable. Records subject to 38 U.S.C. 7332 contain information on medical treatment for drug abuse, alcoholism, sickle cell anemia, and HIV.

12. Any information in this system may be disclosed to the Department of

Justice and to U.S. Attorneys in defense of prosecution of litigation involving the United States and to Federal agencies upon their official request in connection with review of administrative tort claims filed under the Federal Tort Claims Act, 28 U.S.C. 2672, as well as other claims.

13. Any information in this system including available identifying information regarding the debtor, such as the name of the debtor, last known address of the debtor, name of debtor's spouse, social security account number, VA insurance number, VA file number, place of birth and date of birth of debtor, name and mailing address of debtor's employer or firm and dates of employment, may be disclosed to other Federal agencies, State probate courts, State drivers license bureaus, State automobile title and license bureaus and the Government Accountability Office in order to obtain current mailing address, locator and credit report assistance in the collection of unpaid financial obligations owed the United States. The purpose is consistent with the Federal Claims Collection Act of 1966 and 38 U.S.C. 5701(b)(6).

14. Any information in this system relating to the adjudication of incompetency of a VA beneficiary either by the court of competent jurisdiction or by VA may be disclosed to a lender or prospective lender participating in the VA Loan Guaranty Program who is extending credit or proposing to extend credit on behalf of a veteran in order for VA to protect incompetent veterans from entering into unsound financial transactions which might deplete the resources of the veteran and to protect the interest of the Government giving credit assistance to a veteran.

15. Disclosure may be made to the National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of chapter 29 of title 44, United States Code.

16. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records

in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

17. Disclosure of relevant information may be made to individuals, organizations, public or private agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

18. VA may disclose on its own initiative any information in this system, except the names and mailing addresses of veterans and their dependents, that is relevant to a suspected violation or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, Tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, rule, regulation or order.

19. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

20. VA may on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) VA has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to the economic or property interests, identity theft or fraud, or harm to the programs (whether maintained by VA or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out VA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by VA to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit

protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

21. The name and mailing address of a VA beneficiary, and other information as is reasonably necessary to identify such a beneficiary, who has been adjudicated as incompetent under 38 CFR 3.353, may be provided to the Attorney General of the United States or his/her designee, for use by the Department of Justice in the National Instant Criminal Background Check System (NICS) mandated by the Brady Handgun Violence Prevention Act, Public Law 103-159.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Fiduciary Program beneficiary and fiduciary information contained in the Principal Guardianship Folder (PGF), veterans' files, and correspondence files are maintained on paper documents in case folders and/or in the Fiduciary Beneficiary System and are stored at the regional offices (includes record information stored in the Fiduciary Beneficiary System), VA Central Office, and VA Corporate Franchise Data Center in Austin, Texas. Copies of nonfiduciary program investigations and related information contained in veteran's files and correspondence files are maintained on paper documents and are stored at the regional offices and at VA Central Office.

Records (or information contained in records) are also maintained in electronic file folders (e.g., Virtual VA), and on automated storage media (e.g., microfilm, microfiche, magnetic tape and disks). Such information may be accessed through data telecommunication terminal systems designated the Benefits Delivery Network (BDN), Virtual VA and Veterans Service Network (VETSNET). BDN, Virtual VA and VETSNET terminal locations include VA Central Office, regional offices, VA health care facilities, Veterans Integrated Service Network (VISN) offices, Department of Defense Finance and Accounting Service Centers and the U.S. Coast Guard Pay and Personnel Center. Remote on-line access is also made available to authorized remote sites, representatives of claimants and to attorneys of record for claimants. A VA claimant must execute a prior written consent or a power of attorney authorizing access to his or her claims records before VA will allow the representative or attorney to have access to the claimant's automated claims records. Access by representatives and

attorneys of record is to be used solely for the purpose of assisting an individual claimant whose records are accessed in a claim for benefits administered by VA. Information relating to receivable accounts owed to VA, designated the Centralized Accounts Receivable System (CARS), is maintained on magnetic tape, microfiche and microfilm. CARS is accessed through a data telecommunications terminal system at St. Paul, Minnesota.

**RETRIEVABILITY:**

Paper documents and automated storage media are indexed and retrievable by name and file number of VA beneficiary or other individual.

**SAFEGUARDS:**

1. The individual case folder and computer lists are generally kept in secured steel cabinets when not in use. The cabinets are located in areas, which are locked after work hours. Access to these records is restricted to authorized VA personnel on a "need to know" basis. Magnetic tapes and disks, when not in use, are maintained under lock and key in areas accessed by authorized VA personnel on a "need to know" basis.

2. Access to the computer rooms within the regional office is generally limited by appropriate locking devices and restricted to authorized VA employees and vendor personnel. Automated Data Processing (ADP) peripheral devices are generally placed in secure areas (areas that are locked or have limited access) or are otherwise protected. Information in the Fiduciary Beneficiary System may be accessed by authorized VA employees. Access to file information is controlled at two levels; the system recognizes authorized

employees by a series of individually unique passwords/codes and the employees are limited to only the information in the file, which is needed in the performance of their official duties.

3. Access to the VA data processing center is generally restricted to center employees, custodial personnel, Federal Protective Service, and other security personnel. Access to the computer rooms is restricted to authorized operational personnel through electronic locking devices. All other persons gaining access to the computer rooms are escorted.

4. Access to records in VA Central Office is only authorized to VA personnel on a "need to know" basis. Records are maintained in manned rooms during working hours. During non-working hours, there is limited access to the building with visitor control by security personnel.

**RETENTION AND DISPOSAL:**

Paper documents and computer lists are destroyed between 60 days after receipt to 2 years after VA supervision has ceased, depending on the type of record or document. Correspondence files are destroyed after 1 year, veteran files after 2 years, PGF's 2 years after the case becomes inactive. Investigations data and information obtained from SSA is destroyed according to the time standards established in the two preceding sentences. Information contained in the Fiduciary Beneficiary System is automatically purged two years after the case becomes inactive. A record is determined inactive when it comes under the provision of M21-1MR, Part XI, Chapter 4, Section A.2.f.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Compensation and Pension Service (21), VA Central Office, Washington, DC 20420.

**NOTIFICATION PROCEDURE:**

Any individual who wishes to determine whether a record is being maintained in this system under his or her name or other personal identifier, or wants to determine the content of such records should submit a written request or apply in person to the nearest VA regional office or center. Addresses for VA regional offices and centers may be found in VA Appendix 1. All inquiries must reasonably identify the type of records involved, *e.g.*, guardianship file. Inquiries should include the individual's full name, VA file number and return address. If a VA file number is not available, then as much of the following information as possible should be forwarded: Full name, branch of service, dates of service, service numbers, Social Security Number, and date of birth.

**RECORD ACCESS PROCEDURES:**

Individuals seeking information regarding access to or contesting VA records in this system may write, call or visit the nearest VA regional office or center.

**CONTESTING RECORD PROCEDURES:**

See records access procedures above.

**RECORD SOURCE CATEGORIES:**

VA beneficiary, VA beneficiary's dependents, VA-supervised fiduciaries, field examiners, estate analysts, third parties, other Federal, State, and local agencies, and VA records.

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Part II

Department of the Interior

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Fish and Wildlife Service

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Listing and Designation of Critical Habitat for the Chiricahua Leopard Frog; Proposed Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R2-ES-2010-0085; MO 92210-0-0009-B4]

RIN 1018-AX12

**Endangered and Threatened Wildlife and Plants; Listing and Designation of Critical Habitat for the Chiricahua Leopard Frog**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Chiricahua leopard frog (*Lithobates chiricahuensis*) under the Endangered Species Act of 1973, as amended. In total, we are proposing to designate approximately 11,136 acres (4,510 hectares) as critical habitat for the Chiricahua leopard frog. The proposed critical habitat is located in Apache, Cochise, Gila, Graham, Greenlee, Pima, Santa Cruz, and Yavapai Counties, Arizona; and Catron, Hidalgo, Grant, Sierra, and Socorro Counties, New Mexico. In addition, because of a taxonomic revision of the Chiricahua leopard frog, we are reassessing the status of and threats to the currently described species *Lithobates chiricahuensis* and proposing the listing as threatened of the currently described species.

**DATES:** We will consider comments received or postmarked on or before May 16, 2011. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by April 29, 2011.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS-R2-ES-2010-0085.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS-R2-ES-2010-0085; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on the Internet at <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:**

Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone: 602/242-0210; facsimile: 602/242-2513. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** Due to a taxonomic revision of the Chiricahua leopard frog, we must reassess the status of and threats to the currently described *Lithobates chiricahuensis*. Therefore, this document consists of: (1) A proposed rule to list the Chiricahua leopard frog (*Lithobates chiricahuensis*) as threatened; and (2) a proposed rule to designate critical habitat for the Chiricahua leopard frog.

**Previous Federal Actions**

We published a proposed rule to list the Chiricahua leopard frog as threatened in the **Federal Register** on June 14, 2000 (65 FR 37343). We published a final rule listing the species as threatened on June 13, 2002 (67 FR 40790). Included in the final rule was a special rule (see 50 CFR 17.43(b)) to exempt operation and maintenance of livestock tanks on non-Federal lands from the section 9 take prohibitions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). For further information on actions associated with listing the species, please see the final listing rule (67 FR 40790; June 13, 2002).

In a May 6, 2009, order from the Arizona District Court, the Secretary of the Interior was required to publish a critical habitat prudency determination for the Chiricahua leopard frog and, if found prudent, a proposed rule to designate critical habitat by December 8, 2010. Because of unforeseen delays related to species taxonomic issues, which required an inclusion of a threats analysis, we requested a 3-month extension to the court-ordered deadlines for both the proposed and final rules. On November 24, 2010, the extension was granted and new deadlines of March 8, 2011, for the proposed rule and March 8, 2012, for the final rule were established for completing and submitting the critical habitat rules to the **Federal Register**. This proposed rule is published in accordance with the Arizona District Court's ruling.

**Public Comments**

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, tribes, the scientific community, industry, or other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Information about the status of the species, especially the Ramsey Canyon portion of the range, including:

- (a) Genetics and taxonomy;
- (b) Historical and current range, including distribution patterns;
- (c) Historical and current population levels, and current and projected trends; and
- (d) 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, 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 Chiricahua leopard frog and regulations that may be addressing those threats.

(4) Additional information concerning the range, distribution, and population size of Chiricahua leopard frog, including the locations of any additional populations.

(5) Any information on the biological or ecological requirements of Chiricahua leopard frog.

(6) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act, including whether there are threats to the species from human activities, how the designation may ameliorate or worsen those threats, and if any potential increase in threats outweighs the benefits of designation such that the designation of critical habitat may not be prudent.

(7) Specific information on:

- The amount and distribution of the Chiricahua leopard frog's habitat;
- What areas occupied at the time of listing and that contain features essential to the conservation of the species should be included in the designation, and why;
- Special management considerations or protections that the physical and

biological features essential to the conservation of the Chiricahua leopard frog that have been identified in this proposal may require, including managing for the potential effects of climate change; and

- 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 subject areas and their possible impacts on proposed critical habitat.

(9) Any probable economic, national security, or other relevant impacts of designating as critical habitat any area that may be included in the final designation. We are particularly interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(10) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(11) Information on whether the benefits of an exclusion of any particular area outweigh the benefits of inclusion under section 4(b)(2) of the Act.

(12) Information on the projected and reasonably likely impacts of climate change on the Chiricahua leopard frog and the critical habitat areas we are proposing.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including any personal identifying information you provide—on <http://www.regulations.gov>. If you provide personal identifying information, such as your street address, phone number, or e-mail address, in your written comments, 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.

A draft economic analysis and draft environmental assessment for this action will be prepared and made available to the public for review. At that time, we will reopen the comment period on this proposed rule and concurrently solicit comments on the

draft economic analysis and draft environmental assessment.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on the Internet at <http://www.regulations.gov>, at Docket No. FWS-R2-ES-2010-0085, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021.

### Proposed Threatened Status for the Chiricahua Leopard Frog

#### Background

Due to a taxonomic revision of the Chiricahua leopard frog, we must reassess the status of and threats to the currently described species. It is our intent to discuss below only those topics directly relevant to the listing of the Chiricahua leopard frog as threatened in this section of the proposed rule. For more information on the Chiricahua leopard frog, refer to the final listing rule published in the **Federal Register** on June 13, 2002 (67 FR 40790) and the species' recovery plan (Service 2007).

#### Species Information

##### Description

When we listed the Chiricahua leopard frog as a threatened species on June 13, 2002 (67 FR 40790), we recognized the scientific name as *Rana chiricahuensis*. Since that time, the genus name *Lithobates* was proposed by Frost *et al.* (2006, p. 249) and adopted by the Society for the Study of Amphibians and Reptiles in their most recent listing of scientific and standard English names of North American amphibians and reptiles north of Mexico (Crother 2008, p. 7). With the publication of this proposed rule, we officially accept the new scientific name of the Chiricahua leopard frog as *Lithobates chiricahuensis*.

In addition, the Ramsey Canyon leopard frog (*Lithobates subaquavocalis*), found on the eastern slopes of the Huachuca Mountains, Cochise County, Arizona, has recently been subsumed into *L. chiricahuensis* (Crother 2008, p. 7) and was noted by the Service as part of the listed entity in a 90-day finding on 192 species from a petition to list 475 species (74 FR 66866; December 16, 2009). Goldberg *et al.* (2004, pp. 313–319) examined the relationships between the Ramsey Canyon leopard frog (*L. subaquavocalis*) and the Chiricahua leopard frog (*L. chiricahuensis*). Genetic analysis

showed no evidence that Ramsey Canyon leopard frog was a separate species from the Chiricahua leopard frog (Goldberg *et al.* 2004, p. 315). The Society for the Study of Amphibians and Reptiles later adopted these leopard frogs as the same species, *L. chiricahuensis* (Crother 2008, p. 7). Therefore, we no longer recognize the Ramsey Canyon leopard frog (*L. subaquavocalis*) as a distinct species and consider it to be synonymous with the Chiricahua leopard frog (*L. chiricahuensis*). In this proposed rule, we present our analysis of the threats to the species given this taxonomic revision to determine if it is appropriate to list the Chiricahua leopard frog as threatened throughout its range (see Summary of Factors Affecting the Species below).

Northern populations of the Chiricahua leopard frog in the Mogollon Rim region of east-central Arizona east to the eastern bajada of the Black Range in New Mexico are physically separated from populations to the south. Previous work had suggested these two separate divisions might be distinct species (Platz and Grudzien 1999, p. 51). Goldberg *et al.* (2004, p. 315) demonstrated that frogs from these two regions showed a 2.4 percent average divergence in mitochondrial DNA sequences. However, more recent work using both mitochondrial DNA and nuclear microsatellites from frog tissues throughout the range of the species provides no evidence of multiple taxa within what we now consider to be the Chiricahua leopard frog (Herrman *et al.* 2009, p. 18).

The Chiricahua leopard frog is distinguished from other members of the leopard frog complex by a combination of characters, including a distinctive pattern on the rear of the thigh consisting of small, raised, cream-colored spots or tubercles (wart-like projections) on a dark background; folds on the back and sides that, towards the rear, are interrupted and deflected towards the middle of the body; stocky body proportions; relatively rough skin on the back and sides; eyes that are positioned relatively high on the head; and often green coloration on the head and back (Platz and Mecham 1979, p. 347.1; Degenhardt *et al.* 1996, pp. 85–87). The species also has a distinctive call consisting of a relatively long snore of 1 to 2 seconds in duration (Platz and Mecham 1979, p. 347.1; Davidson 1996, tracks 58, 59). Overall body lengths of adults range from approximately 2.1 inches (in) (5.3 centimeters (cm)) to 5.4 in (13.7 cm) (Platz and Mecham 1979, p. 347.1; Stebbins 2003, pp. 236–237).



### Life History

The life history of the Chiricahua leopard frog can be characterized as a complex life cycle, consisting of eggs and larvae that are entirely aquatic and adults who are primarily aquatic but may be terrestrial at times. Egg masses of Chiricahua leopard frogs have been reported in all months, but reports of egg laying (oviposition) in June and November through January are uncommon (Zweifel 1968, pp. 45–46; Frost and Bagnara 1977, p. 449; Frost and Platz 1983, p. 67; Scott and Jennings 1985, p. 16; Sredl and Jennings 2005, p. 547). Frost and Platz (1983, p. 67) divided egg-laying activity into two distinct periods with respect to elevation. Populations at elevations below 5,900 feet (ft) (1,798 meters (m)) tended to lay eggs from spring through late summer, with most activity taking place before June. Populations above 5,900 ft (1,798 m) bred in June, July, and August. Scott and Jennings (1985, p. 16) found a similar seasonal pattern of reproductive activity in New Mexico (February through September), as did Frost and Platz (1983, p. 67), although they did not note elevational differences. Additionally, Scott and Jennings (1985, p. 16) noted reduced egg laying in May and June. Zweifel (1968, p. 45) noted that breeding in the early part of the year appeared to be limited to sites where water temperatures do not get too low, such as spring-fed sites. Frogs at warm springs may lay eggs year-round (Scott and Jennings 1985, p. 16). Also, females attach spherical masses of fertilized eggs, ranging in number from 300 to 1,485 eggs, to submerged vegetation (Sredl and Jennings 2005, p. 547).

Eggs hatch in approximately 8 to 14 days depending on temperature (Sredl and Jennings 2005, p. 547). After hatching, tadpoles remain in the water, where they feed and grow. Tadpoles turn into juvenile frogs in 3 to 9 months (Sredl and Jennings 2005, p. 547). Juvenile frogs are typically 1.4 to 1.6 in (35 to 40 millimeters (mm)) in overall body length. Males reach sexual maturity at 2.1 to 2.2 in (5.3 to 5.6 cm), a size they can attain in less than a year (Sredl and Jennings 2005, p. 548).

The diet of the Chiricahua leopard frog includes primarily invertebrates such as beetles, true bugs, and flies, but fish and snails are also taken (Christman and Cummer 2006, pp. 9–18). An adult was documented eating a hummingbird in southeastern Arizona (Field *et al.* 2003, p. 235). Chiricahua leopard frogs can be found active both day and night, but adults tend to be active more at night than juveniles (Sredl and Jennings

2005, p. 547). Chiricahua leopard frogs presumably experience very high mortality (greater than 90 percent) in the egg and early tadpole stages, high mortality when the tadpole turns into a juvenile frog, and then relatively low mortality when the frogs are adults (Zug *et al.* 2001, p. 303; Service 2007, pp. C10–C12). Under ideal conditions, Chiricahua leopard frogs may live as long as 10 years in the wild (Platz *et al.* 1997, p. 553).

### Geographical Range and Distribution

The range of the Chiricahua leopard frog includes central and southeastern Arizona; west-central and southwestern New Mexico; and in Mexico, northeastern Sonora, the Sierra Madre Occidental of northwestern and west-central Chihuahua, and possibly as far south as northern Durango (Platz and Mecham 1984, p. 347.1; Degenhardt *et al.* 1996, p. 87; Sredl and Jennings 2005, p. 546; Brennan and Holycross 2006, p. 44; Lemos-Espinal and Smith 2007, pp. 287, 579; Rorabaugh 2008, p. 32). The distribution of the species in Mexico is unclear due to limited survey work and the presence of closely related taxa (especially *Lithobates lemosespinali* (no common name)) in the southern part of the range of the Chiricahua leopard frog. Based on 2009 data, the species still occurs in most major drainages in Arizona and New Mexico where it occurred historically; the exception to this is the Little Colorado River drainage in Arizona. The species is apparently extirpated from the Chiricahua Mountains of Arizona, which harbored the type locality. In Arizona and New Mexico, the species likely occurs at about 14 and 16 to 19 percent of its historical localities, respectively (Service 2007, p. 6).

### Habitat

Within its geographical range, breeding populations of this species historically inhabited a variety of aquatic habitats (Service 2007, p. 3); however, the species is now limited primarily to headwater streams and springs, and livestock tanks into which nonnative predators (e.g., sportfishes, American bullfrogs (*Lithobates catesbeianus*), crayfish (*Orconectes virilis*), barred tiger salamanders (*Ambystoma mavortium mavortium*)) have not yet invaded or been introduced, or where the numbers of nonnative predators are low and habitats are complex, allowing Chiricahua leopard frogs to coexist with these species (Service 2007, p. 15). The large valley-bottom cienegas (mid-elevation wetland communities typically surrounded by relatively arid

environments), rivers, and lakes where the species occurred historically are populated with nonnative predators at densities with which the Chiricahua leopard frog cannot coexist.

### Dispersal

Although one of the most aquatic of southwestern leopard frogs (Degenhardt *et al.* 1996, p. 86), Chiricahua leopard frogs are known to move among aquatic sites, and such movements are crucial for conserving metapopulations. A metapopulation is a set of local populations that interact via individuals moving between local populations (Hanski and Gilpin 1991, p. 7). If local populations are extirpated through drought, disease, or other factors, the populations can be recolonized via dispersal from adjacent populations. Hence, the long-term viability of metapopulations may be enhanced over that of isolated populations, even though local populations experience periodic extirpations. To determine whether metapopulation structure exists in a specific group of local populations, the dispersal capabilities of the frog must be understood. Based on a review of available information, the recovery plan (Service 2007, pp. D–2, D–3, K–3) provides a rule of thumb on dispersal capabilities. Chiricahua leopard frogs are reasonably likely to disperse 1.0 mile (mi) (1.6 kilometers (km)) overland, 3.0 mi (4.8 km) along ephemeral or intermittent drainages (water existing only briefly), and 5.0 mi (8.0 km) along perennial water courses (water present at all times of the year), or some combination thereof not to exceed 5.0 mi (8.0 km). This is often referred to as the “1–3–5 rule” of dispersal.

### Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants (Lists). A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. The final listing rule for the Chiricahua leopard frog (67 FR 40790; June 13, 2002) contained a discussion of these five factors, as did the proposed

rule (65 FR 37343; June 14, 2000). Threats discussed in the previous listing rules are still affecting the Chiricahua leopard frog today. Please refer to these rules or the Chiricahua leopard frog recovery plan (Service 2007; pp. 18–45) for a more detailed analysis of the threats affecting the species. Because we no longer recognize the Ramsey Canyon leopard frog as a distinct species and consider it to be synonymous with the Chiricahua leopard frog, we reanalyzed factors relevant to the entire listed entity below. However, because all the threats from the previous rules still apply, we provide a summary of those below.

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

The recovery plan lists the following threats to habitat or range of the Chiricahua leopard frog: Mining, including mining-related contaminants; other contaminants; dams; diversions; stream channelization; groundwater pumping; woodcutting; urban and agricultural development; road construction; grazing by livestock and elk; climate change; and altered fire regimes (Service 2007, pp. 31–37). Although these threats are widespread and varied, a threats assessment that was accomplished as part of the recovery plan showed chytridiomycosis and predation by nonnative species as consistently more important threats than these habitat-based factors (Service 2007, pp. 20–27).

Chiricahua leopard frogs are fairly tolerant of variations in water quality, but likely do not persist in waters severely polluted with cattle feces (Service 2007, p. 34), or runoff from mine tailings or leach ponds (Rathbun 1969, pp. 1–3; U.S. Bureau of Land Management 1998, p. 26; Service 2007, p. 36). Furthermore, variation in pH, ultraviolet radiation, and temperature, as well as predation stress, can alter the potency of chemical effects (Akins and Wofford 1999, p. 107; Monson *et al.* 1999, pp. 309–311; Reylea 2004, pp. 1081–1084). Chemicals may also serve as a stressor that makes frogs more susceptible to disease, such as chytridiomycosis (*see* discussion under Factor C below) (Parris and Baud 2004, p. 344). The effects of pesticides and other chemicals on amphibians can be complex because of indirect effects on the amphibian environment, direct lethal and sublethal effects on individuals, and interactions between contaminants and other factors associated with amphibian decline (Sparling 2003, pp. 1101–1120; Reylea 2008, pp. 367–374).

A copper mine (the Rosemont Mine) has been proposed in the northeastern portion of the Santa Rita Mountains, Pima County, Arizona (recovery unit 2), the footprint of which includes several sites recently occupied by Chiricahua leopard frogs. Recent research indicates that Chiricahua leopard frog tadpoles are sensitive to cadmium and copper above certain levels (Little and Calfee 2008, pp. 6–10), making the introduction of copper into Chiricahua leopard frog habitat a possible significant threat. No analyses have been conducted yet to quantify how the frogs and their habitats may be affected in that region, which potentially includes the Bureau of Land Management's Las Cienegas National Riparian Conservation Area; however, a draft environmental impact statement will likely be published in 2011.

The Southwest Endangered Species Act Team (2008, pp. iii-IV–5) published “Chiricahua leopard frog (*Lithobates [Rana] chiricahuensis*) considerations for making effects determinations and recommendations for reducing and avoiding adverse effects,” which included detailed descriptions of how many different types of projects, including fire management, construction, native fish recovery, and livestock management projects, may affect the frog and its habitat. This document, in addition to the recovery plan (Service 2007, pp. 31–37), can be referenced for more information about habitat-related threats to the Chiricahua leopard frog, while not the most important factors threatening the species, nevertheless affect the Chiricahua leopard frog such that the species is likely to become endangered within the foreseeable future.

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

Even though the final listing rule (67 FR 40790; June 13, 2002) discussed over-collection for the pet trade as a possible threat, we have no information that leads us to believe that overutilization for commercial, recreational, scientific, or educational purposes is currently a threat to the Chiricahua leopard frog.

#### C. Disease and Predation

The threats assessment conducted during the preparation of the recovery plan (Service 2007, pp. 18–45) found that disease (chytridiomycosis) and predation by nonnative species (bullfrogs, crayfish, fish, and tiger salamanders) are the most important threats to the Chiricahua leopard frog.

#### Disease

In some areas, Chiricahua leopard frog populations are known to be seriously affected by chytridiomycosis. Chytridiomycosis is an introduced fungal skin disease caused by the organism *Batrachochytrium dendrobatidis* or “Bd.” Voyles *et al.* (2009) hypothesized that Bd disrupts normal regulatory functioning of frog skin, and evidence suggests that electrolyte depletion and osmotic imbalance that occur in amphibians with severe chytridiomycosis are sufficient to cause mortality. This disease has been associated with numerous population extirpations, particularly in New Mexico, and with major die-offs in other populations of Chiricahua leopard frogs (Service 2007).

#### Predation

Prior to the invasion of perennial waters by predatory, nonnative species (American bullfrog, crayfish, fish species), the frog was historically found in a variety of aquatic habitat types. Today, leopard frogs in the southwestern United States are so strongly impacted by harmful nonnative species, which are most prevalent in perennial waters, that the leopard frogs' occupied niche is increasingly restricted to the uncommon environments that do not contain these nonnative predators, and these environments now tend to be ephemeral and unpredictable. Witte *et al.* (2008, p. 378) found that sites with disappearances of Chiricahua leopard frogs were 2.6 times more likely to have introduced crayfish than were control sites. Unfortunately, few sites with bullfrogs were included in the Witte *et al.* (2008, pp. 375–383) study, and at many sites, there was no identification of the species of fish present.

#### Summary of Factor C

Overall, the Chiricahua leopard frog has made modest population gains in Arizona in spite of disease and predation, but is apparently declining in New Mexico because of these threats. We consider disease, specifically chytridiomycosis, and predation by nonnative species to be threats affecting the species such that the species is likely to become endangered within the foreseeable future.

#### D. Inadequacy of Existing Regulatory Mechanisms

The Chiricahua leopard frog is currently listed as a threatened species (67 FR 40790; June 13, 2002) with a special rule (*see* 50 CFR 17.43(b)) to exempt operation and maintenance of livestock tanks on non-Federal lands from the section 9 take prohibitions of

the Act. Even with regulatory protections of the Act currently in place, nonnative species used for fishing baits in Chiricahua leopard frog habitats pose a significant threat to the Chiricahua leopard frog; use of these nonnative species as fishing baits presents a vehicle for the distribution of these often predatory or competitive bait species into frog habitat and for the dissemination of deadly diseases to the frog. Picco and Collins (2008, pp. 1585–1587) found waterdogs (tiger salamanders; *Ambystoma tigrinum*) infected with chytridiomycosis in Arizona bait shops, and waterdogs infected with ranavirus in Arizona, New Mexico, and Colorado bait shops. Furthermore, they found that 26 to 67 percent of anglers released tiger salamanders bought as bait into the waters where they fish, and 4 percent of bait shops released tiger salamanders back into the wild after they were housed in shops with infected animals, despite the fact that release of live salamanders is prohibited by Arizona Game and Fish Commission Orders. This study showed the inadequacy of current State regulations in regard to preventing the spread of amphibian diseases via the waterdog bait trade. Even though the Chiricahua leopard frog is currently listed under the Endangered Species Act as a threatened species, additional regulation or increased enforcement of existing regulations or both are needed to stem the spread of amphibian diseases via use of waterdogs for bait. Therefore, we consider the inadequacy of current regulatory mechanisms to prevent the spread of amphibian diseases via the bait trade to be a threat such that the species is likely to become endangered within the foreseeable future.

#### *E. Other Natural or Manmade Factors Affecting Its Continued Existence*

##### Small Populations

Among the potential threats in this category discussed in the Chiricahua leopard frog recovery plan (Service 2007, pp. i-M–17) and the final listing rule (67 FR 40790; June 13, 2002), are genetic and stochastic effects that manifest in small populations. Specifically, small populations are vulnerable to extirpation due to random variations in age structure and sex ratios, as well as from disease or other natural events that a larger population is more likely to survive. Inbreeding depression and loss of genetic diversity in small populations can also reduce the fitness of individuals and the ability of a population to adapt to change. The recent genetic study revealed no

systemic lack of genetic diversity within the Chiricahua leopard frog as a species (Herrmann *et al.* 2009, pp. 12–17). In fact, populations were quite variable; up to 16 different genetic groupings were found. This does not preclude the possibility that individual populations may suffer from genetic or demographic problems, but the study shows the species retains good genetic variability.

##### Climate Change

The Chiricahua leopard frog recovery plan (Service 2007, pp. 40–43) describes anticipated effects of climate change on the Chiricahua leopard frog. The plan cited literature indicating that temperatures rose in the 20th century and warming is predicted to continue over the 21st century (Service 2007, pp. 40–43). Climate models are less certain about predicted trends in precipitation, but the southwestern United States is expected to become drier. Since the recovery plan was prepared, the Intergovernmental Panel on Climate Change (IPCC) (2007, pp. 1–8) published a report stating that global warming is occurring and that precipitation patterns are being affected.

According to the IPCC report, global mean precipitation is anticipated to increase, but not uniformly (IPCC 2007, p. 8). In the American Southwest and elsewhere in the middle latitudes, precipitation is expected to decrease. There is also high confidence that many semi-arid areas like the western United States will suffer a decrease in water resources due to climate change, as a result of less annual mean precipitation and reduced length of snow season and snow depth (IPCC 2007, p. 8). Although most climate models predict a drying trend in the 21st century in the southwestern United States, these predictions are less certain than predicted warming trends. The models do not predict summer precipitation well, and typically at least half of precipitation within the range of the Chiricahua leopard frog occurs in the summer months (Brown 1982, pp. 58–62; Guido 2008, p. 5). Furthermore, there have been no trends either in summer rainfall over the last 100 years in Arizona (Guido 2008, pp. 3–5), or since 1955 in annual precipitation in the western United States (van Mantgem *et al.* 2009, p. 523). On the other hand, all severe, multi-year droughts in the southwestern United States and northwestern Mexico have been associated with La Niña events (Seager *et al.* 2007, p. 3), during which sea surface temperatures in the tropical Pacific decline. Climate models predict that drought driven by La Niña events will be deeper and more profound than

any during the last several hundred years (Seager *et al.* 2007, p. 3).

Drought has likely contributed to loss of Chiricahua leopard frog populations since the species was originally listed in 2002. Stock tank populations are particularly vulnerable to loss, because they tend to dry out during periods of below normal precipitation. These trends are likely to continue, but the situation is complicated by interactions with other factors. For example, the effects of drought cannot be separated from the effects of introduced aquatic predators, because drought will affect those predators as well as populations of Chiricahua leopard frogs. The interaction between predators and drought resistance of frog habitats is often a delicate balance. Stock tanks are likely an important habitat for Chiricahua leopard frogs in part because these sites dry out periodically, which rids them of most aquatic predators. Leopard frogs can often withstand drying of stock tanks for 30 days or more, whereas fish and bullfrogs may not. However, if stock tanks dry for longer periods of time, neither leopard frogs nor introduced predators may be capable of persisting. Drought will reduce habitats of both leopard frogs and introduced predators, but exactly how that will affect the Chiricahua leopard frog will probably be site-specific. At this time, it is difficult to predict how drought will impact the overall species' status, but Chiricahua leopard frog sites could be buffered from the effects of drought by wells or other anthropogenic water supplies. Even though drought may contribute to loss of site-specific populations, we do not consider it to be a threat to the species at this time or in the foreseeable future.

Additionally, the effects of chytridiomycosis on frogs are related to water temperature. Sites where Chiricahua leopard frogs coexist with the disease are typically at lower elevations and are warmer sites (Service 2007, p. 26). As a result, if temperatures increase as predicted, perhaps more populations will be able to persist with the disease. Thus climate change, particularly in the form of increased water temperatures, does not seem to pose a significant threat to the Chiricahua leopard frog into the foreseeable future.

##### Summary of Factor E

The Chiricahua leopard frog recovery plan (Service 2007) describes genetic and stochastic effects that manifest in small populations and the anticipated effects of climate change on the Chiricahua leopard frog as potential threats to the species. Herrmann *et al.*'s

recent genetic study (2009, pp. 12–17), however, revealed no systemic lack of genetic diversity within Chiricahua leopard frog populations. Moreover, climate change, particularly in the form of increased water temperatures, does not seem to pose a significant threat to the Chiricahua leopard frog into the foreseeable future. As such, other natural or manmade factors affecting the species' continued existence do not appear to be a threat affecting the Chiricahua leopard frog such that the species is likely to become endangered within the foreseeable future.

### Proposed Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Chiricahua leopard frog. In summary, the most significant threats to the Chiricahua leopard frog include the effects of the disease chytridiomycosis, which has been associated with major die-offs in some populations of Chiricahua leopard frogs (Service 2007, pp. B8–B88), and predation by nonnative species (Factor C). Additional factors affecting the species include degradation and loss of habitat as a result of water diversions and groundwater pumping, poor livestock management, altered fire regimes due to fire suppression and livestock grazing, mining, contaminants, development, and other human activities; and inadequate regulatory mechanisms regarding introduction of nonnative bait species (Factors A and D) (67 FR 40800–40806, June 13, 2002; Sredl and Jennings 2005, pp. 546–549; Service 2007, pp. B1–B88).

Evidence indicates that, since the time of listing, the species has probably made modest population gains in Arizona, but is apparently declining in New Mexico. Overall in the United States, the status of the Chiricahua leopard frog is either static or improving. The status and trends for the species are unknown in Mexico. An aggressive recovery program is underway in the United States, and reestablishment of populations, creation of refugial populations, and habitat enhancement and creation have helped stabilize or improve the status of the species in some areas. Although progress has been made to secure some existing populations and establish new populations, the status of the species continues to be affected by threats such that the species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Due primarily to ongoing conservation measures and the existence of relatively robust

populations and metapopulations, we have determined that the species is not in immediate danger of extinction (*i.e.*, on the brink of extinction). However, because we believe that the present threats are likely to continue in the future (such as chytrid fungus and nonnative predators spreading and increasing in prevalence and range, affecting more populations of the leopard frog, thus increasing the threats in the foreseeable future), we have determined that the Chiricahua leopard frog is likely to become in danger of extinction throughout all or a significant portion of its range in the foreseeable future. Therefore, we determine that the Chiricahua leopard frog meets the definition of a threatened species under the Act.

### 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, and local agencies; private organizations; and individuals. The Act provides for possible cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed wildlife are discussed in Effects of Critical Habitat Designation and are further discussed, in part, below.

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 being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) 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) 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, U.S. Forest Service, and Bureau of Land Management; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; 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, codified at 50 CFR 17.21 for endangered wildlife and 50 CFR 17.31 for threatened 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. 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 or threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species and 50 CFR 17.32 for threatened wildlife. You may obtain permits 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 these taxa at least 100 years old, as defined by section 10(h)(1) of the Act.

(2) Introduction of nonnative species that compete with or prey upon the Chiricahua leopard frog, such as the introduction of competing, nonnative crayfish to the States of Arizona or New Mexico.

(3) The unauthorized release of biological control agents that attack any life stage of this species.

(4) Unauthorized modification of the channel or water flow of any stream or water body in which the Chiricahua leopard frog is known to occur.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Arizona 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, P.O. Box 1306, Albuquerque, NM 87103; telephone: 505-248-6633; facsimile: 505-248-6788.

### Critical Habitat

#### *Background*

Critical habitat is defined in section 3 of the Act as:

(i) 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 (PBFs):

(I) Essential to the conservation of the species and

(II) Which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination 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 under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, and law enforcement; habitat acquisition, enhancement, protection, and maintenance; propagation and

population reestablishment or augmentation; 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 prohibition against Federal agencies carrying out, funding, or authorizing activities likely to result in the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect 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 or other non-Federal lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the Federal action agency's and the applicant's obligation is not to restore or recover the species, but to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the PBFs essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the PBFs laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it was listed only when we determine that those areas are essential for the conservation of the species and that designation limited to those areas occupied at the time of listing would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on

Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by Federal agencies, States, or local governments; scientific status surveys and studies; biological assessments; or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. This is particularly true of the Chiricahua leopard frog. Furthermore, 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 required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, 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.

#### Prudence Determination

Section 4 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 endangered or threatened. Our regulations at 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 activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) the designation of critical habitat would not be beneficial to the species.

There is no documentation that the Chiricahua leopard frog is significantly threatened by collection. Although human visitation to Chiricahua leopard frog habitat carries with it the possibility of introducing infectious disease and potentially increasing other threats where the frogs occur, the locations of important recovery areas are already accessible to the public through Web sites, reports, online databases, and other easily accessible venues. Therefore, identifying and mapping critical habitat is unlikely to increase threats to the species or its habitat. 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 of critical habitat to the Chiricahua leopard frog 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. Therefore, because 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 Chiricahua leopard frog.

### Proposed Critical Habitat Designation for Chiricahua Leopard Frog

#### Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Chiricahua leopard frog in this section of the proposed rule.

#### Physical and Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and the regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat within the geographical area occupied at the time of listing, we consider the physical and biological features (PBFs) essential to the conservation of the species that may require special management considerations or protection. These include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, or rearing (or development) of offspring; and
- (5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derived the specific PBFs required for the Chiricahua leopard frog from the studies of this species' habitat, ecology, and life history as described below. These needs are identified in the species' recovery plan (Service 2007), particularly in the Habitat Characteristics and Ecosystems section of Part 1: Background (pp. 15–18); in the Recovery Strategy in Part 11: Recovery (pp. 49–51); in Appendix C—Population and Habitat Viability Analysis (pp. C8–C35); and in Appendix D—Guidelines for Establishing and Augmenting Chiricahua Leopard Frog Populations, and for Refugia and Holding Facilities (pp. D2–D5). Additional insight is provided by Degenhardt *et al.* (1996, pp. 85–87), Sredl and Jennings (2005, pp. 546–549), and Witte *et al.* (2008, pp. 5–8).

#### Space for Individual and Population Growth and for Normal Behavior

Generally, Chiricahua leopard frogs need aquatic breeding and overwintering sites, both in the context of metapopulations and as isolated populations. For this species, a metapopulation should consist of at least four local populations that exhibit regular recruitment, three of which are

continually in existence. Local populations should be arranged in geographical space in such a way that no local population will be greater than 5.0 mi (8.0 km) from at least one other local population during some part of the year unless facilitated dispersal is planned (Service 2007, p. K–3). Movement of frogs among local populations is reasonably certain to occur if those populations are separated by no more than 1.0 mi (1.6 km) overland, 3.0 mi (4.8 km) along ephemeral or intermittent drainages, 5.0 mi (8.0 km) along perennial water courses, or some combination thereof not to exceed 5.0 mi (8.0 km) (the “1–3–5 rule” of dispersal, *see* “Dispersal” in the Background section above). Metapopulations should include at least one large, healthy subpopulation (*e.g.*, at least 100 adults) in order to achieve an acceptable level of viability as a larger unit. If aquatic habitats can be managed for persistence through drought periods (*e.g.*, supplying water via a pipeline or a well, lining a pond), overall metapopulation viability may be achievable with a smaller number of individuals per subpopulation (*e.g.*, 40 to 50 adults) (Service 2007, p. K–3).

Isolated breeding populations are also essential for the conservation of the frog because they buffer against disease and disease organisms that can spread rapidly through a metapopulation as infected individuals move among aquatic sites. An isolated, but robust, breeding population should be beyond the reasonable dispersal distance (*see* “Dispersal” in the Background section) from other Chiricahua leopard frog populations, contain at least 60 adults, and exhibit a diverse age class distribution that is relatively stable over time. A population of 40 to 50 adults can also be robust or strong if it resides in a drought-resistant habitat (Service 2007, p. K–5). At least two metapopulations and one isolated robust population are needed in each recovery unit to meet the recovery criteria in the recovery plan (Service 2007, p. 53).

#### Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Chiricahua leopard frogs are fairly tolerant of variations in water quality, but likely do not persist in waters severely polluted with cattle feces (Service 2007, p. 34) or runoff from mine tailings or leach ponds (Rathbun 1969, pp. 1–3; U.S. Bureau of Land Management 1998, p. 26; Service 2007, p. 36). Furthermore, variation in pH, ultraviolet radiation, and temperature, as well as predation stress, can alter the

potency of chemical effects (Akins and Wofford 1999, p. 107; Monson *et al.* 1999, pp. 309–311; Reylea 2004a, pp. 1081–1084). Chemicals may also serve as a stressor that makes frogs more susceptible to disease, such as chytridiomycosis (Parris and Baud 2004, p. 344). The effects of pesticides and other chemicals on amphibians can be complex because of indirect effects on the amphibian environment, direct lethal and sublethal effects on individuals, and interactions between contaminants and other factors associated with amphibian decline (Sparling 2003, pp. 1101–1120; Reylea 2008, pp. 367–374).

#### Cover or Shelter

Chiricahua leopard frogs are most often encountered in or very near water, generally at breeding locations. Only rarely are they found very far from water. That said, they can be found basking or foraging in riparian vegetation and on open banklines out to the edge of riparian vegetation. These upland areas provide essential foraging and basking sites. A combination of open ground and vegetation cover is desirable for basking and foraging, respectively. Vegetation in these areas provide habitat for prey species and protection from terrestrial predators (those living on dry land). In particular, Chiricahua leopard frogs use these upland areas during the summer rainy season.

#### Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Aquatic breeding habitat is essential for providing space, food, and cover necessary to sustain all life stages of Chiricahua leopard frogs. Suitable breeding habitat consists of permanent or nearly permanent aquatic habitats from about 3,200 to 8,900 ft (975 to 2,715 m) elevation with deep (greater than 20 in (0.5 m)) pools in which nonnative predators are absent or occur at such low densities and in complex habitats to allow persistence of Chiricahua leopard frogs (Service 2007, pp. 15–18, D–3). Included are cienegas or springs, pools, livestock tanks, lakes, reservoirs, streams, and rivers. Sites as small as 6.0-ft (1.8-m) diameter steel troughs can serve as important breeding sites, particularly if that population is part of a metapopulation that can be recolonized from adjacent sites if extirpation occurs. Some of the most robust extant breeding populations are in earthen livestock watering tanks. Absence of the disease chytridiomycosis is crucial for population persistence in some regions, particularly in west-central New Mexico and at some other

locales, as well. However, some populations persist with the disease (*e.g.*, sites between Interstate 19 and the Baboquivari Mountains, Arizona) with few noticeable effects on demographics or survivorship. Persistence with disease is enhanced in warm springs and at lower elevations with warmer water (Service 2007, pp. 22–27, B67).

To be considered essential breeding habitat, water must be permanent enough to support breeding, tadpole development to metamorphosis (change into a frog), and survival of frogs. Tadpole development lasts 3 to 9 months, and some tadpoles overwinter (Sredl and Jennings 2005, p. 547). Juvenile and adult frogs need moisture for survival, including sites for hibernation. Overwintering sites of Chiricahua leopard frogs have not been investigated; however, hibernacula (shelter occupied during winter by inactive animals) of related species include sites at the bottom of well-oxygenated ponds, burial in mud, or moist caves (Service 2007, p. 17). Given these requirements, sites that dry out for 1 month or more will not provide essential breeding or overwintering habitat. However, occasional drying for short periods (less than 1 month) may be beneficial in that the frogs can survive, but nonnative predators, particularly fish, and in some cases, American bullfrogs and populations of aquatic forms of tiger salamanders, will be eliminated during the dry period (Service 2007, p. D3). Water quality requirements at breeding sites included having a pH equal to or greater than 5.6 (Watkins-Colwell and Watkins-Colwell 1998, p. 64), salinities less than 5 parts per thousand (Ruibal 1959, pp. 318–319), and very little chemical pollutants, including but not limited to heavy metals, pesticides, mine runoff, and fire retardants, where the pollutants do not exceed the tolerance of Chiricahua leopard frogs (Rathbun 1969, pp. 1–3; U.S. Bureau of Land Management 1998, p. 26; Boone and Bridges 2003, pp. 152–167; Calfee and Little 2003, pp. 1527–1531; Sparling 2003, pp. 1109–1111; Relyea 2004b, pp. 1741–1746; Service 2007, p. 36; Little and Calfee 2008, pp. 6–10). White (2004, pp. 53–54, 73–79, 136–140) provides specific pesticide use guidelines for minimizing impacts to the Chiricahua leopard frog.

Essential aquatic breeding sites require some open water. Chiricahua leopard frogs can be eliminated from sites that become entirely overgrown with cattails (*Typha sp.*) or other emergent plants. At the same time, frogs need some emergent or submerged vegetation, root masses, undercut banks, fractured rock substrates, or some

combination thereof as refugia from predators and extreme climatic conditions (Sredl and Jennings 2005, p. 547). In essential breeding habitat, if nonnative crayfish, predatory fishes, bullfrogs, or barred tiger salamanders are present, they occur only as rare dispersing individuals that do not breed, or are at low enough densities in habitats that are complex and with abundant escape cover (*e.g.*, aquatic and emergent vegetation cover, diversity of moving and stationary water) that persistence of both Chiricahua leopard frogs and nonnative species can occur (Sredl and Howland 1995, pp. 383–384; Service 2007, pp. 20–22, D3; Witte *et al.* 2008, pp. 7–8).

Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

In some areas, Chiricahua leopard frog populations are known to be seriously affected by the fungal skin disease chytridiomycosis. This disease has been associated with numerous population extirpations, particularly in recovery unit 6 in New Mexico (Service 2007, pp. 5–6, 24–27). The frog appears to be less susceptible to mortality from the disease in warmer waters and at lower elevations. The precise temperature at which frogs can coexist with the disease is unknown and may depend on a variety of factors; however, at Cuchillo Negro Warm Springs, Sierra County, New Mexico, Chiricahua and plains leopard frogs (*Lithobates blairi*) become uncommon to nonexistent where winter water temperatures drop below about 20 degrees Celsius (°C) (68 degrees Fahrenheit (°F)) (Christman 2006a, p. 8). A pH of greater than 8 during at least part of the year may also limit the ability of the disease to be an effective pathogen (Service 2007, pp. 26–27). Furthermore, based on experience in Arizona, particularly the Huachuca Mountains, if Chiricahua leopard frogs are absent for a period of months or years, the disease organism may drop out of the system or become scarce enough that frogs can persist again if reestablished. Essential breeding habitats either lack chytridiomycosis or include conditions that allow for persistence of Chiricahua leopard frogs with the disease, as in warmer waters or at lower elevations.

#### Dispersal Habitat

Dispersal habitat provides routes for connectivity and gene flow among local populations within a metapopulation, which enhances the likelihood of metapopulation persistence and allows for recolonization of sites that are lost due to drought, disease, or other factors

(Hanski and Gilpin 1991, pp. 4–6; Service 2007, p. 50). Detailed studies of dispersal and metapopulation dynamics of Chiricahua leopard frogs have not been conducted; however, Jennings and Scott (1991, pp. 1–43) noted that maintenance of corridors used by dispersing juveniles and adults that connect separate populations may be critical to conserving populations of frogs. As a group, leopard frogs are surprisingly good at dispersal. In Michigan, young northern leopard frogs (*Lithobates pipiens*) commonly move up to 0.5 mi (0.8 km) from their birthplace, and three young males established residency up to 3.2 mi (5.2 km) away from where they were born (Dole 1971, p. 221). Movement may occur via dispersal of frogs or passive transport of tadpoles along stream courses. The maximum distance moved by a radio-telemetered Chiricahua leopard frog in New Mexico was 2.2 mi (3.5 km) in one direction along a drainage (Service 2007, p. 18). In 1974, Frost and Bagnara (1977, p. 449) noted passive or active movement of Chiricahua and plains leopard frogs for 5 mi (8 km) or more along East Turkey Creek in the Chiricahua Mountains, Arizona. In August 1996, Rosen and Schwalbe (1998, p. 188) found up to 25 young adult and subadult Chiricahua leopard frogs at a roadside puddle in the San Bernardino Valley, Arizona. They believed that the only possible origin of these frogs was a stock tank located 3.5 mi (5.5 km) away. In September 2009, 15 to 20 Chiricahua leopard frogs were found at Peña Blanca Lake west of Nogales. The nearest likely source population was Summit Reservoir, a straight line distance of 3.1 mi (4.9 km) overland or approximately 4.4 mi (7.0 km) along intermittent drainages (Service 2010b, pp. 7–8).

Movements away from water do not appear to be random. Streams are important dispersal corridors for young northern leopard frogs (Seburn *et al.* 1997, pp. 68–70). Displaced northern leopard frogs will return to their place of origin, and may use olfactory, visual, or auditory cues, and possibly celestial orientation, as guides (Dole 1968, pp. 395–398; 1972, pp. 275–276; Sinsch 1991, pp. 542–544). Based on this and other information (Service 2007, pp. 12–14) and as noted in the Background section above, Chiricahua leopard frogs are reasonably likely to disperse 1.0 mi (1.6 km) overland, 3.0 mi (4.8 km) along ephemeral or intermittent drainages, 5.0 mi (8.0 km) along perennial (continuous) water courses, or some combination thereof not to exceed 5.0 mi (8.0 km). Dispersal habitat must

provide corridors through which leopard frogs can move among aquatic breeding sites in metapopulations. These dispersal habitats will often be drainages connecting aquatic breeding sites, and may include ephemeral, intermittent, and perennial waters that are not suitable for breeding. The most likely dispersal routes may include combinations of ephemeral, intermittent, and perennial drainages, as well as uplands. Some vegetation cover for protection from predators, and aquatic sites that can serve as buffers against desiccation (drying) and stop-overs for foraging (feeding) are desirable along dispersal routes. A lack of barriers that would block dispersal is critical. Features on the landscape likely to serve as partial or complete barriers to dispersal, include cliff faces and urban areas (Service 2007, p. D–3), reservoirs 20 acres (ac) (50 hectares (ha)) or more in size that are stocked with sportfishes or other nonnative predators, highways, major dams, walls, or other structures that physically block movement (Andrews *et al.* 2008, pp. 124–132; Eigenbrod *et al.* 2009, pp. 32–40; 75 FR 12818, March 17, 2010). The effects of highways on frog dispersal can be mitigated with frog fencing and culverts (Service 2007, pp. 17–18). Unlike some other species of leopard frogs, Chiricahua leopard frogs have only rarely been found in association with agricultural fields; hence, agriculture may also serve as a barrier to movement.

#### Primary Constituent Elements for the Chiricahua Leopard Frog

Under the Act and its implementing regulations, we are required to identify the physical and biological features essential to the conservation of the Chiricahua leopard frog in areas occupied at the time of listing, focusing on the features' primary constituent elements (PCEs). We consider primary constituent elements to be the elements of physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species, and the habitat requirements for sustaining the essential life-history functions of the species, we have determined that the PCEs essential to the conservation of the Chiricahua leopard frog are:

- (1) Aquatic breeding habitat and immediately adjacent uplands exhibiting the following characteristics:
  - (a) Perennial (water present during all seasons of the year) or nearly perennial

pools or ponds at least 6.0 ft (1.8 m) in diameter and 20 in (0.5 m) in depth;

(b) Wet in most years, and do not or only very rarely dry for more than a month;

(c) pH greater than or equal to 5.6;

(d) Salinity less than 5 parts per thousand;

(e) Pollutants absent or minimally present at low enough levels that they are barely detectable;

(f) Emergent and or submerged vegetation, root masses, undercut banks, fractured rock substrates, or some combination thereof; but emergent vegetation does not completely cover the surface of water bodies;

(g) Nonnative crayfish, predatory fishes, bullfrogs, barred tiger salamanders, and other introduced predators absent or occurring at levels that do not preclude presence of the Chiricahua leopard frog;

(h) Absence of chytridiomycosis, or if chytridiomycosis is present, then conditions that allow persistence of Chiricahua leopard frogs with the disease (*e.g.*, water temperatures that do not drop below 20 °C (68 °F), pH of greater than 8 during at least part of the year); and

(i) Uplands immediately adjacent to breeding sites that Chiricahua leopard frogs use for foraging and basking.

(2) Dispersal habitat, consisting of ephemeral (water present for only a short time), intermittent, or perennial drainages that are generally not suitable for breeding, and associated uplands that provide overland movement corridors for frogs among breeding sites in a metapopulation with the following characteristics:

(a) Are not more than 1.0 mi (1.6 km) overland, 3.0 mi (4.8 km) along ephemeral or intermittent drainages, 5.0 mi (8.0 km) along perennial drainages, or some combination thereof not to exceed 5.0 mi (8.0 km);

(b) Provide some vegetation cover for protection from predators, and in drainages, some ephemeral, intermittent, or perennial aquatic sites; and

(c) Are free of barriers that block movement by Chiricahua leopard frogs, including urban, industrial, or agricultural development; reservoirs that are 50 ac (20 ha) or more in size and stocked with predatory fishes, bullfrogs, or crayfish; highways that do not include frog fencing and culverts; and walls, major dams, or other structures that physically block movement.

With this proposed designation of critical habitat, we intend to conserve the PCEs essential to the conservation of the species through the identification of the appropriate quantity and spatial



arrangement of the PCEs sufficient to support the life-history functions of the species. Because not all life-history functions require both PCEs 1 and 2, not all areas proposed as critical habitat will contain both PCEs. Each of the areas proposed in this rule has been determined to contain sufficient PCEs, or, with reasonable effort, PCEs can be restored, to provide for one or more of the life-history functions of the Chiricahua leopard frog.

Under our regulations, we are required to identify the PCEs within the geographical area occupied by the Chiricahua leopard frog at the time of listing that are essential to the conservation of the species and which may require special management considerations or protections. The PCEs are laid out in a specific spatial arrangement and quantity determined to be essential to the conservation of the species. All proposed critical habitat units are within the species' historical geographical range in the United States and contain sufficient PCEs to support at least one life-history function. In addition, all but two proposed critical habitat units, units 13 and 17, are currently occupied by Chiricahua leopard frogs. Units 13 and 17 were occupied at the time of listing and currently contain sufficient PCEs to support life-history functions essential for the conservation of the species. These units are needed as future sites for frog colonization or reestablishment and could be restored (*e.g.*, control of nonnative predators) to allow Chiricahua leopard frog persistence with a reasonable level of effort.

### Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and that may require special management considerations or protection.

All areas proposed for designation as critical habitat will require some level of management to address the current and future threats to the Chiricahua leopard frog and to maintain or restore the PCEs. Special management in aquatic breeding sites will be needed to ensure that these sites provide water quantity, quality, and permanence or near permanence; cover; and absence of extraordinary predation and disease that can affect population persistence. In dispersal habitat, special management will be needed to ensure frogs can move through those sites with reasonable success. The designation of critical

habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the Chiricahua leopard frog. Federal activities that may affect areas outside of critical habitat, such as construction of water diversions, permitting livestock grazing, sportfish stocking, channelization, levee construction, energy development, fire and fuels management, and road construction, are still subject to review under section 7 of the Act if they may affect the Chiricahua leopard frog because Federal agencies must consider both effects to the frog and effects to critical habitat independently. The prohibitions of section 9 of the Act also continue to apply both inside and outside of designated critical habitat.

A detailed discussion of activities influencing the Chiricahua leopard frog and its habitat can be found in the final listing rule (67 FR 40790; June 13, 2002) and the recovery plan (Service 2007, pp. 18–45). The recovery plan also contains recovery-unit-specific threat assessments (Service 2007, pp. B1–B88). Activities that may warrant special management of the physical and biological features that define essential habitat (appropriate quantity and distribution of PCEs) for the Chiricahua leopard frog include, but are not limited to, introduction of predators, such as bullfrogs, crayfish, sportfishes, and barred tiger salamanders; introduction or spread of chytridiomycosis; recreational activities; livestock grazing; water diversions and development; construction and maintenance of roads and utility corridors; fire suppression, fuels management, and prescribed fire; and various types of development. These activities have the potential to affect critical habitat and PCEs if they are conducted within designated units or upstream and in some cases downstream in the floodplains of those units; however, some of these activities, when conducted appropriately, may be compatible with maintenance of adequate PCEs.

### Criteria Used To Identify Critical Habitat

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of the Chiricahua leopard frog, and areas outside of the geographical area occupied at the time of listing that are essential for the conservation of the species. Areas occupied at the time of listing are identified and described in

Rorabaugh (2010, pp. 7–17) and information cited therein for Arizona, and for New Mexico in Jennings (1995, pp. 10–21), Painter (2000, pp. 10–21), and 67 FR 40793 (June 13, 2002). We have also reviewed available information that pertains to the habitat requirements of this species. The following were particularly useful: Degenhardt *et al.* (1996, pp. 85–87), Sredl and Jennings (2005, pp. 546–549), Service (2007, pp. 15–18, 47–48), and Witte *et al.* (2008, pp. 5–8).

Units occupied at the time of listing include the specific sites occupied by Chiricahua leopard frogs in June 2002 that contain sufficient PCEs to support life-history functions essential for the conservation of the species. Included are sites where the species was breeding as well as localities where dispersing individuals were present, and other sites for which the breeding status was unknown. If metapopulation structure was known or suspected, dispersal habitats connecting breeding populations within metapopulations are also proposed.

Sites not known to be occupied at the time of listing in June 2002 are also proposed as critical habitat if they are essential to the conservation of the species. Specifically, we assessed whether they are needed to meet the following recovery criterion from the recovery plan: At least two metapopulations located in different drainages (defined here as USGS 10-digit Hydrologic Units) plus at least one isolated and robust population occur in each recovery unit and exhibit long-term persistence and stability (even though local populations may go extinct in metapopulations, Service 2007, p. 53). If sites are needed to meet that criterion, they are proposed for critical habitat herein. At the time of listing, 3 of the units being proposed for critical habitat were unoccupied, and for 10 additional units, their occupancy status was unknown (*see* Table 1). However, all 13 of these units are currently occupied and possess one or both PCEs, or have the ability to develop the PCEs with a reasonable level of restoration work. These units, which were unoccupied or not known to be occupied at the time of listing, are being proposed as critical habitat because they currently contain known breeding populations of Chiricahua leopard frogs, which are relatively scarce (33 populations in Arizona and 20 to 23 in New Mexico), are all considered essential to the conservation of the species, and help meet the population goals in the recovery criterion discussed above.

TABLE 1—OCCUPANCY OF CHIRICAHUA LEOPARD FROG BY PROPOSED CRITICAL HABITAT UNITS

Critical habitat unit	Occupied at time of listing?	Currently occupied?
<b>Recovery Unit 1 (Tumacacori-Atascosa-Pajarito Mountains, Arizona and Mexico)</b>		
(1) Twin Tanks and Ox Frame Tank .....	Unknown .....	Yes.
(2) Garcia Tank .....	Yes .....	Yes.
(3) Buenos Aires NWR Central Tanks .....	Yes .....	Yes.
(4) Bonita, Upper Turner, and Mojonea Tanks .....	Yes .....	Yes.
(5) Sycamore Canyon .....	Yes .....	Yes.
(6) Peña Blanca Lake and Spring and Associated Tanks .....	Yes .....	Yes.
<b>Recovery Unit 2 (Santa Rita-Huachuca-Ajos Bavispe, Arizona and Mexico)</b>		
(7) Florida Canyon .....	Unknown .....	Yes.
(8) Eastern Slope of the Santa Rita Mountains .....	Unknown .....	Yes.
(9) Las Cienegas National Conservation Area .....	Yes .....	Yes.
(10) Pasture 9 Tank .....	No .....	Yes.
(11) Scotia Canyon .....	No .....	Yes.
(12) Beatty's Guest Ranch .....	Yes .....	Yes.
(13) Carr Barn Pond .....	Yes .....	No.
(14) Ramsey and Brown Canyons .....	No .....	Yes.
<b>Recovery Unit 3 (Chiricahua Mountains-Malpai Borderlands-Sierra Madre, Arizona, New Mexico, and Mexico)</b>		
(15) High Lonesome Well .....	Yes .....	Yes.
(16) Peloncillo Mountains .....	Yes .....	Yes.
(17) Cave Creek .....	Yes .....	No.
(18) Leslie Creek .....	Yes .....	Yes.
(19) Rosewood and North Tanks .....	Yes .....	Yes.
<b>Recovery Unit 4 (Piñaleño-Galiuro-Dragoon Mountains, Arizona)</b>		
(20) Deer Creek .....	Yes .....	Yes.
(21) Oak Spring and Oak Creek .....	Unknown .....	Yes.
(22) Dragoon Mountains .....	Yes .....	Yes.
<b>Recovery Unit 5 (Mogollon Rim-Verde River, Arizona)</b>		
(23) Buckskin Hills .....	Yes .....	Yes.
(24) Crouch, Gentry, and Cherry Creeks, and Parallel Canyon .....	Yes .....	Yes.
(25) Ellison and Lewis Creeks .....	Unknown .....	Yes.
<b>Recovery Unit 6 (White Mountains-Upper Gila, Arizona and New Mexico)</b>		
(26) Concho Bill and Deer Creek .....	Unknown .....	Yes.
(27) Campbell Blue and Coleman Creeks .....	Yes .....	Yes.
(28) Tularosa River .....	Yes .....	Yes.
(29) Deep Creek Divide Area .....	Yes .....	Yes.
(30) Main Diamond Creek .....	Yes .....	Yes.
(31) Beaver Creek .....	Unknown .....	Yes.
<b>Recovery Unit 7 (Upper Gila-Blue River, Arizona and New Mexico)</b>		
(32) Left Prong of Dix Creek .....	Unknown .....	Yes.
(33) Rattlesnake Pasture Tank and Associated Tanks .....	Unknown .....	Yes.
(34) Coal Creek .....	Unknown .....	Yes.
(35) Blue Creek .....	Yes .....	Yes.
<b>Recovery Unit 8 (Black-Mimbres-Rio Grande, New Mexico)</b>		
(36) Seco Creek .....	Yes .....	Yes.
(37) Alamosa Warm Springs .....	Yes .....	Yes.
(38) Cuchillo Negro Warm Springs and Creek .....	Yes .....	Yes.
(39) Ash and Bolton Springs .....	Yes .....	Yes.
(40) Mimbres River .....	Yes .....	Yes.

Recovery planning is focused on these existing breeding populations and building on them with habitat rehabilitation and population reestablishments to construct metapopulations and isolated robust

populations needed to meet the recovery criterion. Such work is underway in all recovery units, but is further along in some than others. In particular, recovery units 1 (Tumacacori-Atascosa-Pajarito

Mountains, Arizona and Sonora), 2 (Santa Rita-Huachuca-Ajos Bavispe, Arizona and Sonora), 3 (Chiricahua Mountains-Malpai Borderlands-Sierra Madre), 4 (Piñaleño-Galiuro-Dragoon Mountains, Arizona), 5 (Mogollon

Rim—Verde River, Arizona), and 8 (Black-Mimbres-Rio Grande, New Mexico) are moving towards meeting the above-cited recovery criterion, and metapopulations and isolated, robust populations have been or are being identified (Rorabaugh 2010, pp. 17–30; Service 2010a, pp. 2–7; 2010b, pp. 2–9). In these recovery units, unoccupied sites have sometimes been identified by the Service, in cooperation with the recovery team steering committees and local recovery groups, where population reestablishment is needed to complete a metapopulation or to establish an isolated, robust population (Rorabaugh 2010, pp. 17–30; Service 2010a, pp. 2–7; 2010b, pp. 2–9). These unoccupied sites are proposed as critical habitat herein.

Identification of such recovery sites in recovery units 6 (White Mountains-Upper Gila, Arizona and New Mexico) and 7 (Upper Gila-Blue River, Arizona and New Mexico) is more difficult, because less work or progress in recovery has been made in these areas. The recovery plan identifies management areas, which are areas within recovery units with the greatest potential for successful recovery actions and threat alleviation (Service 2007, p. 49). Within recovery units 6 and 7, critical habitat has been proposed at specific sites within management areas with the greatest potential for building metapopulations and isolated robust populations. As in other recovery units, existing breeding populations were used either as subpopulations in metapopulations or as isolated, robust populations. Metapopulations were constructed with these existing breeding populations, sites occupied at the time of listing that still retain PCEs sufficient to support life-history functions essential for the conservation of the species, and unoccupied sites with one or more PCEs or the potential to support PCEs with a reasonable level of restoration work. In metapopulations, all of these sites are within reasonable dispersal distance (the “1–3–5 rule” described above) of each other. In recovery unit 7, enough sites could not be found that meet the definition of critical habitat to construct two metapopulations and one isolated, robust population. Similarly, in recovery unit 6, one metapopulation

exists, plus several isolated populations, but we have not been able to find aquatic sites that meet the definition of critical habitat to build a second metapopulation. In particular, other aquatic sites, some of which were occupied at the time of listing, lack the PCEs sufficient to support life-history functions essential for the conservation of the species, primarily due to presence of chytridiomycosis, which is a very serious threat in recovery unit 6. This recovery unit will require further investigation, and habitat restoration or creation may be needed to provide additional habitat for breeding Chiricahua leopard frog populations that can contribute to meeting the population goals in the recovery criterion discussed above.

Also included in this critical habitat proposal are dispersal corridors among subpopulations within a metapopulation. These corridors were selected as the most likely routes for dispersal of frogs among sites, based on reasonable dispersal distances along perennial and ephemeral or intermittent drainages, or via overland routes where PCE 2 is present. Our selection of routes assumes perennial drainages are better dispersal corridors than ephemeral or intermittent drainages, and the ephemeral or intermittent drainages are better dispersal corridors than overland routes. We also assume that, if all else is equal, the shorter the route the more likely Chiricahua leopard frogs will successfully disperse along it. In addition, we considered the presence of waterfalls, steep slopes, and other obstacles that may be difficult for a frog to negotiate.

When determining proposed critical habitat boundaries within this proposed rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PCEs for the Chiricahua leopard frog. 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 adverse modification would not be prohibited under 7(a)(2) unless the specific action would affect the PCEs in the adjacent critical habitat.

We are proposing for designation of critical habitat lands that we have determined are occupied at the time of listing and contain sufficient PCEs to support life-history functions essential for the conservation of the species and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of the species.

Critical habitat units are proposed for designation based on sufficient PCEs being present to support the Chiricahua leopard frog's life processes. Some units contain both PCEs 1 and 2 and support multiple life processes. Some units contain one of the PCEs or only the potential to develop PCEs necessary to support the Chiricahua leopard frog's particular use of that habitat. In most cases, aquatic sites within metapopulations contain both PCEs 1 and 2. Isolated aquatic sites contain only PCE 1, and dispersal corridors only contain PCE 2, or a reasonable potential to develop those PCEs.

#### **Proposed Critical Habitat Designation**

We are proposing 40 units as critical habitat for the Chiricahua leopard frog. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the species. All 40 units we are proposing as critical habitat are within the species' geographical range, including areas occupied at the time of listing and areas not known to be occupied at the time of listing but identified as essential for the conservation of the species (Platz and Mecham 1984, p. 347.1). Table 1 below shows the specific occupancy status of each unit at the time of listing and currently (based on the most recent data available) (Rorabaugh 2010, pp. 7–30; Service files). The approximate area of each proposed critical habitat unit is shown in Table 2. The 40 areas we propose as critical habitat are grouped herein by recovery unit.

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR THE CHIRICAHUA LEOPARD FROG

[Area estimates reflect all land within critical habitat unit boundaries. Note that grazing allotments are not considered in private ownership.]

Critical habitat unit	Land ownership by type acres (hectares)			Size of unit in acres (hectares)
	Federal	State	Private	
(1) Twin Tanks and Ox Frame Tank .....	0	1.3 (0.5)	0.4 (0.2)	1.7 (0.7)
(2) Garcia Tank .....	0.7 (0.3)	0	0	0.7 (0.3)
(3) Buenos Aires NWR Central Tanks .....	1,720 (696)	0	0	1,720 (696)
(4) Bonita, Upper Turner, and Mojonera Tanks .....	201 (81)	0	0	201 (81)
(5) Sycamore Canyon .....	262 (106)	0	7 (3)	268 (108)
(6) Peña Blanca Lake and Spring and Associated Tanks .....	202 (82)	0	0	202 (82)
(7) Florida Canyon .....	4 (2)	0	0	4 (2)
(8) Eastern Slope of the Santa Rita Mountains .....	172 (70)	0	14 (6)	186 (75)
(9) Las Cienegas National Conservation Area .....	1,235 (500)	186 (75)	0	1,420 (575)
(10) Pasture 9 Tank .....	0	0	0.5 (0.2)	0.5 (0.2)
(11) Scotia Canyon .....	70 (29)	0	0	70 (29)
(12) Beatty's Guest Ranch .....	0	0	10 (4)	10 (4)
(13) Carr Barn Pond .....	0.6 (0.3)	0	0	0.6 (0.3)
(14) Ramsey and Brown Canyons .....	58 (24)	0	65 (26)	123 (50)
(15) High Lonesome Well .....	0	0	0.4 (0.2)	0.4 (0.2)
(16) Peloncillo Mountains .....	366 (148)	0	289 (117)	655 (265)
(17) Cave Creek .....	234 (95)	0	92 (37)	326 (132)
(18) Leslie Creek .....	26 (11)	0	0	26 (11)
(19) Rosewood and North Tanks .....	0	78 (31)	19 (8)	97 (39)
(20) Deer Creek .....	17 (7)	69 (28)	34 (14)	120 (48)
(21) Oak Spring and Oak Creek .....	27 (11)	0	0	27 (11)
(22) Dragoon Mountains .....	74 (30)	0	0	74 (30)
(23) Buckskin Hills .....	232 (94)	0	0	232 (94)
(24) Crouch, Gentry, and Cherry Creeks, and Parallel Canyon .....	334 (135)	64 (26)	6 (3)	404 (163)
(25) Ellison and Lewis Creeks .....	83 (34)	0	15 (6)	99 (40)
(26) Concho Bill and Deer Creek .....	17 (7)	0	0	17 (7)
(27) Campbell Blue and Coleman Creeks .....	174 (70)	0	0	174 (70)
(28) Tularosa River .....	335 (135)	0	1,575 (637)	1,910 (772)
(29) Deep Creek Divide Area .....	408 (165)	0	102 (41)	510 (206)
(30) Main Diamond Creek .....	14 (6)	0	40 (16)	54 (22)
(31) Beaver Creek .....	132 (54)	0	25 (10)	157 (64)
(32) Left Prong of Dix Creek .....	13 (5)	0	0	13 (5)
(33) Rattlesnake Pasture Tank and Associated Tanks .....	59 (24)	0	0	59 (24)
(34) Coal Creek .....	7 (3)	0	0	7 (3)
(35) Blue Creek .....	24 (10)	0	12 (5)	37 (15)
(36) Seco Creek .....	66 (27)	0	610 (247)	676 (273)
(37) Alamosa Warm Springs .....	0.2 (0.1)	25 (10)	54 (22)	79 (32)
(38) Cuchillo Negro Warm Springs and Creek .....	3 (1)	3 (1)	23 (9)	28 (12)
(39) Ash and Bolton Springs .....	0	0	49 (20)	49 (20)
(40) Mimbres River .....	0	0	1,097 (444)	1,097 (444)
Total .....	6,571 (2,661)	426 (173)	4,139 (1,676)	11,136 (4,510)

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Chiricahua leopard frog, below. Unless indicated otherwise below, the physical and biological features of critical habitat in stream and riverine lotic (actively moving water) systems are contained within the riverine and riparian ecosystems formed by the wetted channel and adjacent floodplains within 328 lateral ft (100 lateral m) on either side of bankfull stage. Bankfull stage is generally considered to be that level of stream discharge reached just before flows spill out onto the adjacent floodplain. The discharges that occur at bankfull stage, in combination with the range of flows that occur over a length

of time, govern the shape and size of the river channel (Rosgen 1996, pp. 2–2 to 2–4; Leopold 1997, pp. 62–63, 66). The use of bankfull stage and 328 ft (100 m) on either side recognizes the naturally dynamic nature of riverine systems, recognizes that floodplains are an integral part of the stream ecosystem, and contains the features essential to the conservation of the species.

Ephemeral drainages (containing water for only brief periods) proposed as critical habitat for dispersal corridors among breeding sites in metapopulations will, in some cases, be less distinct than the stream or river reaches where frogs breed. Nonetheless, these ephemeral drainages will still be defined by wetland plant species,

denser or taller specimens of upland species, channel characteristics such as sandy or gravelly soils that contrast with upland soils, the presence of cut banks, or some combination of these. Where dispersal corridors cross uplands, proposed critical habitat is 328 ft (100 m) wide, the centerline of which is the line delineated on our critical habitat maps and legal descriptions.

In ponds proposed as critical habitat, most of which are impoundments for watering cattle or other livestock, proposed critical habitat extends for 20 ft (6.1 m) beyond the high water line or to the boundary of the riparian and upland vegetation edge, whichever is greatest. The frogs are commonly found foraging and basking within 20 feet of

the shoreline of tanks. In addition, proposed critical habitat extends upstream from ponds from the extent of the boundary for 328 ft (100 m) from the high water line. The proposed critical habitat extends to 328 ft (100 m) upstream because there is often a riparian drainage coming into the tank, and the frogs are likely moving along those drainages. Also, the high water line is defined as that water level which, if exceeded, results in overflow of the pond. In most cases, this is the elevation of the spillway in livestock impoundments.

*Recovery Unit 1 (Tumacacori-Atascosa-Pajarito Mountains, Arizona and Mexico)*

Unit 1: Twin Tanks and Ox Frame Tank

Unit 1 consists of 1.3 ac (0.5 ha) of lands owned by the Arizona State Land Department and 0.4 ac (0.2 ha) of private lands in the Sierrita Mountains, Pima County, Arizona. Twin Tanks is on lands owned and managed by the Arizona State Land Department and consists of two tanks in proximity to each other as well as a drainage running between them. Ox Frame Tank is on private lands. This unit is proposed as critical habitat because it is essential for the conservation of the species.

Occupancy of these livestock tanks at the time of listing is unknown, as they were not surveyed for frogs until 2007; however, these sites are important breeding sites for recovery. Twin Tanks held more than 1,000 frogs in 2008, and is a robust breeding population. Ox Frame and Twin tanks are too far apart (4.3 mi (7.0 km) overland) across rugged terrain to expect frogs to move between these sites. Hence, these tanks serve as isolated populations. PCE 1 is present at both sites. The Twin Tanks area is less than 0.5 mi (0.8 km) upslope of active mining at Freeport McMoRan's Sierrita Copper Mine and could be affected by those mining activities. Both sites are also at risk of introduction of nonnative predators, such as bullfrogs and crayfish. Presence of chytridiomycosis at these tanks has not been investigated.

Unit 2: Garcia Tank

Unit 2, consisting of 0.7 ac (0.3 ha), is a former cattle tank located on the Buenos Aires National Wildlife Refuge (NWR), Pima County, Arizona. It is a double tank; the southwest or downstream impoundment is what dependably holds water, but both parts of the tank are proposed as critical habitat. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCE 1) to support life-

history functions essential for the conservation of the species.

A breeding site, this unit was known to have been occupied in 2002 and 2006. Leopard frogs were noted in 2010, but they were not identified to species (the lowland leopard frog, *Lithobates yavapaiensis*, is known to occur in the area). It is about 3.6 mi (5.8 km) over land across dissected and hilly terrain to the next nearest population at Lower Carpenter Tank. The nearest known populations to the east are on the Coronado National Forest more than 9.0 mi (14 km) away. Hence, this site is isolated and is managed as an isolated, robust population. The greatest threats needing management are introductions of or colonization by nonnative species, such as bullfrogs and crayfish; and drought that could greatly reduce or eliminate the aquatic habitat.

Unit 3: Buenos Aires NWR Central Tanks

This unit, consisting of 1,720 ac (696 ha) within the Buenos Aires National Wildlife Refuge (NWR), Pima County, Arizona, includes former cattle tanks and other waters used as breeding and dispersal sites plus intervening and connecting drainages and uplands. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Core breeding sites at permanent or nearly permanent tanks (Carpenter, Rock, State, Triangle, and New Round Hill) support the strongest metapopulation known within the range of the species. Chongo Tank, where a population was established in 2009, may become a sixth breeding site. Seven other tanks support frogs periodically to regularly, and breeding and recruitment likely takes place at these tanks in wet cycles. Frogs occupied Carpenter, Rock, and Triangle Tanks in 2002 at or about the time of listing. Tanks proposed for designation include Carpenter, Rock, State, Triangle, New Round Hill, Banado, Choffo, Barrel Cactus, Sufrido, Hito, Morley, McKay, and Chongo Tanks. McKay Tank is actually a cluster of three tanks, all of which are proposed as critical habitat. Also proposed as critical habitat are the intervening drainages, including: (1) Puertocito Wash from Triangle Tank north through and including Aguire Lake to New Round Hill Tank, then upstream to the confluence with Las Moras Wash, and upstream in Las Moras Wash to Chongo Tank; (2) an unnamed drainage from Puertocito Wash upstream to McKay Tank; (3) an unnamed drainage from

Puertocito Wash upstream to Rock Tank, including Morley Tank, then upstream in an unnamed drainage to the top of that drainage, directly overland to an unnamed drainage, and then upstream to Hito Tank and downstream to McKay Tank; (4) from Sufrido Tank downstream in an unnamed drainage to its confluence with an unnamed drainage running between Rock and Morley tanks; (5) Lopez Wash from Carpenter Tank downstream to Aguire Lake; (6) an unnamed drainage from its confluence with Lopez Wash upstream to Choffo Tank; (7) an unnamed drainage from its confluence with Lopez Wash upstream to State Tank; (8) an unnamed drainage from Banado Tank downstream to its confluence with an unnamed drainage, then upstream in that drainage to Barrel Cactus Tank; and (9) an unnamed drainage from Banado Tank upstream to a saddle, then directly downslope to Lopez Wash.

In this unit, bullfrogs remain a threat, but efforts are underway to eliminate the last known populations of bullfrogs in the Altar Valley (on the Santa Margarita Ranch to the south of Buenos Aires NWR). Frogs in this area have tested positive for chytridiomycosis, but the disease appears to have little effect on population viability.

Unit 4: Bonita, Upper Turner, and Mojonera Tanks

This unit includes 201 ac (81 ha) of Coronado National Forest lands in the Pajarito and Atascosa Mountains, Santa Cruz County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

Two breeding sites (Bonita Tank and Mojonera Tank), combined with a dispersal site or site where breeding and recruitment may occur in wet years (Upper Turner Tank), form the nucleus for a future metapopulation. Three additional waters—Sierra Tank East, Sierra Tank West, and Sierra Well—may have the potential to support breeding with habitat work. Frogs currently occupy Bonita and Mojonera Tanks, and Bonita was occupied at the time of listing. Frogs were last found at Upper Turner Tank in 2004. The occupancy status of Mojonera and Upper Turner Tanks at the time of listing is unknown. The proposed critical habitat in Unit 4 also includes intervening drainages, uplands, and ephemeral or intermittent waters as follows: (1) From Upper Turner Tank upstream in an unnamed drainage to its confluence with a minor drainage coming in from the east, then directly upslope in that drainage and

east to a saddle, and directly downslope to Bonita Canyon, and upstream in Bonita Canyon to Bonita Tank; and (2) from Mojonera Tank downstream in Mojonera Canyon to a sharp bend where the drainage turns west-northwest, then southeast and upstream in an unnamed drainage to a saddle, downslope through an unnamed drainage to its confluence with another unnamed drainage, upstream in that unnamed drainage to a saddle, and then downstream in an unnamed drainage to Sierra Well, to include Sierra Tank West and Sierra Tank East, then directly overland to Upper Turner Tank.

In this unit, bullfrogs are a continuing threat, and illegal border activity and associated law enforcement have resulted in watershed damage. A road on the berm of Upper Turner Tank is scheduled for improvement to access a surveillance tower operated by U.S. Customs and Border Protection. Frogs in this region have tested positive for chytridiomycosis, but the disease appears to have little effect on population viability.

#### Unit 5: Sycamore Canyon

This unit includes 262 ac (106 ha) of Coronado National Forest land and 7 ac (3 ha) of private lands along Atascosa Canyon through Bear Valley Ranch in the Pajarito and Atascosa Mountains, Santa Cruz County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Sycamore Canyon is the only significant site with moving water in recovery unit 1 to support breeding Chiricahua leopard frogs. Most other sites are livestock tanks or impounded springs. Sycamore Canyon, Bear Valley Ranch Tank, Rattlesnake Tank, and Atascosa Canyon downstream of Bear Valley Ranch were all occupied by Chiricahua leopard frogs at the time of listing. The occupancy status of the other sites at the time of listing is unknown. Sycamore Canyon, Yank Tank, North Mesa Tank, South Mesa Tank, and Bear Valley Ranch Tank are currently occupied. The current occupancy status of Rattlesnake Tank and Atascosa Canyon downstream of Bear Valley Ranch Tank is unknown. Proposed critical habitat includes approximately 6.35 mi (10.23 km) of Sycamore Canyon from Ruby Road to the international border, which supports frogs and breeding, although in the driest months (May and June) the stream dries to pools and tinajas (a term used in the American Southwest for water

pockets formed in bedrock depressions that occur below waterfalls or are carved out by spring flow or seepage).

A number of livestock tanks in the region form a strong metapopulation with Sycamore Canyon. Proposed critical habitat includes the following tanks and their connecting drainages: (1) From Yank Tank downstream in an unnamed drainage to Sycamore Canyon; (2) from North Mesa Tank downstream in Atascosa Canyon to its confluence with Peñasco Canyon, then from that confluence downstream in Peñasco Canyon to Sycamore Canyon; (3) from Horse Pasture Spring downstream to Peñasco Canyon; (4) from Bear Valley Ranch Tank downstream in an unnamed drainage to Atascosa Canyon; (5) from South Mesa Tank downstream in an unnamed drainage to Peñasco Canyon; and (6) from Rattlesnake Tank downstream in an unnamed canyon to its confluence with another unnamed drainage, then upstream in that drainage to South Mesa Tank.

Bullfrogs have been a continuing problem in this unit, although recent control efforts seem to have eliminated them from Sycamore Canyon. Nonnative green sunfish (*Lepomis cyanellus*) have occasionally been found in Sycamore Canyon, as well. Pools critical to survival of frogs and tadpoles through the dry season, are sensitive to sedimentation and erosion upstream in the watershed of Sycamore Canyon. The earliest records of chytridiomycosis in the United States are from Sycamore Canyon (1972). A robust population of Chiricahua leopard frogs persists at this site despite the disease and periodic die-offs. Illegal border activity and associated law enforcement have resulted in many trails and new vehicle routes in the area, as well as trampling in the canyon.

Sycamore Canyon is designated a Research Natural Area by the Coronado National Forest and is closed to livestock grazing. Critical habitat is designated for the Sonora chub (*Gila ditaenia*) in Sycamore Canyon from Hank and Yank Spring (about 0.25 mi (0.40 km) downstream of the Ruby Road crossing) downstream to the international border, and in a 25-ft (7.6-m) strip on both sides of the creek (51 FR 16042; April 30, 1986). Much of this unit also lies within the Pajarita Wilderness area. These designations provide some level of protection to Chiricahua leopard frog habitats in Sycamore Canyon.

#### Unit 6: Peña Blanca Lake and Spring and Associated Tanks

This unit includes 202 ac (82 ha) and is all on Coronado National Forest

lands, Santa Cruz County, Arizona. This area is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

This unit is a metapopulation that includes Peña Blanca Lake, Peña Blanca Spring, Summit Reservoir, Tinker Tank, Thumb Butte Tank, and Coyote Tank. These sites were all occupied in 2009. Chiricahua leopard frogs and tadpoles were found in Peña Blanca Lake in 2009 and 2010, after the lake had been drained and then refilled, which eliminated the nonnative predators. However, early in 2010, rainbow trout (*Oncorhynchus mykiss*) were restocked back into the lake, and plans are underway to reestablish a variety of warm water fishes, as well. Currently, the Service is working with project proponents to help design the sportfish project in a way that will allow persistence of Chiricahua leopard frogs, but whether this site retains the PCEs necessary for breeding will be evaluated in our final critical habitat determination.

In 2002, Chiricahua leopard frogs were only known to occur at Peña Blanca Spring. Occupancy status at the time of listing for the other sites is unknown. Proposed critical habitat also includes: (1) From Summit Reservoir directly southeast to a saddle on Summit Motorway, then downslope to an unnamed drainage and downstream in that drainage to its confluence with Alamo Canyon, then downstream in Alamo Canyon to its confluence with Peña Blanca Canyon, then downstream in Peña Blanca Canyon to Peña Blanca Lake, to include Peña Blanca Spring; (2) from Thumb Butte Tank downstream in an unnamed drainage to its confluence with Alamo Canyon; (3) from Tinker Tank downstream in an unnamed drainage to its confluence with Alamo Canyon, then downstream in Alamo Canyon to the confluence with the drainage from Summit Reservoir; and (4) from Coyote Tank downstream in an unnamed drainage to its confluence with Alamo Canyon, and then downstream in Alamo Canyon to the confluence with the drainage from Tinker Tank, to include Alamo Spring.

Nonnative introduced predators, particularly bullfrogs and sportfish, remain a serious threat in this region. A concerted effort was made in 2008–2010 to clear the area of bullfrogs. The effort appears to be successful, and Chiricahua leopard frogs have benefited. However, there is a continuing threat of reinvasion or introduction of bullfrogs. As discussed, sportfish at Peña Blanca Lake

are an additional threat. Frogs in this region test positive for chytridiomycosis; however, the disease appears to have little effect on population viability.

*Recovery Unit 2 (Santa Rita-Huachuca-Ajos Bavispe, Arizona and Mexico)*

Unit 7: Florida Canyon

This unit includes 4 ac (2 ha) and is all on Coronado National Forest lands in the Santa Rita Mountains, Pima County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species.

Chiricahua leopard frogs currently occupy this site; however, its occupancy status at the time of listing is unknown. A single frog was found in 2008, which was augmented with frogs from elsewhere in the Santa Rita Mountains in 2009. The site is too far from other known breeding populations to be part of a metapopulation (the next nearest population is about 5 mi (8 km) straight line distance away in Unit 8; hence, it will be managed as an isolated, robust population). PCE 1 is present and will be enhanced in 2010, with the addition of a steel tank for breeding. Included in the proposal is approximately 1,521 ft (463 m) of Florida Canyon from a silted-in dam to the downstream end of the Florida Workstation property.

Water is a limiting factor in this system, particularly during drought. Fire in the watershed could result in scouring and sedimentation in the pools important as habitat for the frog. The addition of a steel tank will provide dependable water for breeding that is safe from erosion or sedimentation events. Chytridiomycosis and introduced predators are potential threats, but neither has been recorded at this site.

Unit 8: Eastern Slope of the Santa Rita Mountains

This unit includes 172 ac (70 ha) of Coronado National Forest lands and 14 ac (6 ha) of private lands in the Greaterville area in Pima County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species.

Included in the proposed critical habitat designation are two metal troughs in Louisiana Gulch, Greaterville Tank, Los Posos Gulch Tank, and Granite Mountain Tank complex. The Granite Mountain Tank complex includes two impoundments and a well. All but Los Posos Gulch Tank are currently occupied breeding sites; however, the occupancy status at the time of listing for these sites is unknown. PCEs 1 and 2 are present. More than 60 frogs were observed at Los

Posos Gulch Tank in 2008. It was once thought to be a robust breeding site; however, it dried, and the frogs disappeared in 2009. These four sites collectively form a metapopulation. A number of other sites in this region have been found to support dispersing Chiricahua leopard frogs; however, only a few frogs and no breeding have been observed at these sites, so they are thought to represent dispersing frogs. The occupancy status of these other sites at the time of listing is unknown. Proposed critical habitat also includes intervening drainages as follows: (1) From Los Posos Gulch upstream to a saddle, then downslope in an unnamed drainage to the confluence with another unnamed drainage, then upstream and south in that drainage to a saddle, and downslope through an unnamed drainage to its confluence with Ophir Gulch, then in Ophir Gulch to upper Granite Mountain Tank, to include an ephemeral tank near upper Granite Mountain Tank and a well; (2) from Greaterville Tank downstream in an unnamed drainage to Ophir Gulch; and (3) Louisiana Gulch from the metal tanks upstream to the headwaters of Louisiana Gulch then across a saddle and downslope through an unnamed drainage to its confluence with Ophir Gulch.

Surface water is a primary limiting factor in this unit. The breeding habitat at Louisiana Gulch, although limited to two 6.0-ft (1.8-m) diameter steel tanks, is dependable because it is fed by a well. The other tanks are filled by runoff and susceptible to drying during drought. Nonnative predators and chytridiomycosis are not known to be imminent threats in this area.

Unit 9: Las Cienegas National Conservation Area

This unit is in Pima County, Arizona, and includes 1,235 ac (500 ha) of Bureau of Land Management lands and 186 ac (75 ha) of Arizona State Land Department lands, including an approximate 4.33-mi (6.98-km) reach of Empire Gulch and 1.91 mi (3.08 km) of Cienega Creek, including the Cinco Ponds. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

At the time of listing, Empire Gulch was occupied; however the occupancy status of Cinco Ponds at that time is unknown. Currently, Chiricahua leopard frogs are extant at Empire Gulch and Cinco Ponds. Frogs breed in a reach of Empire Gulch near Empire Ranch. This reach includes: (1) Empire Gulch

from a pipeline road crossing above the breeding site downstream to Cienega Creek; and (2) Cienega Creek from the Empire Gulch confluence upstream to the approximate end of the wetted reach and where the creek bends hard to the east, to include Cinco Ponds. An enclosed Chiricahua leopard frog facility exists along Empire Gulch and is used to headstart eggs and tadpoles for release to augment the wild population. Frogs may breed periodically at Cinco Ponds. These sites are too far (more than 8.0 mi (13 km) straight line distance) from the next nearest population, which is in Unit 8; thus the population(s) in Unit 9 currently acts as an isolated population(s).

The recovery program for the Chiricahua leopard frog at Las Cienegas is a collaborative, multi-partner approach that recently got a boost with a substantial grant from the National Fish and Wildlife Foundation. However, bullfrogs are present and represent a persistent problem. Chiricahua leopard frogs suffer from chytridiomycosis in this unit, which has resulted in periodic die-offs; however, the frogs are persisting with the disease. Crayfish occur within a few miles and pose a significant threat if they reach Cienega Creek or Empire Gulch. The frog population in this unit is not robust.

Las Cienegas National Conservation Area is managed under the principles of multiple-use and ecosystem management for future generations. Empire Gulch and Cienega Creek downstream of its confluence with Empire Gulch is designated critical habitat for the endangered Gila chub (*Gila intermedia*) (70 FR 66663; November 2, 2005). The chub and the endangered Gila topminnow (*Poeciliopsis occidentalis*) occur in Cienega Creek adjacent to Empire Gulch. The Gila topminnow also occurs in Empire Gulch. Neither species occurs in Cinco Ponds. Where these species or critical habitat occur, some level of protection may be afforded to Chiricahua leopard frog habitat.

Unit 10: Pasture 9 Tank

This unit includes 0.5 ac (0.2 ha) and is a former cattle pond entirely on private lands of the San Rafael Ranch, San Rafael Valley, Santa Cruz County, Arizona. It is proposed as critical habitat because it is essential for the conservation of the species.

This unit was not known to be occupied at the time of listing; however, Chiricahua leopard frogs were established at this site through a reintroduction in 2009. The next nearest population is about a 10.5-mi (16.8-km), straight-line distance away in the Unit

11; hence, Pasture 9 Tank is being managed as an isolated population. PCE 1 is present in this unit.

The site is fenced with bullfrog exclusion fencing, which also excludes livestock, and the pond is equipped with a solar-powered pump and well that provides a continual source of water for the pond. The design of the fence allows Chiricahua leopard frogs to exit the fenced area, but they cannot return. Proposed critical habitat includes all areas within the fence. This is a cooperative project with the landowner through the Service's Partners for Fish and Wildlife Program. The landowner has also entered into a Safe Harbor Agreement for the Chiricahua leopard frog; however, bullfrogs are in the area and remain a threat if the fence is breached.

Chytridiomycosis is present in endangered Sonoran tiger salamander (*Ambystoma tigrinum stebbinsi*) populations in the San Rafael Valley, and the disease has caused mass die-offs and extirpations of Chiricahua leopard frogs in the nearby Huachuca Mountains; as a result, chytridiomycosis is considered a threat at Pasture 9 Tank. This unit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* section below).

#### Unit 11: Scotia Canyon

This unit includes 70 ac (29 ha) in Scotia Canyon, Huachuca Mountain, Cochise County, Arizona, and is entirely on Coronado National Forest lands. This unit is proposed as critical habitat because it is essential for the conservation of the species.

The unit encompasses an approximate 1.36-mi (2.19-km) reach of the canyon with perennial pools, as well as a perennial travertine (a form of limestone) seep, a spring fed, perennial impoundment (Peterson Ranch Pond), and an ephemeral impoundment adjacent to Peterson Ranch Pond. There is also a perennial or nearly perennial impoundment in the channel downstream of the travertine seep. Breeding habitat occurs at Peterson Ranch Pond and possibly at other perennial or nearly perennial pools.

Chiricahua leopard frogs were reestablished in this canyon via a translocation in 2009; the last record of a Chiricahua leopard frog in the canyon before that was 1986. Scotia Canyon was not occupied at the time of listing. PCEs 1 and 2 are present.

Currently, this site is isolated from other populations, the nearest of which is in Unit 15, about a 4.4-mi (7.0-km), straight-line distance away over

mountainous terrain. Hence this site is managed as an isolated population, but there is some potential for creating connectivity to the metapopulation in Unit 14 via population reestablishment in Garden Canyon at Fort Huachuca. Scotia Canyon, with its pond and stream habitats, has the potential to be a robust population.

This canyon, and sites around it, has been the subject of intensive bullfrog eradication and habitat enhancement work in preparation for reestablishing the Chiricahua leopard frog. However, bullfrog reinvasion is a significant, continuing threat, and other nonnative predators could potentially reach Scotia Canyon via natural or human assisted immigration. In addition, tiger salamanders (*Ambystoma mavortium*) from the Peterson Ranch Pond tested positive for chytridiomycosis in 2009; however, in 2010, the frogs appeared to be doing well in that same pond, and it is unclear as to whether tiger salamander have persisted at that pond. Nonetheless, disease has resulted in extirpations elsewhere in the Huachuca Mountains, and is considered a serious threat in Scotia Canyon. Further, heavy fuel loads could result in a catastrophic wildfire, which would have significant detrimental effects on the frog and its aquatic habitats. Finally, a road through the canyon is eroded in places and contributes sediment to the stream; it receives much use by recreationists and U.S. Customs and Border Protection.

The proposed critical habitat designation for the Chiricahua leopard frog largely overlaps that of critical habitat for the endangered plant Huachuca water-umbel (*Lilaeopsis schaffneriana* var. *recurva*). Several listed and candidate species have been recorded in Scotia Canyon. These occurrences of critical habitat and listed species provide some level of protection to Chiricahua leopard frog habitat in this unit.

#### Unit 12: Beatty's Guest Ranch

This unit includes 10 ac (4.0 ha) of private lands in Miller Canyon on the east slope of the Huachuca Mountains, Cochise County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Beatty's Guest Ranch is one of four proposed critical habitat units (12, 13, 14, and 15) which was considered to be populated by the Ramsey Canyon leopard frog, until the Ramsey Canyon leopard frog was determined to be the same species as the Chiricahua leopard

frog in 2008 (Crothers 2008, p. 7). Frogs and habitat in these four units have been managed intensively since 1995. A conservation agreement and very active conservation partnership was formalized in 1997. The conservation agreement implements the Chiricahua leopard frog recovery plan in this portion of the Huachuca Mountains. More recently, landowners in this unit enrolled their lands in the Arizona Game and Fish Department's (AGFD) Safe Harbor Agreement with a Certificate of Inclusion. Currently, The Nature Conservancy is in the process of enrolling their Ramsey Canyon Preserve in Unit 14, as well. Because frogs would not exist on these properties but for reestablishment projects by the Service and AGFD with the permission of the landowners, Beatty's Guest Ranch and The Nature Conservancy's Ramsey Canyon Preserve have been assigned a zero baseline for frogs under the Safe Harbor Agreement.

Frogs were present in Unit 12 at the time of listing and are currently extant. This is a robust breeding population that inhabits a number of constructed ponds on the property. Frogs freely move among the ponds through an apple orchard, connecting streams, and overland. Beatty's Guest Ranch is too far from other populations (about a 3.0-mi (4.8-km), straight-line distance from Unit 14 over rugged terrain, or about 2.0 mi (3.2 km) along ephemeral or intermittent drainages and 1.7 mi (2.7 km) overland to Unit 13) to form a metapopulation, and because of presence of chytridiomycosis and population decline and extirpation associated with the disease in Units 13, 14, and 15, such connection is not desirable. As a result, Unit 12 is managed as an isolated, robust population. This is the most stable and robust population of Chiricahua leopard frogs known in recovery unit 2.

Given the presence of chytridiomycosis in Units 13, 14, and 15 and its apparent dire effects on Chiricahua leopard frog populations there, chytridiomycosis is an ever present threat in Unit 12. However, frogs at the Beatty's Guest Ranch have never tested positive for the disease. Factors may be acting at this site to prevent its establishment as an epizootic disease (an outbreak of disease affecting many animals of one kind at the same time). Because of the diligent management of the Beatty family, no other factors threaten this population. The frogs are present as a result of a translocation agreed to by the Beattys, who are signatories to the conservation agreement described above, and have also enrolled their property into a Safe



Harbor Agreement for the Chiricahua leopard frog. Under section 4(b)(2) of the Act, this unit is being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

#### Unit 13: Carr Barn Pond

This unit includes 0.6 ac (0.3 ha) of Coronado National Forest lands in the Huachuca Mountains, Cochise County, Arizona. Carr Barn Pond is an impoundment with a small, lined pond with water provided from a well. During runoff events, the size of the pond expands considerably and then gradually shrinks back to the lined section.

This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

As with Units 12, 14, and 15, this unit has been the subject of a conservation agreement and much intensive management for the Ramsey Canyon (=Chiricahua) leopard frog. The Coronado National Forest created and now maintains Carr Barn Pond consistent with the Ramsey Canyon (=Chiricahua) leopard frog conservation agreement, to which they are a signatory. This site was occupied at the time of listing and was occupied into 2009, but the population has since been eliminated, probably by chytridiomycosis. This site is too far away (3.4 mi (5.4 km) from Unit 14 and about 3.0 mi (4.8 km) from Unit 12 by way of a straight-line distance over rugged terrain) to be part of a metapopulation; hence, it is currently considered isolated. There is some potential for connecting it to Units 11, 14, and 15 (*see* discussion above), but additional habitat creation or enhancement and population reestablishment would be needed.

The unit has a history of nonnative predator problems and disease. We believe PCE 1 is present, but disease is a serious threat here that may be an impediment to viable frog populations. The population has been eliminated after chytridiomycosis die-offs three times; twice the population has subsequently been reestablished through translocations. Largemouth bass have been introduced illegally into the pond and then removed, and bullfrogs periodically invade the site but are promptly removed before they breed.

#### Unit 14: Ramsey and Brown Canyons

This unit includes 65 ac (26 ha) of private lands in Ramsey Canyon and 58 ac (24 ha) of Coronado National Forest

in Brown and Ramsey Canyons, Huachuca Mountains, Cochise County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

This unit along with other Units (12, 13, and 15) have been managed intensively for Ramsey Canyon (=Chiricahua) leopard frog conservation since 1995. This unit is managed as a metapopulation. Places where frogs have bred and that still retain PCE 1 include Ramsey Canyon, Trout and Meadow Ponds on private lands owned by The Nature Conservancy, and the Ramsey Canyon Box; and in Brown Canyon, the Wild Duck Pond, House Pond, and the Brown Canyon Box (on Coronado National Forest lands). PCEs 1 and 2 are present within this unit.

In addition to the breeding ponds, this critical habitat proposal also includes dispersal sites and corridors for connectivity among breeding ponds as follows: (1) From the top of the Box in Ramsey Canyon downstream to a dirt road crossing of Ramsey Canyon at the mouth of the canyon; (2) Brown Canyon from the Box downstream to the Wild Duck Pond and House Pond on the former Barchas Ranch; and (3) from the dirt road crossing of Ramsey Canyon directly overland to House Pond.

The Ramsey Canyon portion of the unit was not occupied at the time of listing, but Brown Canyon was occupied. Both canyons are considered currently occupied, but although frogs have bred at the Box in Brown Canyon, the site is too small to support more than just a few frogs. In addition, recent die-offs associated with chytridiomycosis have significantly reduced populations in both canyons. The House and Wild Duck ponds as well as Ramsey Canyon have a history of chytridiomycosis outbreaks. The Ramsey Canyon population has been eliminated twice and then reestablished; the Wild Duck and House Ponds have also undergone repeated disease-related declines and extirpations followed by reestablishments. The populations tend to do well for months or years after reestablishment only to experience epizootic (an outbreak of disease affecting many animals of one kind at the same time) chytridiomycosis outbreaks followed by declines or extirpation.

Additional threats in this unit include nonnative species, drying, sedimentation, and fire. Nonnative predators threaten populations at the House and Wild Duck Ponds, where bullfrogs have been found periodically

and goldfish were once introduced. Those two ponds are buffered against drought and drying by a pipeline from a spring and a windmill. However, the Box in Brown Canyon is subject to low water and drying during drought. That later population depends upon immigration or active reestablishment for long-term persistence. The Trout and Meadow Ponds in Ramsey Canyon are fed by pipelines; thus the water supply is dependable. The Trout Pond could however be filled in with sediment during a flood. Further, a fire in the watershed could threaten aquatic breeding sites in both canyons.

Lands owned by The Nature Conservancy in Ramsey Canyon are known as the Ramsey Canyon Preserve and are managed for preservation of natural features and species, including the Chiricahua leopard frog. The Nature Conservancy has been an active participant in Chiricahua leopard frog recovery for many years; the Ramsey Canyon Preserve is currently in the process of being signed onto a Safe Harbor Agreement, and The Nature Conservancy signed the Ramsey Canyon leopard frog conservation agreement, which implements the Chiricahua leopard frog recovery plan in the Huachuca Mountains. Under section 4(b)(2) of the Act, the Ramsey Canyon Preserve is being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

#### *Recovery Unit 3 (Chiricahua Mountains-Malpai Borderlands-Sierra Madre, Arizona, New Mexico, and Mexico)*

#### Unit 15: High Lonesome Well

This unit includes 0.4 ac (0.2 ha) of privately owned lands in the Playas Valley, Hidalgo County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCE 1) to support life-history functions essential for the conservation of the species.

This unit consists of an elevated concrete tank into which Chiricahua leopard frogs were introduced prior to listing (Painter 2000, p. 15). The tank is supplied with water from a windmill and provides water for livestock. The site supports a robust breeding population, but is much too far from other populations to be part of a metapopulation (the nearest population is in Unit 17, 25.4 mi (40.6 km) to the west). Furthermore, although frogs can exit the tank, they cannot get back into the tank. As a result, it is managed as an isolated, robust population.

Chiricahua leopard frogs were present at the time of listing and are currently extant. The population is threatened by deterioration of the concrete tank, which needs repair or replacement. Catastrophic failure of the tank would result in loss of this population. Chytridiomycosis has not been detected at this site, but disease testing has been minimal. Nonnative predators have not been recorded. Because of the nature of the site, such predators could not colonize the tank on their own; they would have to be introduced.

#### Unit 16: Peloncillo Mountains

This unit includes 366 ac (148 ha) of Coronado National Forest lands and 289 ac (117 ha) of private lands in Hidalgo County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Aquatic habitats proposed as critical habitat in this unit include Geronimo, Javelina, State Line, and Canoncito Ranch Tanks; Maverick Spring; and pools or ponds in the Cloverdale Cienega and along Cloverdale Creek below Canoncito Ranch Tank. Breeding occurs in State Line and Canoncito Ranch Tanks, and possibly other aquatic sites. Canoncito Ranch and Geronimo tanks were occupied at the time of listing. The occupancy status of the other sites at that time is unknown. All four of the tanks and Maverick Spring have recent records of frogs (2007 to the present) and are considered currently occupied. Frogs disperse from Canoncito Ranch Tank into Cloverdale Cienega and Cloverdale Creek when water is present. This unit is managed as a metapopulation.

Also included in this critical habitat proposal are intervening drainages and uplands needed for connectivity among these aquatic sites, including: (1) Cloverdale Creek from Canoncito Ranch Tank downstream to rock pools about 630 feet (192 m) below the Cloverdale Road crossing of Cloverdale Creek, including Cloverdale Cienega; (2) from Geronimo Tank downstream in an unnamed drainage to its confluence with Clanton Draw, then upstream to the confluence with an unnamed drainage, and upstream in that drainage to its headwaters, across a mesa to the headwaters of an unnamed drainage, then downslope through that drainage to State Line Tank; (3) from State Line Tank upstream in an unnamed drainage to a mesa, then directly overland to the headwaters of Cloverdale Creek, and then downstream in Cloverdale Creek to

Javelina Tank; and (4) from Javelina Tank downstream in Cloverdale Creek to the Canoncito Ranch Tank, to include Maverick Spring.

Periodic drought dries most of the aquatic sites completely or to small pools, which limits population growth potential. Nonnative sportfish are present at Geronimo Tank and may preclude successful recruitment. Occurrence of chytridiomycosis in this area has not been investigated, but may also be a limiting factor.

Sky Island Alliance is working with partners to restore the Cloverdale Cienega, which should improve aquatic habitats for Chiricahua leopard frogs. The owner of the Canoncito Ranch has signed onto a Safe Harbor Agreement for the Chiricahua leopard frog. Under section 4(b)(2) of the Act, the private lands in Unit 16 are being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

#### Unit 17: Cave Creek

This unit includes 234 ac (95 ha) of Coronado National Forest lands and 92 ac (37 ha) of private lands owned by the American Museum of Natural History in the Chiricahua Mountains, Cochise County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

Included in the proposed critical habitat are an approximate 5.84-mi (9.41-km) reach of Cave Creek and associated ponds in or near the channel, from Herb Martyr Pond downstream to the eastern U.S. Forest Service boundary, to include John Hands Pond and a spring-fed pond at the Southwest Research Station. PCEs 1 and 2 are present. This site will be managed as a metapopulation.

Herb Martyr Pond is the type locality for the Chiricahua leopard frog; however, no frogs have been observed at the site since 1977. The pool behind the dam is entirely silted in, and pools at the base of the dam are probably not adequate for Chiricahua leopard frog survival or reproduction. However, with restoration this site could once again support Chiricahua leopard frogs. The pond below the dam at John Hands appears suitable for occupancy, but Chiricahua leopard frogs have not been recorded there since 1966. The spring-fed pond at the Southwest Research Station appears to be excellent habitat, but we have no record of the species occurring there. Chiricahua leopard frogs were occasionally seen in Cave Creek through 2002, and an egg mass

observed in Cave Creek on the Southwest Research Station property indicates it may be suitable for breeding, although the creek dries to shallow pools in most years in May and June. This unit is not currently occupied by Chiricahua leopard frogs; however, the Southwest Research Station is headstarting tadpoles collected from Leslie Canyon NWR (Unit 18); they will be captively bred and released at the pond on the station's property as early as 2011.

Scarcity of water can occur in drought years; however, the pond at the Southwest Research Station is fed by a well and thus is buffered against drought. Bullfrogs occur to the east but have never been recorded in the unit. The current status and past history of chytridiomycosis in this unit are unknown; however, the pond at the Southwest Research Station is fed by a warm spring and could provide some buffer against the disease. Rainbow trout were present and occurred concurrently with Chiricahua leopard frogs at Herb Martyr Pond, but no trout are currently known in the unit.

The Southwest Research Station has signed a Safe Harbor Agreement for the Chiricahua leopard frog and is an active participant in recovery. The Service and AGFD are working with additional private landowners downstream of the proposed critical habitat to bring them into the Safe Harbor Agreement. Under section 4(b)(2) of the Act, the American Museum of Natural History lands are being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

#### Unit 18: Leslie Creek

The unit consists of 26 ac (11 ha) of National Wildlife Refuge lands on Leslie Canyon NWR, Cochise County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCE 1) to support life-history functions essential for the conservation of the species.

This unit is a stream system with intermittent pools and two small impoundments. Its upstream limit is the Leslie Canyon NWR boundary, and its downstream limit is at the crossing of Leslie Canyon Road, an approximate stream distance of 4,094 ft (1,248 m).

Chiricahua leopard frogs were present in this unit at the time of listing and are currently extant. This population is too far (24.8 mi (36.7 km)) from the next nearest breeding site (North Tank in Unit 19) to be part of a metapopulation. Hence it is managed as an isolated population.

Drought and lack of pools are limiting factors in this unit. Chiricahua leopard frogs are positive for chytridiomycosis at this site, and although they are persisting with the disease, the population is not robust, and the effects of the disease may be responsible in part. Bullfrogs occur in ponds to the east, but have never been recorded in Leslie Creek.

The endangered Huachuca water-umbel, endangered Yaqui chub (*Gila purpurea*), and endangered Yaqui topminnow (*Poeciliopsis occidentalis sonoriensis*) all occur in Leslie Creek, and the area is managed to conserve the aquatic and riparian habitats of the canyon. A landowner adjacent to the the refuge has signed a Safe Harbor Agreement for the Chiricahua leopard frog and other species. With future habitat renovations and population reestablishments, there is some potential for developing additional populations of Chiricahua leopard frogs in this area, which could form a metapopulation with the Leslie Canyon population.

#### Unit 19: Rosewood and North Tanks

This unit includes 19 ac (8 ha) of private land and 78 ac (31 ha) of land owned by the Arizona State Land Department in the San Bernardino Valley, Cochise County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Included in this proposed unit are two livestock tanks (Rosewood and North Tanks) and drainages and uplands to allow for movement of frogs between them. North Tank is on private land, while Rosewood Tank and the connecting drainage are on Arizona State Land Department lands. Rosewood Tank was occupied at the time of listing, but North Tank was not. Both tanks are currently occupied. Rosewood Tank is a breeding population, and North Tank probably supports breeding. The North Tank is a recent (2008) reestablishment site for which breeding has not yet been documented. Two interconnected breeding sites do not make a metapopulation (four or more interconnected breeding sites are necessary, Service 2007, p. K-3); hence this unit is considered an isolated population.

The intervening drainages and uplands proposed as critical habitat are as follows: (1) From Rosewood Tank downstream in an unnamed drainage that is parallel to and just south of the Guadalupe Canyon Road to its

confluence with a large unnamed drainage, then upstream in that drainage; (2) under Guadalupe Canyon Road and east to its confluence with a minor unnamed drainage; (3) upstream in that unnamed minor drainage to its headwaters; (4) then overland to the headwaters of another unnamed drainage; (5) downstream in that drainage to its confluence with the drainage containing North Tank; and (6) downstream in that drainage to North Tank.

Chytridiomycosis has not been recorded in this unit despite its presence nearby at San Bernardino NWR. High pH at Rosewood Tank may be a limiting factor for the disease organism. No nonnative predators have been found at either of these tanks. Rosewood Tank has been equipped with two small, concrete-lined refugia ponds fed by a well so that the frogs can persist at this site even if the livestock tank, which is filled by runoff, goes dry.

For many years, the owners of the Magoffin Ranch in this unit have made unprecedented efforts to maintain this population. The private and Arizona State Land Department lands in the proposal are covered by a Safe Harbor Agreement for the Chiricahua leopard frog. The Magoffin Ranch owners have worked tirelessly for the recovery of this species. Under section 4(b)(2) of the Act, lands in this unit are being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

#### *Recovery Unit 4 (Piñaleno-Galiuro-Draoon Mountains, Arizona)*

#### Unit 20: Deer Creek

This unit consists of 17 ac (7 ha) of Coronado National Forest, 69 ac (28 ha) of Arizona State Land Department lands, and 34 ac (14 ha) of private lands in the Galiuro Mountains, Graham County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species. PCEs 1 and 2 are present in this unit.

Included in proposed critical habitat are Home Ranch, Clifford's, Vermont, and Middle Tanks, a series of 10 impoundments on the Penney Mine lease, and intervening drainages, primarily Deer Creek, and associated uplands and ephemeral tanks that provide corridors for movement among these tanks. Breeding has been confirmed on Deer Creek above Clifford's Tank, and in Home Ranch and Vermont Tanks, and is suspected in the other three sites named above when water is present long enough for tadpoles to metamorphose into adults (3 to 9 months). Home Ranch Tank

supports a robust or nearly robust population of Chiricahua leopard frogs. This unit functions as a metapopulation. Intervening drainages include: (1) Deer Creek from a point where it exits a canyon and turns abruptly to the east, upstream to its confluence with an unnamed drainage, upstream in that drainage to a confluence with four other drainages, upstream from that confluence in the western drainage to Clifford's Tank, upstream from that confluence in the west-central drainage to an unnamed tank, then directly overland southeast to another unnamed tank, then downstream from that tank in an unnamed drainage to the aforementioned confluence and upstream in that unnamed drainage to a saddle, and downstream from that saddle in an unnamed drainage to its confluence with an unnamed tributary to Gardner Canyon, and upstream in that unnamed tributary to Home Ranch Tank; (2) from the largest of the Penney Mine Tanks directly overland and southwest to an unnamed tank, and downstream from that tank in an unnamed drainage to the aforementioned confluence, to include another unnamed tank situated in that drainage; (3) from Vermont Tank directly overland and east to Deer Creek; and (4) from Middle Tank upstream in an unnamed drainage to a saddle, and then directly downslope to Deer Creek.

The primary threat to Chiricahua leopard frogs and their habitats in this unit is periodic drought that results in breeding sites drying out. During a severe drought in 2002, all but one of the waters in the unit dried out. The occupancy status of the unit at the time of listing is unknown. Frogs in this unit reportedly died for unknown reasons in the 1980s (Goforth 2005, p. 2), possibly indicative of chytridiomycosis; however, no Chiricahua leopard frogs have tested positive for the disease from this unit. The only nonnative aquatic predator recorded in this unit is the barred tiger salamander.

Recovery work has occurred in this unit, including headstarting of egg masses and reestablishment and augmentation of populations. The Service, AGFD, Arizona State Land Department, and an agate miner (Penney Mine Tanks) have drafted a conservation plan for managing habitats on the mine lease, but funds are lacking to implement that plan.

#### Unit 21: Oak Spring and Oak Creek

This unit consists of 27 ac (11 ha) of Coronado National Forest lands in the Galiuro Mountains, Graham County, Arizona. Oak Spring and Oak Creek are proposed as critical habitat because they

are essential for the conservation of the species.

The unit is currently occupied; however, its occupancy status at the time of listing is unknown. It is just north of Deer Creek (Unit 20) but is too far (about 1.6 mi (2.6 km)) overland (via straight-line distance) from the nearest aquatic sites (Home Ranch and Clifford's Tanks) in that unit. Connectivity is further complicated by a ridgeline between Oak Spring and Home Ranch Tank. Hence, this site is managed as an isolated population.

PCEs 1 and 2 are present in this unit. The site does not support enough frogs to be considered a robust population. This unit is an approximate 1.06-mi (1.71-km) intermittent reach of an incised canyon punctuated by pools of varying permanence, from Oak Spring downstream in Oak Creek to where a hiking trail intersects the creek. The largest pool, Cattail Pool, is permanent or nearly so and typically supports several Chiricahua leopard frogs and breeding. The reach proposed for critical habitat captures the area where Chiricahua leopard frogs have been seen.

The primary threat in this unit is extended drought during which all of the pools are subject to reduction or drying. Cattail Pool is spring-fed, and is likely the last pool to dry out. Oak Spring is also tapped for water developments, which may limit the capability of the site to support frogs. Chiricahua leopard frogs have been headstarted and released at this site to augment the population.

#### Unit 22: Dragoon Mountains

This unit includes 74 ac (30 ha) of Coronado National Forest lands in Cochise County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Shaw Tank and Tunnel Spring in Middlemarch Canyon are proposed as critical habitat in this unit and are currently occupied breeding sites. The latter is a robust population that was occupied at the time of listing. Shaw Tank is a reestablishment site that was not known to be occupied in 2002.

Also included in the proposal as proposed critical habitat is Halfmoon Tank, which supported a robust population of Chiricahua leopard frogs until 2002. It dried or nearly dried that year and may or may not have supported Chiricahua leopard frogs at the time of listing. PCE 1 at Halfmoon Tank has been compromised by siltation

and recent drought. The tank is in need of renovation so that it may again dependably hold water and support breeding.

Currently, not enough breeding sites exist to comprise a metapopulation (four are necessary) in this unit; however, with additional habitat creation or renovation, a metapopulation may be possible, which is needed for this recovery unit (the only other metapopulation is in Unit 20).

Also included in this critical habitat proposal are intervening drainages for connectivity, including Stronghold Canyon from Halfmoon Tank to Cochise Spring, then upstream in an unnamed canyon to Shaw Tank, and continuing upstream to the headwaters of that canyon, across a saddle and downstream in Middlemarch Canyon to Tunnel Spring.

Threats to the Chiricahua leopard frog and its habitat are primarily scarcity of suitable breeding habitat and loss of that habitat during drought. Tunnel Spring is spring-fed and thus buffered against drought; however, Shaw and Halfmoon Tanks are filled with runoff. Neither nonnative predators nor chytridiomycosis have been noted in these populations and habitats, although if introduced they would constitute additional stressors.

Recovery work, including headstarting of eggs collected from Tunnel Spring and establishment of a new population at Shaw Tank with reared tadpoles and frogs, has been accomplished in this unit, and the U.S. Forest Service's livestock permittee has been an enthusiastic participant in those recovery activities.

#### *Recovery Unit 5 (Mogollon Rim-Verde River, Arizona)*

#### Unit 23: Buckskin Hills

This unit includes 232 ac (94 ha) of Coconino National Forest lands in Yavapai County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Included in this proposed critical habitat unit are six tanks occupied at the time of listing (Sycamore Basin, Middle, Walt's, Partnership, Black, and Buckskin) that form a metapopulation. Frogs currently occur at Middle and Walt's Tanks. Also included in the critical habitat proposal are two tanks occupied in 2001 that probably dried out during a drought in 2002: Doren's Defeat and Needed Tanks. The former holds water well and is about 0.5 mi

(0.8 km) from Partnership Tank and 0.67 mi (1.07 km) from Walt's Tank. Needed Tank may not hold water long enough for breeding, but it provides a stopover for dispersing frogs.

This proposed critical habitat also includes drainages and uplands likely used as dispersal corridors among these tanks, including: (1) From Middle Tank downstream in Boulder Canyon to its confluence with an unnamed drainage that comes in from the northwest, to include Black Tank, then upstream in that unnamed drainage to a saddle, to include Needed Tank, downstream from the saddle in an unnamed drainage to its confluence with another unnamed drainage, downstream in that drainage to the confluence with an unnamed drainage, to include Walt's Tank, and upstream in that unnamed drainage to Partnership Tank; (2) from Doren's Defeat Tank upstream in an unnamed drainage to Partnership Tank; (3) from the confluence of an unnamed drainage with Boulder Canyon west to a point where the drainage turns southwest, then directly overland to the top of Sycamore Canyon, and then downstream in Sycamore Canyon to Sycamore Basin Tank; and (4) from Buckskin Tank upstream in an unnamed drainage to the top of that drainage, then directly overland to an unnamed drainage that contains Walt's Tank.

The greatest threats are reintroduction of nonnative species and drought. Divide Tank, which is adjacent to Highway 260, has supported nonnatives in the past and is a likely place for future illegal stockings of fish or bullfrogs. If established there, nonnatives could spread to sites proposed herein as critical habitat. All of the tanks proposed as critical habitat are filled by runoff; hence, they are vulnerable to drying during drought. When the species was proposed for listing, the populations in the Buckskin Hills were unknown; however, during 2000–2001, frogs were found at 11 sites. After a severe drought in 2002, frogs only remained at Sycamore Basin and Walt's Tanks. Drilling a well to make one or more of the tanks less susceptible to drying is cost prohibitive because of the extreme depth to groundwater. Because the tanks depend on runoff, and as most tanks went dry in 2002, protecting more than the minimum four breeding sites needed for a metapopulation is warranted. Chytridiomycosis has not been found in any wild frogs in the Buckskin Hills; however, the disease occurs in Arizona treefrogs (*Hyla wrightorum*) and western chorus frogs (*Pseudacris triseriata*) less than 10 mi (16 km) to the east, and frogs collected from Walt's Tank

subsequently tested positive for the disease in captivity. It is unknown whether they contracted the disease in the wild or while captive.

Much recovery work has been accomplished in this unit, including captive rearing, population reestablishments, tank renovations, erosion control, fencing, and elimination of nonnative predators such as sportfishes and crayfish.

#### Unit 24: Crouch, Gentry, and Cherry Creeks, and Parallel Canyon

This unit includes 334 ac (135 ha) of Tonto National Forest lands, 64 ac (26 ha) of AGFD lands, and 6 ac (3 ha) of private lands in Gila County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Included as proposed critical habitat are Trail Tank, HY Tank, Carroll Spring, West Prong of Gentry Creek, Pine Spring, and portions of Cherry and Crouch Creeks, all of which provide breeding or potential breeding habitat. Also included are intervening drainages and uplands needed for connectivity among breeding sites, including: (1) Cherry Creek from Rock Spring upstream to its confluence with an unnamed drainage, upstream in that drainage and across a saddle, then downstream in an unnamed drainage to Trail Tank; (2) Crouch Creek from its headwaters just south of Highway 288 downstream to an unnamed drainage leading to Pine Spring, to include Cunningham Spring and Carroll Spring, then upstream in that unnamed drainage from Crouch Creek to Pine Spring; (3) from HY Tank downstream in an unnamed drainage to Cherry Creek, to include Bottle Spring; (4) from Cunningham Spring east across a low saddle to West Prong of Gentry Creek where the creek turns southwest; and (5) from Bottle Spring south over a low saddle to the headwaters of Crouch Creek.

At the time of listing, Chiricahua leopard frogs occurred in Crouch Creek, Carroll Spring, HY Tank, Bottle Spring, and West Prong of Gentry Creek. Trail Tank has nearly permanent water and is in the Parallel Canyon drainage, but close to the divide with Cherry Creek. In May 2010, it was renovated to remove a breeding population of bullfrogs and green sunfish. Additional followup removal of bullfrogs occurred in July 2010. Bullfrogs at the nearby ephemeral Roadside Tank were also eliminated in 2010. Once bullfrogs are confirmed absent, plans will move forward to

translocate Chiricahua leopard frogs to Trail Tank.

Chiricahua leopard frogs were moved to Pine Spring in 2006, and habitat work was accomplished there to improve pool habitats. However, no frogs were observed during a site visit in May 2010. The connectivity of Pine Spring to Cunningham Spring and other sites upstream in Crouch Creek is complicated by a waterfall below Cunningham Spring; however, an overland route of less than a mile provides access around the waterfall.

Chiricahua leopard frogs were first noted in Cherry Creek in 2008, just before additional frogs were released into that site. Reproduction has been noted and frogs were observed in Cherry Creek in 2010.

Threats in this unit include predation by nonnative species, including bullfrogs, crayfish, and sportfish; predation by tiger salamanders (presumably native); chytridiomycosis, which was found in a Cherry Creek frog in 2009; and minimal water. None of the populations are robust due to the small size of breeding habitats. It is hoped that Trail Tank may provide enough aquatic habitat for a robust population. Other sites have renovation potential and could possibly in the future support robust populations, but none of the other sites currently have the PCEs due to presence of nonnative species or other factors.

This unit has received habitat work, renovations, nonnative species control, headstarting, population reestablishment, and population augmentation.

#### Unit 25: Ellison and Lewis Creeks

This unit includes 83 ac (34) of Tonto National Forest lands and 15 ac (6 ha) of private lands in Gila County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species. PCEs 1 and 2 are present in this unit.

Included in this critical habitat proposal are potential breeding sites at Moore Saddle Tank #42, Ellison Creek just east of Pyle Ranch, Lewis Creek downstream of Pyle Ranch, and Low Tank. Intervening drainages that provide connectivity among the latter three sites are also proposed as critical habitat as follows: (1) Unnamed tributary to Ellison Creek from its confluence with an unnamed drainage downstream to Ellison Creek; (2) then directly west across the Ellison Creek floodplain and over a low saddle to Lewis Creek below Pyle Ranch; (3) then downstream in Lewis Creek to its confluence with an unnamed drainage;

and (4) then upstream in that unnamed drainage to Low Tank.

Moore Saddle Tank #42 is about 0.8 mi (1.3 km) overland from Low Tank; hence, it is within the one-mile overland distance for reasonable dispersal likelihood; however, there are four drainages that bisect that route, and it is likely that any Chiricahua leopard frogs traversing those uplands would move down or upstream in one of those drainages rather than crossing them. As a result, Moore Saddle Tank #42 will be managed as an isolated and potentially robust population.

This leaves the other sites one short of the four needed to form a metapopulation; however, no other sites in the area are known that contain the PCEs or have the potential for developing the PCEs. Additional exploration of the area and likely some habitat renovation will be needed to secure a fourth site.

Chiricahua leopard frogs have occasionally been found in Ellison Creek. In 1998, small numbers of frogs were found here, but were not seen again until 2006. Despite intensive surveys, no frogs were found in 2007 or 2008.

Whether this unit was occupied at the time of listing is unclear. In 2009, egg masses from Crouch Creek in Unit 24 were headstarted, and tadpoles and young frogs were stocked at the four sites listed above as potential breeding sites. Frogs from those releases appeared to be doing well at all four sites in 2010. Additional releases of Crouch Creek frogs occurred in July 2010.

#### *Recovery Unit 6 (White Mountains-Upper Gila, Arizona and New Mexico)*

##### Unit 26: Concho Bill and Deer Creek

This unit includes 17 ac (7 ha) of Apache-Sitgreaves National Forest in Apache County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species. PCE 1 is present. Included in this critical habitat proposal is a spring at Concho Bill and a meadow-ephemeral stream reach extending for approximately 2,667 ft (813 m) below the spring.

This is an isolated population that was established through captive breeding and translocation of stock from Three Forks, which is also in recovery unit 6 in Arizona. Frogs were first released at the spring pool in 2000; subsequent releases have augmented the population. Whether the frogs persisted after that initial release until the time of listing is unknown. The population is small and generally only a few frogs if any are detected during surveys.

The primary threat is the limited pool habitat for breeding and overwintering, which thus far has limited the size of the population. Small populations are subject to extirpation from random variations in demographics of age structure and sex ratio, and from disease and natural events (Service 2007, p. 38). In addition, crayfish are nearby in the Black River and could invade this site.

#### Unit 27: Campbell Blue and Coleman Creeks

The unit includes 174 ac (70 ha) of Apache-Sitgreaves National Forest in Greenlee County, Arizona. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCE 1) to support life-history functions essential for the conservation of the species.

Included as critical habitat is an approximate 2.04-mi (3.28-km) reach of Campbell Blue Creek from the western boundary of Luce Ranch upstream to the Coleman Creek confluence, and Coleman Creek from its confluence with Campbell Blue Creek upstream to its confluence with Canyon Creek, an approximate stream distance of 1.04 mi (1.68 km).

This unit is too far from other known Chiricahua leopard frog populations to be considered part of a metapopulation. The nearest population is about 12.2 mi (19.6 km) to the northwest in Unit 26. Frogs were observed in Unit 27 in 2002, and then again in 2010. No more than a few frogs were seen during surveys (two were observed in 2010); however, the site is difficult to survey and frogs have many opportunities for hiding from observers.

Crayfish and introduced rainbow trout are present throughout this stream system, which likely limit recruitment of frogs into the population. In 2010, the creeks had numerous beaver ponds and vegetation cover that are probably important as protection from predators. Backwaters and off-channel pools provide better habitat than the often swiftly moving, shallow water in the creeks. The presence of chytridiomycosis has not been investigated in this unit.

#### Unit 28: Tularosa River

This unit contains 335 ac (135 ha) of Gila National Forest and 1,575 ac (637 ha) of private lands in Catron County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

This unit is an approximate 19.31-mi (31.08-km) reach of the Tularosa River from Tularosa Spring downstream to the entrance to the canyon below Hell Hole. Frogs were observed in this reach in 2002 at the time of listing and continue to persist. This unit is isolated from other populations, but is a large system potentially capable of supporting a robust population.

In 2009, small numbers of frogs were found at two sites in the unit. The frogs may occur throughout this reach of the river, but breeding is likely limited to isolated localities where nonnative predators are rare or absent. Crayfish are abundant, rainbow trout are present, and bullfrogs have recently been found downstream of the Apache Creek confluence and just below Hell Hole. Chytridiomycosis is present. The first Chiricahua leopard frogs to test positive for the disease in New Mexico (1985) were found at Tularosa Spring. The frogs were found at that site through 2005, but none have been observed since. A robust population was present nearby at a pond in a tributary to Kerr Canyon, in Kerr Canyon, and at Kerr Spring, but experienced a die-off from chytridiomycosis in 2009; it is unknown if frogs persist in that area. Chytridiomycosis is considered a serious threat in this unit. Both bullfrogs and crayfish are relatively recent arrivals in this system and limit, but thus far have not precluded, recovery opportunities.

The proposed critical habitat does not extend much below Hell Hole because of a lack of recent frog observations in that reach, presumably due to prevalence of nonnative species and disease. Chiricahua leopard frogs occurred in the 1980s in this lower reach but have not been observed since.

#### Unit 29: Deep Creek Divide Area

This unit consists of 408 ac (165 ha) of Gila National Forest and 102 ac (41 ha) of private lands in Catron County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCEs 1 and 2) to support life-history functions essential for the conservation of the species.

Included as proposed critical habitat are three livestock tanks (Long Mesa, Cullum, and Burro Tanks) in the Deep Creek Divide area and connecting reaches of North and South Fork of Negrito Creek above their confluence. Long Mesa Tank is currently occupied; surveys in 2010 did not find frogs at Cullum Tanks or the North Fork of Negrito Creek, although Chiricahua leopard frogs occupied these sites in

2009. Frogs were last found in South Fork of Negrito Creek in 2006, and at Burro Tank in 2002. Four impoundments on private lands along South Fork of Negrito Creek have not been surveyed for frogs; however, it is presumed they serve or once served as habitat for Chiricahua leopard frogs. Long Mesa, Cullum, and Burro Tanks, and South Fork of Negrito Creek were occupied at the time of listing. All sites are thought to retain the PCEs.

Also included in this proposed critical habitat are intervening drainages and uplands for movement among these breeding sites as follows: (1) From Burro Tank downstream in Burro Canyon to Negrito Creek, then upstream in Negrito Creek to the confluence of South Fork and North Fork of Negrito Creek; (2) from Long Mesa Tank overland and east to Shotgun Canyon, then downstream in that canyon to Cullum Tank; and (3) from Cullum Tank downstream in Shotgun and Bull Basin Canyons to an unnamed drainage, then upstream in that drainage to its confluence with a minor drainage coming off Rainy Mesa from the east-northeast, then upstream in that drainage and across Rainy Mesa to Burro Tank.

Populations in this unit have suffered from chytridiomycosis. A complex of tanks, springs, and streams in the Deep Creek Divide area was once a stronghold for the Chiricahua leopard frog on the Gila National Forest. However, most of those populations contracted the disease, suffered die-offs, and disappeared. Frogs on the North Fork of Negrito Creek were few in number and appeared sick in 2008. Their possible absence in 2010 may be a result of a disease-related die-off. Presence of the disease compromises PCE 1 and limits recovery opportunities in this unit.

#### Unit 30: Main Diamond Creek

This unit consists of 14 ac (6 ha) of Gila National Forest and 40 ac (16 ha) of private lands along Main Diamond Creek downstream of Links Ranch, Catron County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs (PCE 1) to support life-history functions essential for the conservation of the species.

This site currently supports a robust population. Chiricahua leopard frogs may occur periodically or regularly at an impoundment at Links Ranch, but that impoundment also contains bullfrogs and may have sportfish, as well. This proposed critical habitat includes an approximate 3,980-ft (1,213-m), perennial or nearly perennial reach of Main Diamond Creek from the

downstream (western) boundary of Links Ranch downstream through a meadow to the confluence of a drainage that comes in from the south, which is also where the creek enters a canyon. This population is about a 4.6-mi (7.4-km), straight-line distance over rugged terrain to the next nearest population at Beaver Creek (Unit 31). As a result, it is managed as an isolated, robust population.

Chytridiomycosis has not been found in this population, but is a potential threat. Bullfrogs at the impoundment likely prey upon Chiricahua leopard frogs. The creek is primarily privately owned; the future plans of the landowners regarding land management in the area are unknown.

#### Unit 31: Beaver Creek

This unit consists of 132 ac (54 ha) of Gila National Forest and 25 ac (10 ha) of private lands near Wall Lake, Catron County, New Mexico. This unit is an approximate 5.59-mi (8.89-km) portion of Beaver Creek beginning at a warm spring and running downstream to its confluence with Taylor Creek. Below that confluence, the stream is known as the East Fork of the Gila River. This unit is proposed as critical habitat because it is essential for the conservation of the species. PCE 1 is present in this unit.

The status of the population at the time of listing is unknown; however, Chiricahua leopard frogs are currently present. The population is not well studied; Beaver Creek is, however, a long enough reach that it could support a robust population. The nearest known population of Chiricahua leopard frogs is at Main Diamond Creek (Unit 30), approximately a 4.6-mi (7.4-km), straight-line distance away over rugged terrain. As a result, this site is managed as an isolated population.

The spring at the upstream end of the unit is a warm spring, which may help frogs survive with chytridiomycosis, if the disease is present or colonizes the area in the future (Johnson and Smorynski 1998, p. 45; Service 2007, p. 26). Rainbow trout, bass (*Micropterus* sp.), and bullfrogs reportedly occur along Beaver Creek with Chiricahua leopard frogs, although trout are limited to the cooler waters near the confluence with Taylor Creek (Johnson and Smorynski 1998, pp. 44–45). The mechanisms by which Chiricahua leopard frogs coexist with these nonnative predators are unknown; however, habitat complexity and adequate cover are likely important features that may need special management.

#### Recovery Unit 7 (Upper Gila-Blue River, Arizona and New Mexico)

##### Unit 32: Left Prong of Dix Creek

This unit contains 13 ac (5 ha) of Apache-Sitgreaves National Forest lands in Greenlee County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species. PCE 1 is present.

This reach runs from a warm spring above “The Hole” and continues to the confluence with the right prong of Dix Creek, an approximate stream distance of 4,248 ft (1,296 m). This population was discovered in 2003; its status at the time of listing is unknown. Chiricahua leopard frogs were found again in 2005. They were not observed in 2010, but a large boulder has lodged itself in the canyon, blocking access to the spring; hence, the warm spring was not surveyed. In 2003, Chiricahua leopard frogs were also reported from below a warm spring in the Right Prong of Dix Creek; however, surveys in 2010 only found lowland leopard frogs. Either the frogs in this reach were misidentified in 2003, or lowland leopard frogs have displaced Chiricahua leopard frogs in the Right Prong. Currently, the population in the Left Prong is isolated.

The next nearest known Chiricahua leopard frog population is at Rattlesnake Pasture Tank (Unit 33), about a 6.0-mi (9.6-km), straight-line distance over rough terrain. A number of stock tanks have potential to connect these two sites and form a metapopulation; however, they have not been investigated in enough detail to understand whether PCEs are present or have the potential to be developed. No Chiricahua leopard frogs have ever been found in these tanks.

This proposed critical habitat overlaps that of critical habitat for Gila chub (*Gila intermedia*), which provides a level of protection for this unit. A healthy population of Gila chub, as well as other native fishes, occurs in the Left Prong of Dix Creek. A natural rock barrier about a mile below the confluence of the Right and Left Prongs serves as a barrier to upstream movement of nonnative fishes from the San Francisco River. The warm waters of the spring may allow persistence of Chiricahua leopard frogs if chytridiomycosis is present or if it colonizes this area in the future. A rough dirt road crosses the left prong of Dix Creek in the proposed critical habitat unit. It likely contributes some sediment to the stream.

##### Unit 33: Rattlesnake Pasture Tank and Associated Tanks

This unit contains 59 ac (24 ha) of Apache-Sitgreaves National Forest in Greenlee County, Arizona. This unit is proposed as critical habitat because it is essential for the conservation of the species. PCEs 1 and 2 are present in this unit.

Included in the proposed critical habitat are three stock tanks: Rattlesnake Pasture, Rattlesnake Gap, and Buckhorn. Also included are intervening drainages and uplands for connectivity, including: (1) From Rattlesnake Pasture Tank downstream in an unnamed drainage to Red Tank Canyon (including Buckhorn Tank), then upstream in Red Tank Canyon to Rattlesnake Gap Tank; and (2) from Rattlesnake Gap Tank upstream in an unnamed drainage to its confluence with a minor drainage, then upslope to a saddle, and across that saddle and directly downslope to Rattlesnake Pasture Tank.

Chiricahua leopard frogs were discovered at Rattlesnake Pasture Tank in 2003, and are currently there. Status at the time of listing is unknown. The species has not been found at Rattlesnake Gap or Buckhorn Tanks; however, all three tanks are close to each other and well connected via drainages to allow movement of frogs from Rattlesnake Pasture Tank to these other tanks. Rattlesnake Gap and Buckhorn Tanks appear to have fairly permanent water. Other tanks in the area, including Cold Spring Mountain Tank and Rattlesnake Tanks #1 and 2, do not hold water consistently enough to support a breeding population of frogs (and Chiricahua leopard frogs have not been found at these other tanks). The three tanks proposed form a nucleus from which a metapopulation could be constructed; however, habitat work will be needed to achieve the fourth breeding site of the metapopulation.

Tiger salamanders, presumably native Arizona tiger salamanders (*Ambystoma mavortium nebulosum*), occur in all three tanks and likely prey upon Chiricahua leopard frogs to some degree. However, a healthy population of Chiricahua leopard frogs occurs with Arizona tiger salamanders at Rattlesnake Pasture Tank. Three juvenile to small adult bullfrogs, which were likely immigrants from another site, were found at Rattlesnake Gap Tank in June 2010. If a population of bullfrogs is established at Rattlesnake Gap Tank, it would threaten Chiricahua leopard frogs in Rattlesnake Pasture Tank and the capacity for recovery in this recovery unit 7. These tanks are fed by rainfall

runoff, but Rattlesnake Pasture Tank may be spring fed as well. Nonetheless, there is some risk that these tanks, particularly Buckhorn Tank, could dry out during an extended drought.

#### Unit 34: Coal Creek

This unit consists of 7 ac (3 ha) of Apache-Sitgreaves National Forest in Greenlee County, Arizona, and is proposed as critical habitat because it is essential for the conservation of the species. This is an approximate 3,447-ft (1,051-m) reach of Coal Creek from Highway 78 downstream to the confluence with an unnamed drainage. Seasonally this creek dries up to isolated pools where Chiricahua leopard frogs take refuge. However, during the spring and summer, Coal Creek typically carries water and the frogs distribute themselves throughout this reach. PCE 1 is present.

This population was discovered in 2003, and is considered to be still in existence. Status at the time of listing is unknown. This unit is isolated from other Chiricahua leopard frog populations, the nearest of which is Rattlesnake Pasture Tank in Unit 33, 5.1 mi (8.2 km) to the west over rugged terrain. Hence, it is currently managed as an isolated population; however, it may not have sufficient habitat to support a robust population in most years. There may be some potential for linking this population to Units 32 or 33, if aquatic habitats in between could be identified, renovated as needed, and populations of frogs established. However, potential sites and presence of PCEs have not been investigated in any detail. No Chiricahua leopard frogs have been found at sites between Units 32, 33, and 34.

Neither chytridiomycosis nor nonnative predators is known to be a problem in this unit; however, if introduced, they could be a serious impediment to recovery, particularly when the creek dries to isolated pools, concentrating frogs and any predators or disease in remaining waters. Wildfire in the area could result in ash flow, sedimentation, and erosion in Coal Creek, degrading or eliminating habitat for Chiricahua leopard frogs. The primary threat is probably extended drought, during which the aquatic habitats of the frog could be severely limited or could dry out completely, resulting in extirpation of this isolated population.

#### Unit 35: Blue Creek

This unit includes 24 ac (10 ha) of Bureau of Land Management and 12 ac (5 ha) of private lands in Grant County, New Mexico. This unit is proposed as

critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

Included in this unit is an approximate 2.37-mi (3.81-km) reach of Blue Creek from adjacent to a corral on private lands downstream to the confluence of a drainage that comes in from the east. This is an area where Chiricahua leopard frogs are currently known to breed. Additional habitat may occur upstream on private or State lands; however, the private reach immediately above the proposed critical habitat lacks breeding pools and no frogs have been found there (Barnitz 2010, p. 1). The lands upstream of there have not been surveyed.

PCE 1 is present in this unit; however, this unit is much too far from other known Chiricahua leopard frog populations to be considered part of a metapopulation. The nearest population is at Coal Creek (Unit 34) more than 22 mi (35 km) away by way of a straight-line distance.

The primary limiting factor in this proposed critical habitat reach is lack of perennial flow and periodic flash flooding during the summer. In some years, the entire reach goes dry in June; however, in wetter periods frogs breed throughout this reach. Scouring floods, which happen during or after summer rains, likely wash tadpoles downstream and out of the unit. Nonnative aquatic predators are not known in the unit, and although a Chiricahua leopard frog from this unit tested positive for chytridiomycosis in 2009, no die-offs have been noted. Wildfire in the area could result in ash flow, sedimentation, and erosion in Blue Creek, degrading or eliminating habitat for Chiricahua leopard frogs.

#### *Recovery Unit 8 (Black-Mimbres-Rio Grande, New Mexico)*

#### Unit 36: Seco Creek

This unit includes 610 ac (247 ha) of private lands and 66 ac (27 ha) of Gila National Forest in Sierra County, New Mexico. This area is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

The proposed critical habitat includes: (1) The North Fork of Seco Creek from Sawmill Well downstream to the confluence with South Fork of Seco Creek, including from west to east, Sucker Ledge, Davis Well, North Seco Well, Pauge Well, and LM Bar Well; (2) South Seco Creek from South Seco Well

downstream to its confluence with the North Fork of Seco Creek; (3) Seco Creek from the confluence with North and South Forks of Seco Creek to the confluence with Ash Creek, including Fish Well and Johnson Well; and (4) Ash Creek from Artesia Well downstream to Seco Creek.

Chiricahua leopard frogs are known to breed at all of the above mentioned wells except Sawmill and Johnson Wells. They also breed in a perennial reach of Seco Creek below Johnson Well. Frogs were extant at Davis Well, LM Bar Well, North Seco Well, Pauge Well, and Sucker Ledge at the time of listing. Status at other sites in 2002 is unknown. All of the aquatic sites are currently occupied. PCEs 1 and 2 are present in the unit.

The aquatic sites form a metapopulation, and frogs move among these sites via reaches of the intervening creeks. This unit represents the strongest metapopulation in New Mexico.

Chytridiomycosis has caused extirpations in this region, and in 2001, four tadpoles from Seco Creek appeared to have damaged mouthparts consistent with the disease. However, no frogs have tested positive since then. Bullfrogs have been found occasionally, but the landowner (Ladder Ranch) dispatches them as they are discovered. Tiger salamanders (*Ambystoma mavortium*) occur in most waters on the Ladder Ranch and likely prey upon Chiricahua leopard frog tadpoles and small frogs, but the frogs and salamanders are able to coexist together. Most of the wells listed above are either artesian or equipped with solar-powered pumps, and thus provide dependable water through drought periods.

Recovery work in this unit has included fencing some of the waters from the bison that graze the area and reestablishment of populations using wild-to-wild translocations. The Ladder Ranch also monitors the frogs and habitats, and recently they have initiated a captive breeding facility and program to rear frogs for population augmentation and reestablishment. They also hold Seco Creek frogs in refugia near the ranch headquarters. Research on movements of Chiricahua leopard frogs using radiotelemetry has been funded by the Ladder Ranch and carried out in the Seco Creek area. Under section 4(b)(2) of the Act, private lands in this unit are being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).



### Unit 37: Alamosa Warm Springs

This unit consists of 54 ac (22 ha) of private, 25 ac (10 ha) of New Mexico State, and 0.2 ac (0.1 ha) of Bureau of Land Management lands at the headwaters of Alamosa Creek, Socorro County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species. PCE 1 is present in this unit.

Proposed critical habitat includes an approximate 4,974-ft (1,516-m) spring run from the confluence of Wildhorse Canyon and Alamosa Creek downstream to the confluence with a drainage that comes in from the north, which is below the gauging station in Monticello Box. This reach includes areas where frogs have been found in recent years (Christman 2006b, p. 11).

At its source, waters at Alamosa Warm Springs range from 77 to 85 °F (25.0 to 29.3 °C) (Christman 2006b, p. 3). Chytridiomycosis is present in this population, and presumably the warm waters allow persistence despite the disease.

This is a robust, breeding population, but it is too far removed from other Chiricahua leopard frog populations to be part of a metapopulation. The nearest population is in Unit 38, 20.3 mi (32.5 km) to the south-southeast. As a result, this site is managed as an isolated, robust population.

Alamosa Warm Springs is at the northeastern edge of the distribution of the Chiricahua leopard frog. The species was present at the time of listing and is currently present. This site is drought-resistant because of perennial spring flow. Nonnative aquatic predators are unknown at this site, but if introduced could pose a serious threat to the population. Heavy livestock grazing on the site, in the watershed, and a dirt road through the canyon have degraded the habitat for Chiricahua leopard frogs, and flooding likely flushes tadpoles out of the unit periodically (Christman 2006b, pp. 5–6).

The endangered Alamosa springsnail (*Tryonia alamosae*) occurs at Alamosa Warm Springs; its presence may provide some additional level of protection to Chiricahua leopard frog. The future land management plans of the landowners are unknown.

### Unit 38: Cuchillo Negro Warm Springs and Creek

This unit consists of 3 ac (1 ha) of Bureau of Land Management, 3 ac (1 ha) of New Mexico State, and 23 ac (9 ha) of private lands in Sierra County, New

Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

Two springs on Bureau of Land Management land are the source of a mostly perennial stream flow that runs for about 6.0 mi (9.6 km) down Cuchillo Negro Creek; however, the Chiricahua leopard frogs are rarely found more than 1.2 mi (2.0 km) downstream of the warm springs (Christman 2006a, p. 8). The proposed critical habitat begins at the upper of the two springs and follows Cuchillo Negro Creek downstream to the confluence with an unnamed drainage that comes in from the south, for an approximate stream distance of 1.58 mi (2.54 km).

Chytridiomycosis is present in this population, and it is likely that frogs persist where the water is warm, but succumb to the disease in the cooler waters downstream. Chiricahua leopard frogs currently persist in very low numbers in this unit.

PCE 1 is present in this unit; however, this site is too far from other Chiricahua leopard frog populations to be considered part of a metapopulation. The nearest population is in Unit 36, about 12.7 mi (20.3 km) to the south-southwest. Hence, this population is managed as an isolated population.

Chiricahua leopard frogs coexist with plains leopard frogs at this site; and it is likely the plains leopard frogs occasionally prey upon Chiricahua leopard frog tadpoles and small frogs. Bullfrogs have been recorded in Cuchillo Negro Creek, but only rarely, and apparently do not breed or persist in the reach with the leopard frogs (Christman 2006a, p. 9).

The primary threats in this unit are periodic cleaning out of the channel by the Cuchillo Acequia Association, seasonal flooding that eliminates tadpoles and fills in pools, and chytridiomycosis. The springs located on Bureau of Land Management land are the source of downstream irrigation water, and the Cuchillo Acequia Association has maintained two trenches through the springs reportedly to improve flow. Channel work in 2001 resulted in extensive damage to the springs, stream, and riparian vegetation (67 FR 40802; June 13, 2002).

The private landowner downstream of the springs is the Ladder Ranch, and as described in the Unit 36 description above, the ranch is an active participant in Chiricahua leopard frog recovery. Under section 4(b)(2) of the Act, the private lands in Unit 38 are being considered for exclusion from the final

rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

### Unit 39: Ash and Bolton Springs

This unit consists of 49 ac (20 ha) of private lands east of Hurley in Grant County, New Mexico. This unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

Included in the critical habitat proposal are Ash Spring and a spring in Bolton Canyon locally known as Bolton Springs. Also included are ephemeral or intermittent drainages and uplands needed for movement of frogs among these two breeding sites as follows: (1) From the spring box at Ash Spring downstream in a drainage to a dirt road crossing; and (2) west and overland from the ruins of an old house below Ash Spring to a low saddle, then downslope into an unnamed drainage, and downstream in that drainage to its confluence with another unnamed drainage, downstream in that unnamed drainage its confluence with another unnamed drainage, then upstream in that unnamed drainage to the top of that drainage and directly downslope and west to another unnamed drainage, downstream in that unnamed drainage to its confluence with Bolton Canyon, and upstream in Bolton Canyon to the locally known Bolton Springs.

Populations at Ash and Bolton Springs were present at the time of listing and currently still exist. PCEs 1 and 2 are present in this unit. These sites were once part of a metapopulation, but recent extirpations have left only these two populations. There may be potential in the future to rebuild a metapopulation through natural recolonization or population reestablishments, if threats can be managed.

The lands are owned by Freeport-McMoRan Copper and Gold Subsidiaries as part of the Chino Copper Mine, which is based in nearby Santa Rita and Hurley. In December 2008, Freeport-McMoRan announced plans to suspend mining and milling activities at Chino. The majority of the work force was laid off in 2009. To our knowledge, no current plans exist to expand the mine into the area proposed for critical habitat, and Freeport-McMoRan and its predecessor, Phelps-Dodge, have been cooperative in conservation of the Chiricahua leopard frog.

Chytridiomycosis is probably the key threat in this unit; this region has experienced die-offs and extirpations associated with chytridiomycosis. Large

numbers of dead frogs were found at Ash Spring in 2007; however, the frogs at Bolton Springs have shown no signs of disease. Both populations exist in small aquatic sites that cannot sustain large populations; hence they are also vulnerable to variations in environmental conditions and population demographics.

#### Unit 40: Mimbres River

This unit consists of 1,097 ac (444 ha) of private lands in Grant County, New Mexico. The unit is proposed as critical habitat because it was occupied at the time of listing and currently contains sufficient PCEs to support life-history functions essential for the conservation of the species.

The unit is divided into two disjunct reaches of the Mimbres River that are separated by a 6.6-mi (10.6-km), intermittent reach. PCE 1 is present; however, the two reaches may be too far apart to reasonably expect frogs to move between the two sites, and the next nearest Chiricahua leopard frog population is at Ash Spring in Unit 39, over 10 mi (16 km) away from the lower Mimbres River reach across rugged terrain.

Proposed critical habitat in the upper Mimbres River includes an approximate 2.42-mi (3.89-km) reach that begins where the river flows into The Nature Conservancy's property and continues downstream to the confluence with Bear Canyon. The approximate 5.82-mi (9.36-km) proposed lower critical habitat reach begins at the bridge over the Mimbres River just west of San Lorenzo and continues downstream to where it exits the The Nature Conservancy's Desert parcel near Faywood. The two proposed critical habitat reaches are largely perennial, although portions of the river dry out during drought. Frogs are currently present in both reaches of the Mimbres River.

The best breeding site in the upper reach is at Moreno Spring, which harbors a robust population of Chiricahua leopard frogs. In the upper reach, frogs are also observed and breed in the river itself and at ponds at Emory Oak Ranch. Breeding occurs in the lower river reach as well, where a robust population is present near San Juan.

Chytridiomycosis is present in this unit; however, frogs are persisting with the disease. Moreno Spring is a warm spring that likely provides some buffer against the effects of the chytridiomycosis. Other threats include agricultural and rural development, water diversions, groundwater pumping, and leveeing and bankline work to protect properties from flooding. Periodic high flows probably

wash some tadpoles out of the system and fill in pools used for breeding. No bullfrogs or crayfish have ever been found in this unit; although if introduced, they could pose a significant threat.

The threatened Chihuahua chub (*Gila nigrescens*) occurs in the upper reach, and introduced rainbow trout occur throughout the areas where there is water. Both trout and chub likely prey upon Chiricahua leopard frog tadpoles. Bear Canyon Reservoir in Bear Canyon near the town of Mimbres reportedly supports populations of channel catfish (*Ictalurus punctatus*), black crappie (*Pomoxis nigromaculatus*), largemouth bass, and bluegill (*Lepomis macrochirus*), plus winter stocked rainbow trout (Johnson and Smorynski 1998, p. 132). These species may spill periodically into the Mimbres River from the reservoir, adding additional nonnative predators to the river.

Presence of the Chihuahua chub and protections afforded by the Act may provide some level of protection to the upper reach. In addition, The Nature Conservancy owns the majority of the river in the upper reach (not including Moreno Spring or Emory Oak Ranch) and significant parcels in the lower reach. These lands, known as The Mimbres River Preserve, are managed for the benefit of the Chihuahua chub, Chiricahua leopard frog, and other riparian and aquatic resources. Under section 4(b)(2) of the Act, private lands owned by The Nature Conservancy in this unit are being considered for exclusion from the final rule for critical habitat (*see Application of Section 4(b)(2) of the Act* section below).

#### Effects of Critical Habitat Designation

##### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuit Courts of Appeal have invalidated our 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 as a result, 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 remain functional (or retain those PCEs that relate to the ability of the area to periodically support the species) to serve its intended conservation role for the species.

If a species is listed or critical habitat is designated, 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 to destroy or adversely modify its critical habitat. 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. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A letter of concurrence with determination by a Federal agency that their actions 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 or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or 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 may sometimes 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.

Federal activities that may affect the Chiricahua leopard frog or its critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring 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 us under section 10 of the Act) or involving some other Federal action (such as funding from the Natural Resource Conservation Service, Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally authorized, funded, or permitted do not require section 7 consultations.

#### *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, or retain those PCEs that relate to the ability of the area to periodically or regularly support the species. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the Chiricahua leopard frog. As discussed above, the role of critical habitat is to support the life-history needs of the species and provide for the conservation of the species as breeding habitat or as movement corridors among breeding sites in a metapopulation.

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, when carried out, funded, or authorized by a Federal

agency, may affect critical habitat and therefore should result in consultation for the Chiricahua leopard frog include, but are not limited to:

(1) Actions that would significantly increase sediment deposition or scouring within the stream channel or pond that acts as a breeding site or a movement corridor among breeding sites in a metapopulation. Such activities could include, but are not limited to: Excessive sedimentation from livestock overgrazing; road construction; commercial or urban development; channel alteration; timber harvest; prescribed fires; off-road vehicle or recreational use; and other alterations of watersheds and floodplains. These activities could adversely affect the potential for frogs to survive or breed at a breeding site, and reduce the likelihood that frogs could move among subpopulations in a metapopulation, which in turn would decrease the viability of the metapopulation and its component local populations.

(2) Actions that would alter water chemistry beyond the tolerance limits of the Chiricahua leopard frog (*see* discussion above, "Aquatic Breeding Habitat and Immediately Adjacent Uplands"). Such activities could include, but are not limited to: Release of chemicals, biological pollutants, or effluents into the surface water or into connected groundwater at a point source or by dispersed release (non-point source); livestock grazing that results in waters heavily polluted by feces; runoff from agricultural fields; roadside use of salts; aerial pesticide overspray; runoff from mine tailings or other mining activities; and ash flow and fire retardants from fires and fire suppression. These actions could adversely affect the ability of the habitat to support survival and reproduction of Chiricahua leopard frogs at breeding sites. Variations in water chemistry or temperature could also affect the frog's ability to survive with chytridiomycosis.

(3) Actions that would alter the water quantity or permanence of a breeding site or dispersal corridor. If the permanence of an aquatic system declines so that it regularly dries up for more than a month each year, it will lose its ability to support breeding Chiricahua leopard frogs. If the quantity of water declines, it may reduce the likelihood that the site will support a population of frogs that is robust enough to be viable over time. Similarly, ephemeral, intermittent, or perennial ponds can be important stop-over points for frogs moving among breeding sites in a metapopulation. Reducing the permanence of these sites may reduce

their ability to facilitate frog movements. However, in some cases, increasing permanence can be detrimental as well, in that it could create favorable habitat for predatory fishes, bullfrogs, or crayfish that otherwise could not exist in the system. Such activities that could cause these effects include, but are not limited to, water diversions, groundwater pumping, watershed degradation, construction or destruction of dams or impoundments, developments or 'improvements' at a spring, channelization, dredging, road and bridge construction, and destruction of riparian or wetland vegetation.

(4) Actions that would directly or indirectly result in introduction of nonnative predators, increase the abundance of extant predators, or introduce disease, particularly chytridiomycosis. Possible actions could include, but are not limited to: Introduction or stocking of fishes, bullfrogs, crayfish, tiger salamanders or other predators on the Chiricahua leopard frog; creating or sustaining a sport fishery that encourages use of live fish, crayfish, tiger salamanders, or frogs as bait; water diversions, canals, or other water conveyance that moves water from one place to another and through which inadvertent transport of predators into Chiricahua leopard frog habitat may occur; and movement of water, mud, wet equipment, or vehicles from one aquatic site to another, through which inadvertent transport of may occur.

(5) Actions and structures that would physically block movement among breeding sites in a metapopulation. Such actions and structures include, but are not limited to: Urban, industrial, or agricultural development; reservoirs stocked with predatory fishes, bullfrogs, or crayfish that are 50 ac (20 ha) or more in size; highways that do not include frog fencing and culverts; and walls, dams, fences, canals, or other structures that physically block movement. These actions and structures could reduce or eliminate immigration and emigration among breeding sites in a metapopulation, reducing the viability of the metapopulation and its subpopulations.

(6) Actions that would remove or block access to riparian vegetation and banklines within 20 ft (6.1 m) of the high water line of breeding ponds or to the upland edge of the wetland and riparian vegetation community lining breeding sites, whichever is greatest, or that would reduce vegetation in movement corridors among breeding sites in a metapopulation. Such activities could include, but are not

limited to: Clearing of riparian or wetland vegetation; saltcedar (*Tamarix* sp.) control; road, bridge, or canal construction; urban development; conversion of river bottomlands to agriculture; stream or drainage channelization; and levee or dike construction. In some cases, thinning of very dense vegetation, such as cattails, which can completely take over an aquatic site, can be beneficial to the frog and its habitat. However, in most cases, vegetation clearing or removal, or blocking access to uplands adjacent to breeding sites, will reduce the quality of foraging and basking habitat, and may increase the likelihood of successful predation because cover has been removed.

We note that the above activities may adversely affect critical habitat. As stated previously, an activity adversely affecting critical habitat must be of a severity or intensity that the PCEs are compromised to the extent that the critical habitat can no longer meet its intended conservation function before a destruction or adverse modification determination is reached. Within the context of the goals and purposes of the recovery strategy in the species' recovery plan, an activity that compromises the PCEs to the point that one or more of the recovery criteria could not be achieved or would be very difficult to achieve in one or more recovery units would deteriorate the value of critical habitat to the point that its conservation function could not be met.

### 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:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.”

There are no Department of Defense lands within the proposed critical habitat designation; thus we are not exempting any lands from critical habitat under section 4(a)(3)(B)(i) of the Act.

### Exclusions

#### *Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the 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 must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the

designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis, we make this determination, then we can exclude the area only if such exclusion would not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide; or a combination of these.

In the case of the Chiricahua leopard frog, the benefits of critical habitat include public awareness of Chiricahua leopard frog presence and the importance of habitat protection, and in cases where a Federal nexus exists, increased habitat protection for Chiricahua leopard frogs due to the protection from adverse modification or destruction of critical habitat.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of critical habitat. Federal agencies must consult with us on discretionary actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with the Service on discretionary actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different. The jeopardy analysis looks at the action's impact on survival and recovery of the species, while the adverse modification analysis examines the action's effects on the

designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater regulatory benefits to the recovery of a species.

There are two limitations to the regulatory effect of critical habitat. First, a section 7(a)(2) consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency). If there is no Federal nexus, the critical habitat designation of non-Federal lands itself does not restrict any actions that destroy or adversely modify critical habitat. However, this does not apply in situations where non-Federal lands have a Federal nexus (e.g., a private project on non-Federal lands that requires the issuance of a permit from a Federal agency). Second, the designation only limits destruction or adverse modification. Critical habitat designation alone does not require property owners to undertake affirmative actions to promote the recovery of the species.

The designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation has been initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species or adverse modification of its critical habitat or both, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans may institute proactive actions over the lands they encompass and are often put in place to remove or reduce known threats to a species or its habitat, therefore implementing recovery actions.

Another benefit of including lands in critical habitat is that serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the affected species. For example, critical habitat designation can help inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995, p.

2), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002, p. 720). Stein *et al.* (1995, p. 400) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

The majority of Chiricahua leopard frog habitat and localities are on Federal lands, mostly lands managed by the U.S. Forest Service; however, key aquatic sites are sometimes on non-Federal lands. This is particularly true for New Mexico, where of the 11 proposed critical habitat units in that State, 4 are entirely non-Federal lands and the other 7 contain lands owned by non-Federal entities.

Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and necessary for implementing recovery actions, such as reestablishing listed species and restoring and protecting habitat. Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We strive to promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, Safe Harbor Agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7(a)(2) consultations. In the past decade and a half, we have encouraged non-Federal landowners to enter into conservation agreements, based on our philosophy that voluntary conservation can benefit both landowners and wildlife, and that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (61 FR 63854; December 2, 1996). For the Chiricahua leopard frog, we have often used the Service's Partners for Fish and Wildlife grant program to work with non-Federal partners on recovery projects for this species. This grant program requires a commitment from the participating landowner to maintain the improvements funded by the program for 10 years. We have also worked with private landowners on Chiricahua leopard frog conservation via Safe Harbor Agreements in Arizona and southwestern New Mexico, a conservation agreement for the Ramsey

Canyon (=Chiricahua) leopard frog that protects frogs and their habitats on private and public lands in the Huachuca Mountains of Arizona, and HCPs in southeastern Arizona and southwestern New Mexico.

Many private landowners, however, are wary of the possible consequences of attracting or maintaining endangered species to their property. Mounting evidence suggests that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996, pp. 5–6; Bean 2002, pp. 2–3; Conner and Mathews 2002, pp. 1–2; James 2002, pp. 270–271; Koch 2002, pp. 2–3; Brooke *et al.* 2003, pp. 1639–1643). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives, because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999, pp. 1264–1265; Brook *et al.* 2003, pp. 1644–1648).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999, p. 1263; Bean 2002, p. 2; Brook *et al.* 2003, pp. 1644–1648). The magnitude of this outcome is greatly amplified in situations where active management measures (such as reestablishment, fire management, control of invasive species) are necessary for species conservation (Bean 2002, pp. 3–4). Such is the case for the Chiricahua leopard frog. We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to the species' recovery and provide a superior level of conservation.

The purpose of designating critical habitat is to contribute to the conservation of endangered and threatened species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions authorized, funded, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus, the benefits of excluding areas that are covered by effective partnerships or

other conservation commitments can often be high.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including, but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

#### 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 the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://www.regulations.gov>, or by contacting the Arizona Ecological Services Field Office directly (see **FOR FURTHER INFORMATION CONTACT** section). 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 (DOD) 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 Chiricahua leopard frog are not owned or managed by DOD, and we therefore anticipate no impact to national security. We are not considering any areas for exclusion based on impacts to national security.

#### Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts to national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

#### Habitat Conservation Plans

We consider a current plan (HCPs as well as other types) to provide adequate management or protection if it meets the following criteria:

(1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) The plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

We are requesting comments on the benefit to the Chiricahua leopard frog from the Malpai Borderlands HCP, Malpai Borderlands Safe Harbor Agreement, and the AGFD Safe Harbor Agreement.

#### Malpai Borderlands HCP

The proposed critical habitat units covered by this completed HCP that addresses the Chiricahua leopard frog are Unit 16 (Peloncillo Mountains Tanks) and Unit 19 (Rosewood and North Tanks). Both critical habitat units are in recovery unit 3. The Malpai Borderlands HCP is an umbrella document under which individual landowners may participate. If a landowner seeks assistance from the

Malpai Borderlands Group for a project covered by the HCP, then the conservation measures from the HCP become stipulations for that project. To date, the private landowners in Units 16 and 19 have not conducted Malpai-assisted projects; thus the conservation measures from the HCP have not yet been implemented or realized on those lands.

#### Malpai Borderlands Safe Harbor Agreement and the AGFD Safe Harbor Agreement

Two umbrella Safe Harbor Agreements under which individual landowners can enroll their lands by signing a Certificate of Inclusion have been completed for Arizona and southwestern New Mexico. Under the Certificates of Inclusion, landowners commit to certain conservation actions. These agreements have, in some cases, facilitated habitat improvements and translocations of Chiricahua leopard frogs to private lands to establish new populations. Under section 4(b)(2) of the Act, we will assess the appropriateness of exclusions from critical habitat for non-Federal lands in proposed critical habitat units that are enrolled under either the AGFD Safe Harbor Agreement or the Malpai Borderlands Safe Harbor Agreement. We will also consider exclusions for non-Federal lands that are protected by conservation easements, conservation agreements, or other forms of protective management that benefit the Chiricahua leopard frog and its habitats. Specific units for which we are considering exclusions from critical habitat designation are discussed and described below.

*Unit 10 (Pasture 9 Tank).* The landowner signed a Certificate of Inclusion under the AGFD's Safe Harbor Agreement and allowed us to establish a population of Chiricahua leopard frogs at this site. With financial assistance from the Service's Partners for Wildlife Program, Pasture 9 Tank has been equipped with a solar-powered well that provides a dependable water source for the frogs, and the site is enclosed with bullfrog exclusion fencing. The landowner also has a conservation easement on the ranch and is nearing completion of an HCP, and although that HCP does not specifically address the Chiricahua leopard frog, commitments in the HCP would benefit Chiricahua leopard frog conservation. The conservation easement limits development and guarantees that the ranch will remain in perpetuity as open space. All lands in Unit 10 (0.5 ac (0.2 ha)) will be considered for exclusion.

*Unit 12 (Betty's Guest Ranch).* This unit is entirely privately owned. The

landowner signed onto the AGFD Safe Harbor Agreement with a Certificate of Inclusion, and is also a signatory to the Ramsey Canyon Leopard Frog Conservation Agreement, which was developed prior to that species being recognized as the Chiricahua leopard frog. That conservation agreement is still in place and implements the Chiricahua leopard frog recovery plan on the eastern slopes of the Huachuca Mountains. The landowner allowed Chiricahua leopard frogs to be introduced to the property, and the Beatty family actively manages for the frogs and is an enthusiastic participant in the recovery program. All lands in Unit 12 (10 ac (4.0 ha)) will be considered for exclusion.

*Unit 14 (Ramsey and Brown Canyons).* All lands owned by The Nature Conservancy in Ramsey Canyon (16 ac (6 ha)) of Unit 14 will be considered for exclusion. The Nature Conservancy is a signatory to the Ramsey Canyon Leopard Frog Conservation Agreement and has submitted a Certificate of Inclusion for the AGFD's Safe Harbor Agreement. The Nature Conservancy has been an active participant in leopard frog conservation since conservation work began on the Chiricahua leopard frog in 1993. With assistance from the Service's Partners for Fish and Wildlife Program, The Nature Conservancy has removed anthropogenic structures that interfered with channel morphology and restored the 'Trout Pond' for Chiricahua leopard frogs. They also monitor the frogs, developed the Meadow Ponds where the frogs breed, and have allowed numerous augmentations and introductions of leopard frogs to their Ramsey Canyon property. The property is managed as the Ramsey Canyon Preserve. The Conservancy is dedicated to the preservation of the canyon's biodiversity, including the Chiricahua leopard frog.

*Unit 16 (Peloncillo Mountains Tanks).* The private lands in this unit (289 ac (117 ha)) are located on the Canoncito Ranch, a part of the Diamond A Ranch. All of those private lands will be considered for exclusion from critical habitat designation. The ranch is covered by a conservation easement that limits development and ensures that the ranch will be maintained in open space in perpetuity and with the capability to support a diverse array of wildlife and plants. If the landowner seeks assistance from Malpai Borderlands Group for projects covered by the Malpai Borderlands HCP, certain conservation measures will be required; however, to date the landowner has not elected to participate in the HCP. The owner has

also enrolled lands in the unit in the Malpai Borderlands Safe Harbor Agreement with a Certificate of Inclusion and is further working with Sky Island Alliance on a restoration project of the Cloverdale Cienega, which will improve habitats for the Chiricahua leopard frog.

*Unit 17 (Cave Creek).* Private lands in this unit are owned by the American Museum of Natural History in New York and managed as the Southwest Research Station. The property is a year-round field station for biologists, geologists, and anthropologists interested in studying the diverse environments and biotas of the Chiricahua Mountains and surrounding areas in southeastern Arizona. The property serves as an outdoor classroom for students and researchers. The Southwest Research Station has signed onto the AGFD's Safe Harbor Agreement with a Certificate of Inclusion and, with assistance from the Service's Partners for Fish and Wildlife Program, has developed indoor and outdoor captive propagation and headstarting facilities for the Chiricahua leopard frog. Under a section 10(a)(1)(A) enhancement of survival permit from the Service, the facilities house Chiricahua leopard frogs from proposed Unit 18 (Leslie Creek) with the objective of producing frogs for release at a pond on the station's grounds, to augment the population in proposed Unit 18, and to provide stock for additional population establishments in recovery unit 3. The Southwest Research Station is an enthusiastic partner in recovery of the Chiricahua leopard frog. All lands in Unit 17 owned by the Southwest Research Station (92 ac (37 ha)) will be considered for exclusion.

*Unit 19 (Rosewood and North Tanks).* This unit consists of private and State-leased lands on the Magoffin Ranch. The owners of the Magoffin Ranch have enrolled these lands with a Certificate of Inclusion into the Malpai Borderlands Safe Harbor Agreement and have been an active participant in Chiricahua leopard frog conservation for more than 15 years. They expended much time and labor to haul water to and maintain aquatic habitat at Rosewood Tank during a severe drought in the 1990s. They then constructed two concrete refugia adjacent to the tank that are fed by a well. The refugia maintain Chiricahua leopard frogs at the site even when the tank dries out completely. Chiricahua leopard frogs would have been extirpated from the site without these actions. They also allowed and participated in the establishment of a new population of Chiricahua leopard frogs at North Tank in 2008. Although most of the lands in this unit are owned

by the Arizona State Land Department (78 ac (31 ha)) versus 19 ac (8 ha) of private lands, all the lands in the unit are enrolled in the Safe Harbor Agreement and the Magoffin Ranch leases the State land for grazing and manages and maintains Rosewood and North Tanks. If the landowner seeks assistance from Malpai Borderlands Group for projects covered by the Malpai Borderlands HCP, certain conservation measures will be required; however, to date the landowner has not elected to participate in the HCP. All lands in Unit 19 (97 ac (39 ha)) will be considered for exclusion.

*Unit 36 (Seco Creek).* This unit lies almost entirely within the privately owned Ladder Ranch. The very upper end of Seco Creek is on the Gila National Forest; only the private lands (610 ac (247 ha)) will be considered for exclusion. The 156,439-acre Ladder Ranch is owned by Turner Enterprises and is managed for its biodiversity. The Ladder Ranch has been an active participant in the conservation of a number of rare and listed species, including the Mexican wolf (*Canis lupus baileyi*), Bolson tortoise (*Gopherus flavomarginatus*), Chiricahua leopard frog, black-tailed prairie dog (*Cynomys ludovicianus*), American bison (*Bison bison*), and Rio Grande cutthroat trout (*Oncorhynchus clarki virginalis*). The strongest metapopulation of Chiricahua leopard frogs in New Mexico exists in Unit 36 in part due to the diligent management of the Ladder Ranch, which has included fencing some of the ranch's waters from the bison that graze the area, reestablishment of populations using wild-to-wild translocations, maintenance of wells and tanks, and controlling bullfrogs. The Ladder Ranch also monitors the frogs and habitats, and has recently initiated a captive breeding facility and program to rear frogs for population augmentation and reestablishment. The Service has provided funding for the captive breeding program under the Partners for Fish and Wildlife Program and other granting authorities. The Ladder Ranch maintains captive propagation facilities for the Chiricahua leopard frog under a section 10(a)(1)(A) enhancement of survival permit from the Service. Research on movements of Chiricahua leopard frogs using radiotelemetry has been funded by the Ladder Ranch and carried out in the Seco Creek area, and during the development of the recovery plan, Turner Endangered Species Fund paid for part of the Population and Habitat Viability Analysis (Service 2007, Appendix C, pp. C-1 to C-40).

*Unit 38 (Cuchillo Negro Warm Springs and Creek).* The private lands in Unit 38, which are part of the Ladder Ranch (23 ac (9 ha)), will be considered for exclusion based on the same rationale presented for Unit 36.

*Unit 40 (Mimbres River).* Private lands owned by The Nature Conservancy are managed as the Mimbres River Preserve.

These lands are managed for the benefit of the Chihuahuah chub, Chiricahua leopard frog, and other riparian and aquatic resources. All of The Nature Conservancy's lands in Unit 40 (510 ac (206 ha)) will be considered for exclusion.

Table 3 below provides approximate areas (1,647 ac (667 ha)) of lands that

meet the definition of critical habitat but for which the Service is considering possible exclusions under section 4(b)(2) of the Act from the final critical habitat rule. Table 3 also provides our reasons for the exemptions and proposed exclusions.

TABLE 3—EXEMPTIONS AND AREAS CONSIDERED FOR EXCLUSION BY CRITICAL HABITAT UNIT

Unit	Specific area to be considered for exclusion	Section of the act that is the basis for possible exclusion or exemption	Area meeting the definition of critical habitat in the unit (acres (hectares))	Possible exclusion in acres (hectares)
10	Pasture 9 Tank	4(b)(2)	0.5 (0.2)	0.5 (0.2)
12	Beatty's Guest Ranch	4(b)(2)	10 (4)	10 (4)
14	Ramsey Canyon Preserve	4(b)(2)	123 (50)	16 (6)
16	Canoncito Ranch	4(b)(2)	655 (265)	289 (117)
17	Southwest Research Station	4(b)(2)	326 (132)	92 (37)
19	Magoffin Ranch	4(b)(2)	97 (39)	97 (39)
36	Ladder Ranch	4(b)(2)	676 (273)	610 (247)
38	Ladder Ranch	4(b)(2)	28 (12)	23 (9)
40	Mimbres River Preserve	4(b)(2)	1,097 (444)	510 (206)
Totals			3,013 (1,219)	1,648 (665)

#### Peer Review

In accordance with our joint policy 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 critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period on our specific assumptions and conclusions concerning the taxonomic revision of the Chiricahua leopard frog, our assessment of threats to the currently described species *Lithobates chiricahuensis*, our proposal of listing as threatened the currently described species, and our proposed designation of critical habitat.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

#### Public Hearings

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** (see the **DATES** section

above). Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. A draft economic analysis and draft environmental assessment for this action will be prepared and made available to the public for review. At that time, we will reopen the comment period on this proposed rule and concurrently solicit comments on the draft economic analysis and draft environmental assessment. If determined necessary, in the **Federal Register** notice reopening the comment period, we will announce public hearing(s) during that comment period for the public to present oral and written comment on all three documents.

#### Special Rule Under Section 4(d) of the Act

The June 13, 2002, final rule (67 FR 40790) listing the Chiricahua leopard frog as threatened included a special rule as defined under section 4(d) of the Act to ease the general take prohibitions for livestock use at or maintenance activities of livestock tanks located on private, State, or Tribal lands (see 50 CFR 17.43(b)). Under section 4(d) of the Act, the Secretary may publish a special rule that modifies the standard

protections for threatened species in the Service's regulations at 50 CFR 17.31, which implement section 9 of the Act, with special measures that are determined to be necessary and advisable to provide for the conservation of the species. Based on changes made to the listed entity, we reevaluated the existing 4(d) rule to see if its measures are still necessary and advisable to the conservation of the species and appropriate to apply in the expanded range of the species. We determined that the measures of the 4(d) rule are appropriate and should be applied to the whole range. Therefore, we are not changing any conditions of the June 13, 2002, special rule, and it shall remain in effect as identified in our regulations at 50 CFR 17.43(b).

The special rule replaces the Act's general prohibitions against take of the Chiricahua leopard frog with special measures tailored to the conservation of the species on all non-Federal lands. Through the maintenance and operation of the stock tanks for cattle, habitat is provided for the leopard frogs, hence there is a conservation benefit to the species. Under the special rule, take of Chiricahua leopard frog caused by livestock use of or maintenance activities at livestock tanks located on private, State, or Tribal lands would be exempt from section 9 of the Act. A livestock tank is defined as an existing or future impoundment in an ephemeral drainage or upland site constructed primarily as a watering site for livestock. The rule targets tanks on



private, State, and Tribal lands to encourage landowners and ranchers to continue to maintain these tanks as they provide habitat for the frogs. Livestock use and maintenance of tanks on Federal lands will be addressed through the section 7 process. When a Federal action, such as permitting livestock grazing on Federal lands, may affect a listed species, consultation between us and the action agency is required pursuant to section 7 of the Act. The conclusion of consultation may include mandatory changes in livestock programs in the form of measures to minimize take of a listed animal or to avoid jeopardizing the continued existence of a listed species. Changes in a proposed action resulting from consultations are almost always minor.

### Required Determinations

#### *Regulatory Planning and Review—Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

At this time, we lack the available economic information necessary to determine whether the revised rule would have an annual effect on the economy of \$100 million or more or affect the economy in a material way. To determine the economic consequences of designating the specific area as critical habitat, we are preparing a draft economic analysis of this proposed action, which will be available for public comment. This economic analysis also will be used to determine compliance with E.O. 12866, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, E.O. 12630, and E.O. 13211.

Further, E.O. 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (OMB Circular A-4, September 17, 2003). Under Circular A-4, once an agency

determines that the Federal regulatory action is appropriate, the agency must consider alternative regulatory approaches. Because the determination of critical habitat is a statutory requirement under the Act, we must evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts under section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or a combination of both, constitutes our regulatory alternative analysis for designations.

We will announce the availability of the draft economic analysis and draft environmental assessment in the **Federal Register** and in local newspapers to ensure that they are available for public review and comments. These documents will also be available on the Internet at <http://www.regulations.gov>.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency 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 that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended 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.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O.

12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of that analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination.

As discussed above, designation of critical habitat will require Federal agencies to consult with the Service on activities that may affect critical habitat. If the site is occupied by Chiricahua leopard frogs, consultation would likely be triggered by the presence of the frog, regardless of critical habitat. From Table 1, only 2 of the 40 sites proposed are currently unoccupied; however, this number is somewhat misleading in that, within individual units, there are often ponds or stream segments of critical habitat units that are occupied while others are not (*see* descriptions in Proposed Critical Habitat Designation). Within occupied units, there are sometimes aquatic sites that are unoccupied (while other aquatic sites have frogs). As a result, we expect more consultations on Federal actions than occur with just the listing of the frog without critical habitat. These consultations could incur project delays (consultations run 135 days from the date of initiation of consultation to the issuance of a biological opinion (50 CFR 402.14(e)), and can be extended), and conservation measures developed during consultation, as well as mandatory reasonable and prudent alternatives, could cause additional project costs or alter the scope, timing, location, or duration of a project. Federal actions likely to incur these delays, additional costs, or limitations include issuance of livestock grazing permits, road construction, fuel reduction projects, prescribed fire, transmission lines, fiber optic lines, recreational developments or use, and other Federal actions common to Federal land management. Projects on non-Federal lands would be similarly affected if they are funded, authorized, or carried out by a Federal agency. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a

sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

#### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) 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 [T]ribal 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 [T]ribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted

by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We lack the available economic information to determine if a Small Government Agency Plan is required. Therefore, we defer this finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act.

#### *Takings*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we will analyze the potential takings implications of designating critical habitat for the Chiricahua leopard frog in a takings implications assessment. Following completion of the proposed rule, a draft economic analysis will be completed for the proposed designation. The draft economic analysis will provide the foundation for us to use in preparing a takings implications assessment.

#### *Federalism*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment 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 Arizona and New Mexico. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the PCEs 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*

In accordance with E.O. 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 PCEs within the designated areas to assist the public in understanding the habitat needs of the Chiricahua leopard frog.

#### *Paperwork Reduction Act of 1995*

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 would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act (NEPA)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).] However, when the range of the species includes States within the Tenth Circuit, such as that of the Chiricahua leopard frog, under the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation



3. In § 17.95, amend paragraph (d) by adding an entry for “Chiricahua leopard frog (*Lithobates chiricahuensis*),” 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.**

\* \* \* \* \*

(d) *Amphibians.*

\* \* \* \* \*

Chiricahua leopard frog (*Lithobates chiricahuensis*)

(1) Critical habitat units are depicted for Apache, Cochise, Gila, Graham, Greenlee, Pima, Santa Cruz, and Yavapai Counties, Arizona; and Catron, Grant, Hidalgo, Socorro, and Sierra Counties, New Mexico, on the maps below.

(2) The primary constituent elements of critical habitat for the Chiricahua leopard frog are:

(i) Aquatic breeding habitat and immediately adjacent uplands exhibiting the following characteristics:

(A) Perennial (water present during all seasons of the year) or nearly perennial pools or ponds at least 6.0 feet (1.8 meters) in diameter and 20 inches (0.5 meters) in depth;

(B) Wet in most years, and do not or only very rarely dry for more than a month;

(C) pH greater than or equal to 5.6;

(D) Salinity less than 5 parts per thousand;

(E) Pollutants absent or minimally present at low enough levels that they are barely detectable;

(F) Emergent and or submerged vegetation, root masses, undercut banks, fractured rock substrates, or some combination thereof; but emergent vegetation does not completely cover the surface of water bodies;

(G) Nonnative crayfish, predatory fishes, bullfrogs, barred tiger salamanders, and other introduced predators absent or occurring at levels

that do not preclude presence of the Chiricahua leopard frog;

(H) Absence of chytridiomycosis, or if chytridiomycosis is present, then conditions that allow persistence of Chiricahua leopard frogs with the disease (e.g., water temperatures that do not drop below 20 °C (68 °F), pH of greater than 8 during at least part of the year); and

(I) Uplands immediately adjacent to breeding sites that Chiricahua leopard frogs use for foraging and basking.

(ii) Dispersal habitat, consisting of ephemeral (water present for only a short time), intermittent, or perennial drainages that are generally not suitable for breeding, and associated uplands that provide overland movement corridors for frogs among breeding sites in a metapopulation with the following characteristics:

(A) Are not more than 1.0 mile (1.6 kilometers) overland, 3.0 miles (4.8 kilometers) along ephemeral or intermittent drainages, 5.0 miles (8.0 kilometers) along perennial drainages, or some combination thereof not to exceed 5.0 miles (8.0 kilometers);

(B) Provide some vegetation cover for protection from predators, and in drainages, some ephemeral, intermittent, or perennial aquatic sites; and

(C) Are free of barriers that block movement by Chiricahua leopard frogs, including urban, industrial, or agricultural development; reservoirs that are 50 acres (20 hectares) or more in size and stocked with predatory fishes, bullfrogs, or crayfish; highways that do not include frog fencing and culverts; and walls, major dams, or other structures that physically block movement.

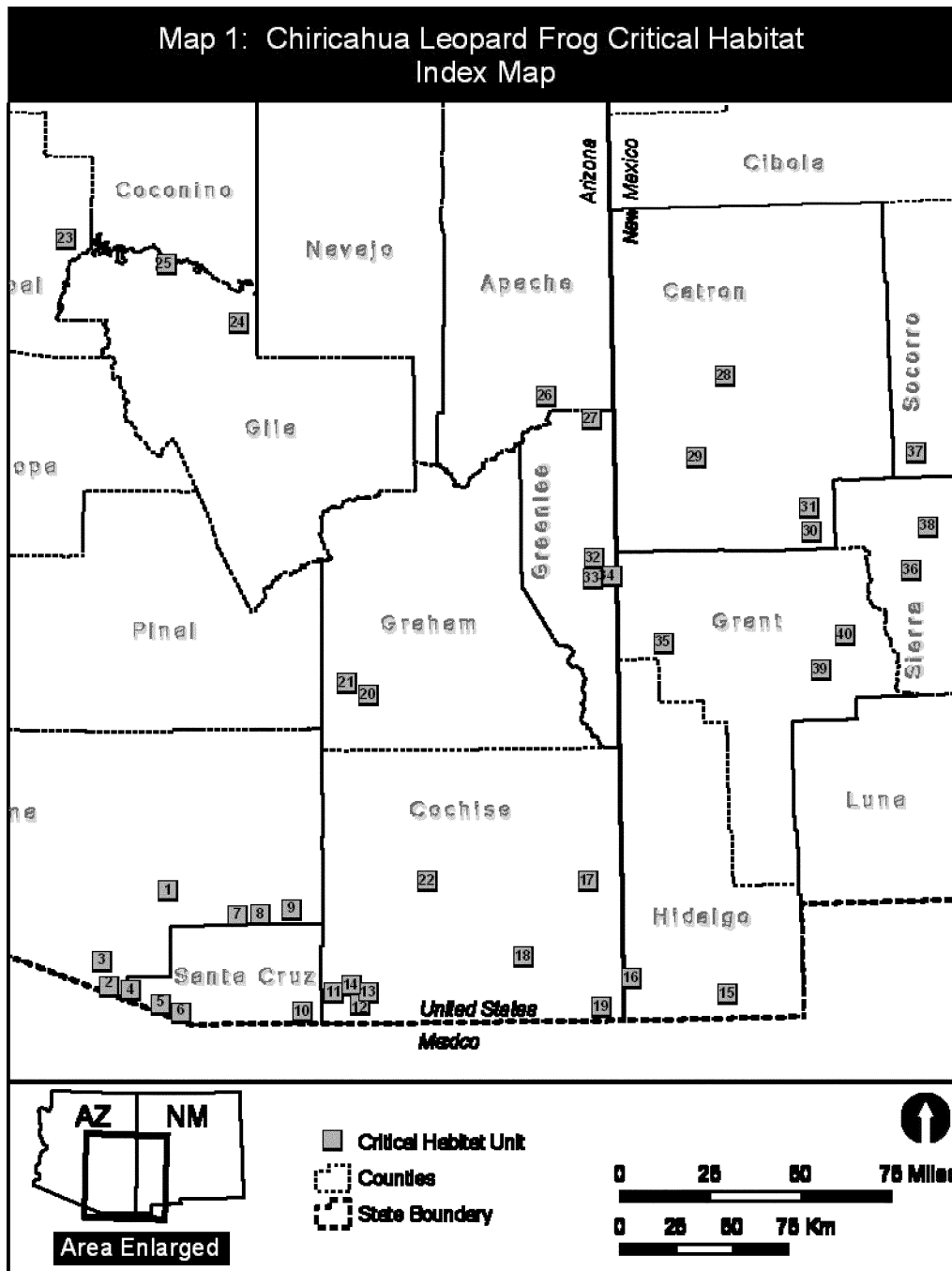
(3) With the exception of impoundments, livestock tanks, and other constructed waters, critical habitat does not include manmade structures (such as buildings, aqueducts, runways,

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 map units. Data layers defining map units were created on a base of USGS 7.5' quadrangles, the Service's online Lands Mapper, the U.S. Geological Survey National Hydrography Dataset, and imagery from Google Earth. Lentic water bodies were digitized from Google Earth imagery. Point locations for lentic water bodies (still or non-flowing water bodies) were calculated as the geographic centroids of the digitized polygons defining the critical habitat boundaries. Line locations for lotic streams (flowing water) and drainages are depicted as the “Flowline” feature class from the National Hydrography Dataset geodatabase. Overland connections were digitized from Google Earth imagery. Administrative boundaries for Arizona and New Mexico were obtained from the Arizona Land Resource Information Service and New Mexico Resource Geographic Information System, respectively. This includes the most current (as of the effective date of this rule) geospatial data available for land ownership, counties, States, and streets. Locations depicting critical habitat are expressed as decimal degree latitude and longitude in the World Geographic Coordinate System projection using the 1984 datum (WGS84). Information on Chiricahua leopard frog localities was derived from survey forms, reports, publications, field notes, and other sources, all of which reside in our files at the Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021. Coordinates given for tanks are the approximate center points of those tanks.

(5) *Note:* Index Map (Map 1) follows.

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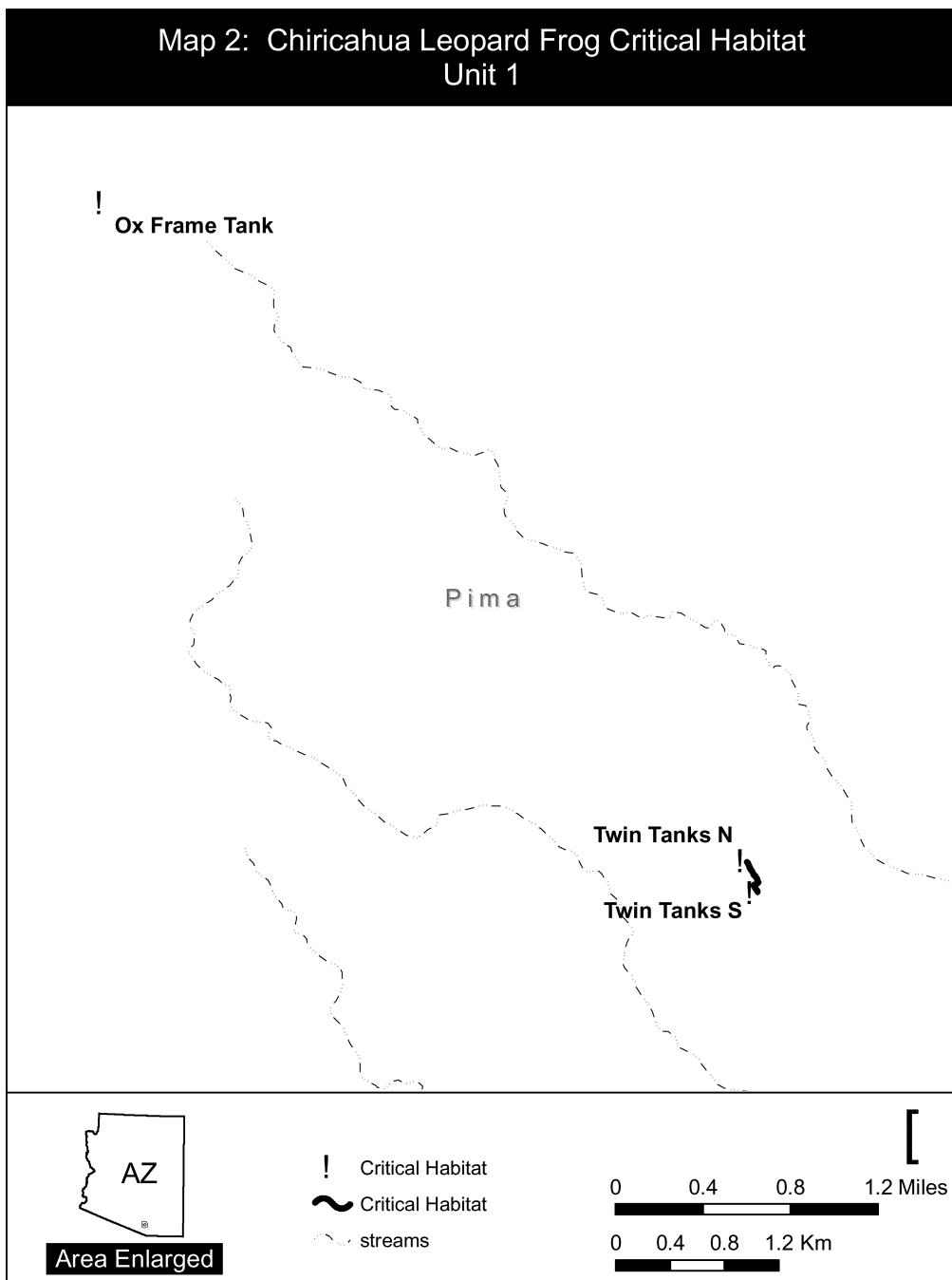
(6) Unit 1: Twin Tanks and Ox Frame Tank, Pima County, Arizona.

(i) Twin Tanks, including the north tank (31.838230 N, 111.149875 W) and

south tank (31.836031 N 111.149102 W), and the drainage running between them, a drainage distance of 979 feet (299 meters).

(ii) Ox Frame Tank (31.881882 N, 111.200318 W).

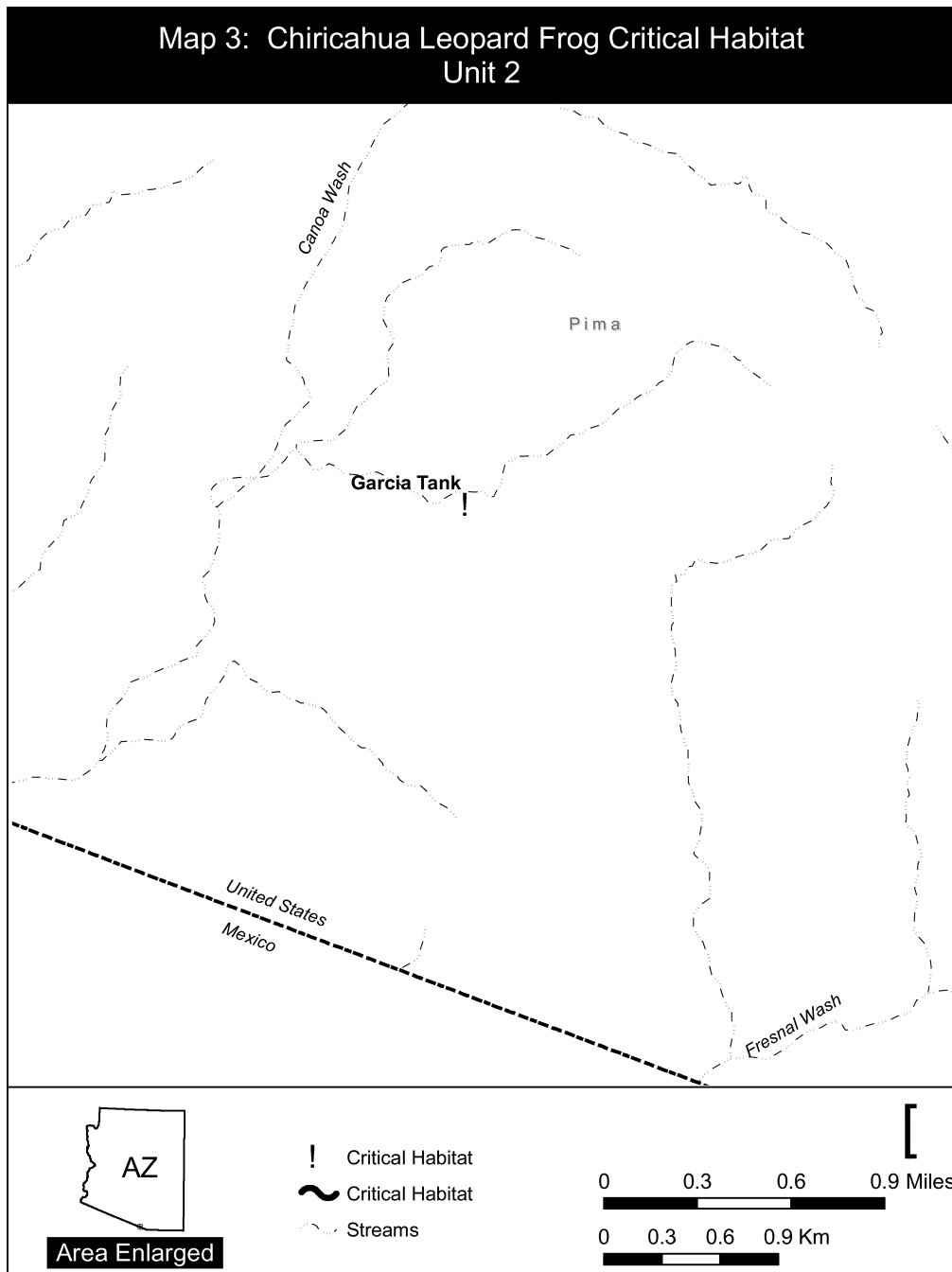
(iii) *Note:* Map of Unit 1, Twin Tanks and Ox Frame Tank (Map 2), follows:



(7) Unit 2: Garcia Tank, Pima County, Arizona.

(i) Garcia Tank (31.477060 N, 111.454114 W).

(ii) Note: Map of Unit 2, Garcia Tank (Map 3), follows:



(8) Unit 3: Buenos Aires NWR Central Tanks, Pima County, Arizona.

(i) Carpenter Tank (31.528748 N, 111.454642 W).

(ii) Rock Tank (31.583905 N, 111.462366 W).

(iii) State Tank (31.569254 N, 111.477114 W).

(iv) Triangle Tank (31.576105 N, 111.510909 W).

(v) New Round Hill Tank (31.613784 N, 111.489390 W).

(vi) Banado Tank (31.532759 N, 111.474729 W).

(vii) Choffo Tank (31.544627 N, 111.463126 W).

(viii) Barrel Cactus Tank (31.545284 N, 111.490310 W).

(ix) Sufrido Tank (31.566364 N, 111.445892 W).

(x) Hito Tank (31.579462 N, 111.446984 W.)

(xi) Morley Tank (31.599057 N, 111.489088 W).

(xii) McKay Tank (31.605788 N, 111.474188 W).

(xiii) Chongo Tank (31.64002 N, 111.50435 W).

(xiv) Arroyo del Compartidero from Triangle Tank (31.576105 N, 111.510909 W) downstream through and including Aguire Lake to an unnamed drainage

(31.594035 N, 111.504265 W); then downstream in that unnamed drainage to its confluence with Bailey Wash (31.596674 N, 111.501912 W); then downstream in Bailey Wash to its confluence with Puertocito Wash (31.604618 N, 111.494127 W); then downstream in Puertocito Wash to its confluence with Las Moras Wash (31.636031 N, 111.471749 W), including New Round Hill Tank (31.613784 N, 111.489390 W); and upstream in Las Moras Wash to Chongo Tank (31.64002 N, 111.50435 W), a distance of approximately 8.52 drainage miles (13.70 kilometers).

(xv) An unnamed drainage from its confluence with Puertocito Wash (31.619650 N, 111.483551 W) upstream to McKay Tank (31.605788 N, 111.474188 W, which is a cluster of three tanks), a distance of approximately 1.55 drainage miles (2.50 kilometers).

(xvi) Puertocito Wash from its confluence with Bailey Wash (31.604618 N, 111.494127 W) upstream to Sufrido Tank (31.566364 N, 111.445892 W), including Morley Tank (31.599057 N, 111.489088 W), a distance of approximately 4.60 drainage miles (7.40 kilometers).

(xvii) An unnamed drainage from its confluence with Puertocito Wash upstream to Rock Tank (31.583905 N, 111.462366 W), then upstream in an unnamed drainage to the top of that drainage (31.582637 N, 111.456882 W) and directly overland to an unnamed drainage (31.583818 N, 111.455223 W), and then upstream to Hito Tank

(31.579462 N, 111.446984 W) and downstream to McKay Tank (31.605788 N, 111.474188 W), a distance of approximately 3.80 drainage miles (6.11 kilometers) and 580 feet (177 meters) overland.

(xviii) Lopez Wash from Carpenter Tank (31.528748 N, 111.454642 W) downstream to its confluence with Aguire Lake (31.590582 N, 111.499589 W), a distance of approximately 6.75 drainage miles (10.87 kilometers).

(xix) An unnamed drainage from its confluence with Lopez Wash (31.542605 N, 111.466699 W) upstream to Choffo Tank (31.544627 N, 111.463126 W), a distance of approximately 1,549 drainage feet (472 meters).

(xx) An unnamed drainage from its confluence with Lopez Wash (31.569735 N, 111.482058 W) upstream to State Tank (31.569254 N, 111.477114 W), a distance of approximately 1,613 drainage feet (492 meters).

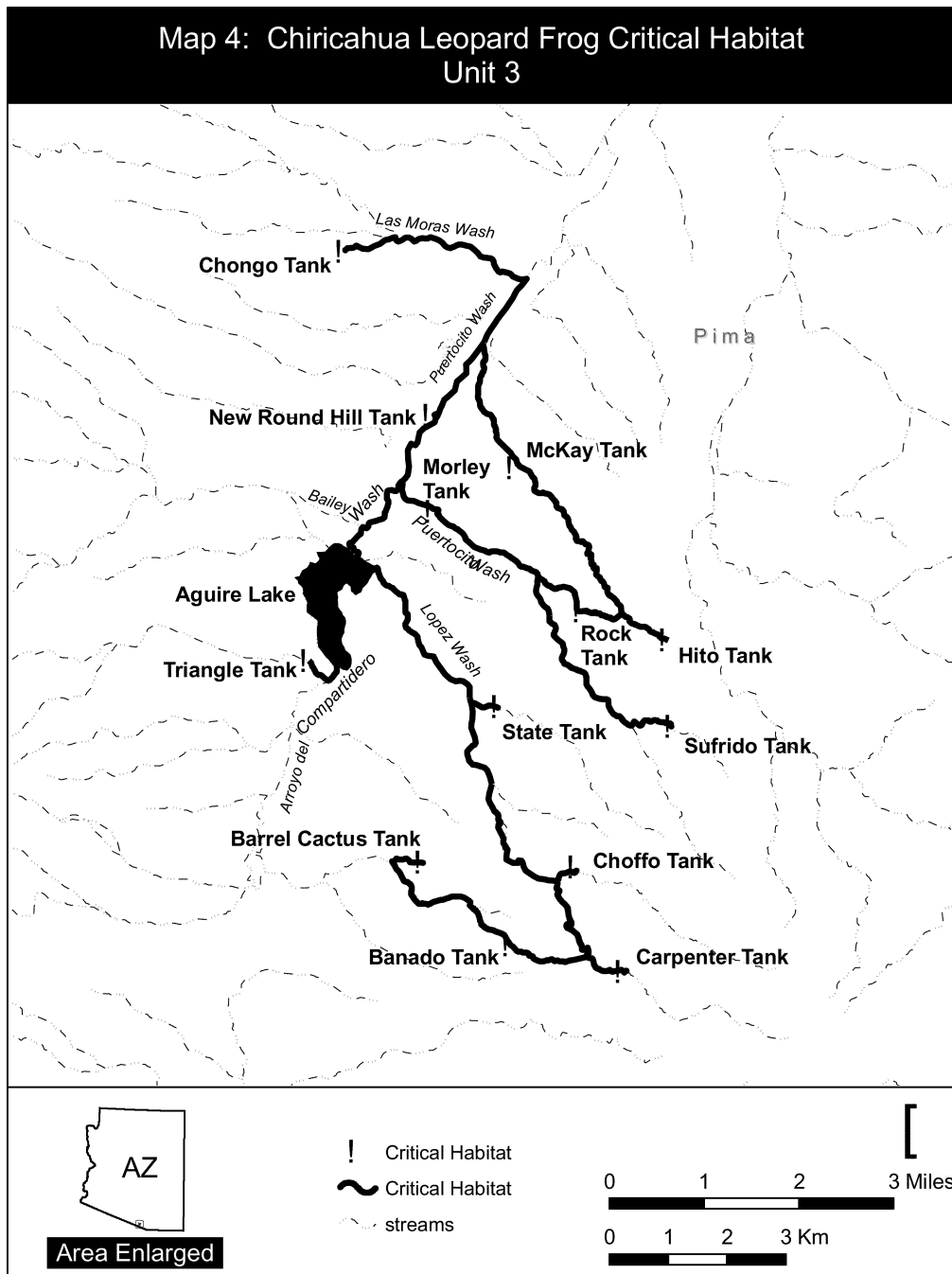
(xxi) An unnamed drainage from Banado Tank (31.532759 N, 111.474729 W) downstream to the confluence with an unnamed drainage (31.545399 N, 111.496152 W), and then upstream in that drainage to Barrel Cactus Tank (31.545284 N, 111.490310 W), a distance of approximately 2.21 drainage miles (3.56 kilometers).

(xxii) An unnamed drainage from Banado Tank (31.532759 N, 111.474729 W) upstream to a saddle (31.530907 N, 111.463162 W), then directly downslope to Lopez Wash (31.532093 N, 111.462159 W), a distance of approximately 3,831 drainage feet (1,168 meters) and 808 feet (246 meters) overland.

(xxiii) *Note:* Map of Unit 3, Buenos Aires NWR Central Tanks (Map 4), follows:

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(9) Unit 4: Bonita, Upper Turner, and Mojonera Tanks, Santa Cruz County, Arizona.

(i) Bonita Tank (31.43525 N, 111.305505 W).

(ii) Upper Turner Tank (31.429690 N, 111.318332 W).

(iii) Mojonera Tank (31.464250 N, 111.320203 W).

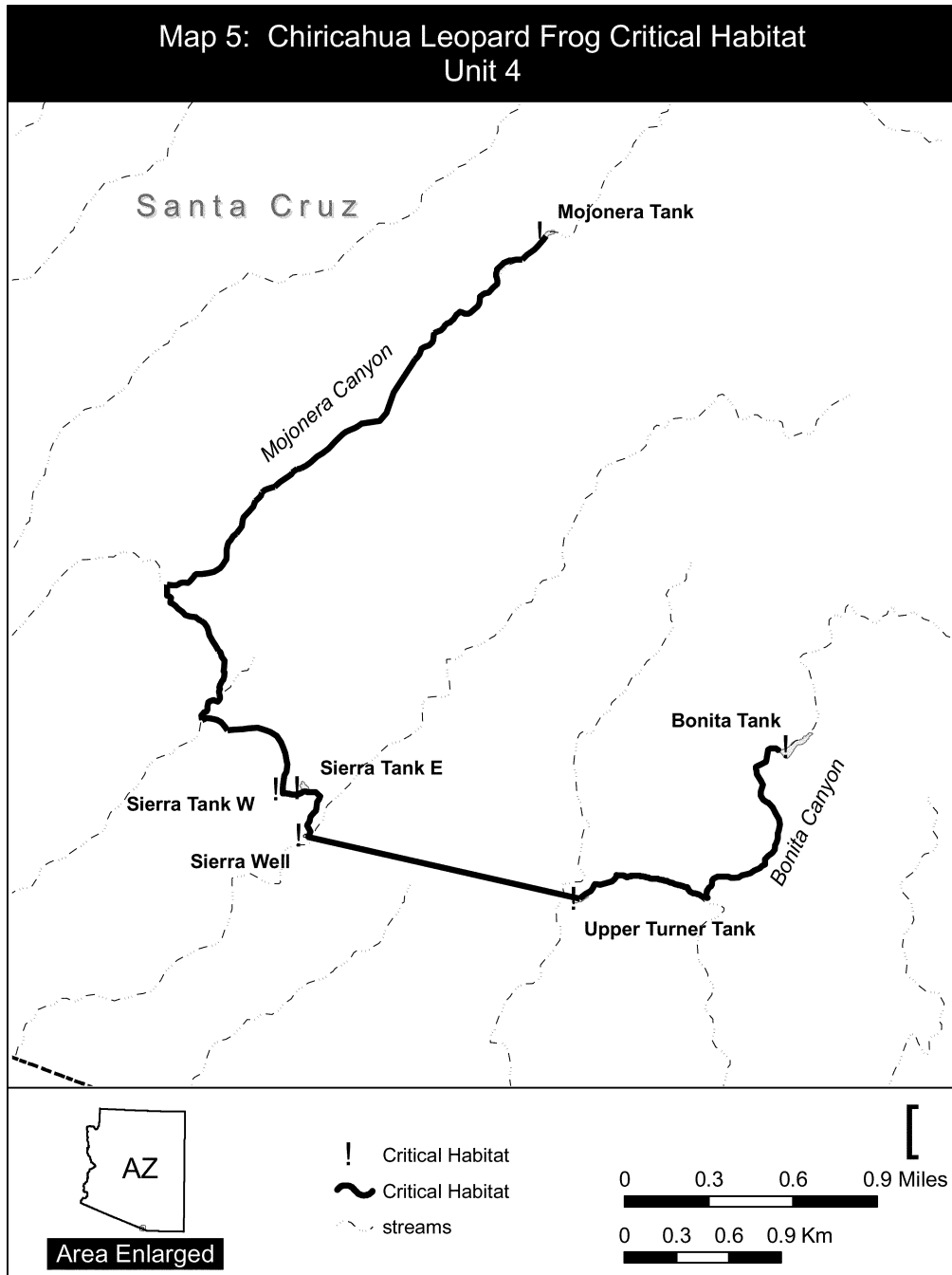
(iv) From Upper Turner Tank (31.429690 N, 111.318332 W) upstream in an unnamed drainage to its confluence with a minor drainage coming in from the east (31.431029 N, 111.315846 W), then directly upslope in that drainage and east to a saddle

(31.431015 N, 111.314770), and directly downslope through an unnamed drainage to Bonita Canyon (31.429806 N, 111.310325 W), and upstream in Bonita Canyon to Bonita Tank, a distance of approximately 1.29 drainage miles (2.08 kilometers) and 150 feet (46 meters) overland.

(v) From Mojonera Tank (31.464250 N, 111.320203 W) downstream in Mojonera Canyon to a sharp bend where the drainage turns west-northwest (31.445989 N, 111.343181 W); then southeast and upstream in an unnamed drainage to a saddle (31.443358 N, 111.340675 W) and downslope through

an unnamed drainage to its confluence with another unnamed drainage (31.438637 N, 111.341044 W); then upstream in that unnamed drainage to a saddle (31.438497 N, 111.337639 W); then downstream in an unnamed drainage to Sierra Well (31.433012 N, 111.334709 W), to include Sierra Tank East (31.435488 N, 111.334736 W) and Sierra Tank West (31.435361 N, 111.336103 W); then directly overland to Upper Turner Tank (31.429690 N, 111.318332 W), a distance of approximately 3.45 drainage miles (5.56 kilometers) and 5,270 feet (1,606 meters) overland.

(vi) Note: Map of Unit 4, Bonita, Upper Turner, and Mojonera Tanks (Map 5), follows:



(10) Unit 5: Sycamore Canyon, Santa Cruz County, Arizona.

(i) Sycamore Canyon from the Ruby Road bridge (31.434030 N, 111.186537 W) south to the International Boundary (31.379952 N, 111.222937 W), a distance of 6.35 stream miles (10.23 kilometers).

(ii) Yank Tank (31.425426 N, 111.183289 W).

(iii) North Mesa Tank (31.415697 N, 111.167584 W).

(iv) Horse Pasture Spring (31.406812 N, 111.184717 W).

(v) Bear Valley Ranch Tank (31.413617 N, 111.176818 W).

(vi) South Mesa Tank (31.406832 N, 111.164505 W).

(vii) Rattlesnake Tank (31.400654 N, 111.163470 W).

(viii) Yanks Canyon from Yank Tank (31.425426N, 111.183289W) downstream to its confluence with Sycamore Canyon (31.428987 N, 111.190679 W), a distance of approximately 2,822 drainage feet (860 meters).

(ix) From North Mesa Tank (31.415697 N, 111.167584 W) downstream in Atascosa Canyon to its confluence with Peñasco Canyon

(31.402594 N, 111.186647 W), then from that confluence downstream in Peñasco Canyon to its confluence with Sycamore Canyon (31.407395 N, 111.195820 W), a distance of approximately 2.91 drainage miles (4.69 kilometers).

(x) From Horse Pasture Spring (31.406812 N, 111.184717 W) downstream to Peñasco Canyon, a drainage distance of approximately 1,759 feet (536 meters).

(xi) From Bear Valley Ranch Tank (31.413617 N, 111.176818 W) downstream in an unnamed drainage to

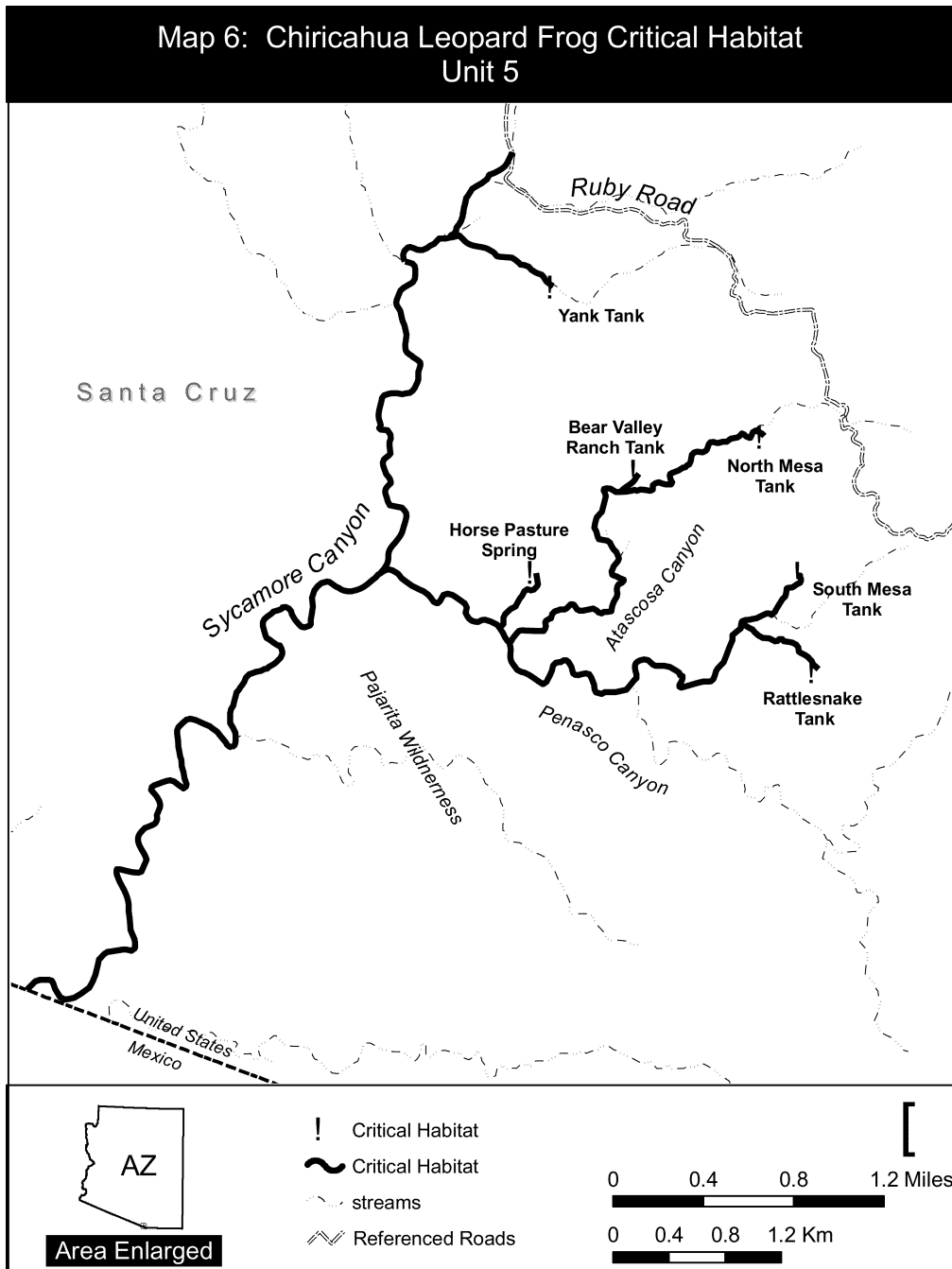
its confluence with Atascosa Canyon (31.402583 N, 111.186593 W), a drainage distance of approximately 611 stream feet (186 meters).

(xii) From South Mesa Tank (31.406832 N, 111.164505 W) downstream in unnamed drainage to its confluence with another unnamed drainage (31.403615 N, 111.169213 W), then downstream in that unnamed drainage to its confluence with Peñasco Canyon (31.399519 N, 111.177701 W), then downstream in Peñasco Canyon to its confluence with Atascosa Canyon

(31.402594 N, 111.186647 W), a drainage distance of approximately 2.05 miles (3.30 kilometers).

(xiii) From Rattlesnake Tank (31.400654 N, 111.163470 W) downstream in an unnamed drainage to its confluence with another unnamed drainage (31.403615 N, 111.169213 W), a drainage distance of approximately 2,274 feet (693 meters).

(xiv) *Note:* Map of Unit 5, Sycamore Canyon (Map 6), follows:



(11) Unit 6: Peña Blanca Lake and Spring and Associated Tanks, Santa Cruz County, Arizona.

(i) Peña Blanca Lake (31.409091 N, 111.084971 W at the dam).

(ii) Peña Blanca Spring (31.388895 N, 111.092297 W).

(iii) Summit Reservoir (31.396565 N, 111.141347 W).

(iv) Tinker Tank (31.380107 N, 111.136359 W).

(v) Coyote Tank (31.369894 N, 111.150751 W).

(vi) Thumb Butte Tank (31.388426 N, 111.118105 W).

(vii) From Summit Reservoir directly southeast to a saddle on Summit Motorway (31.395580 N, 111.140552 W), then directly downslope to an unnamed drainage at (31.394133 N, 111.139450 W) and downstream in that drainage to its confluence with Alamo

Canyon (31.384521 N, 111.121496 W), then downstream in Alamo Canyon to its confluence with Peña Blanca Canyon (31.388301 N, 111.093728 W), then downstream in Peña Blanca Canyon to Peña Blanca Lake (31.409091 N, 111.084971 W at the dam) to include Peña Blanca Spring (31.388895 N, 111.092297 W), a distance of approximately 4.44 drainage miles (7.10 kilometers) and 1,040 feet (317 meters) overland.

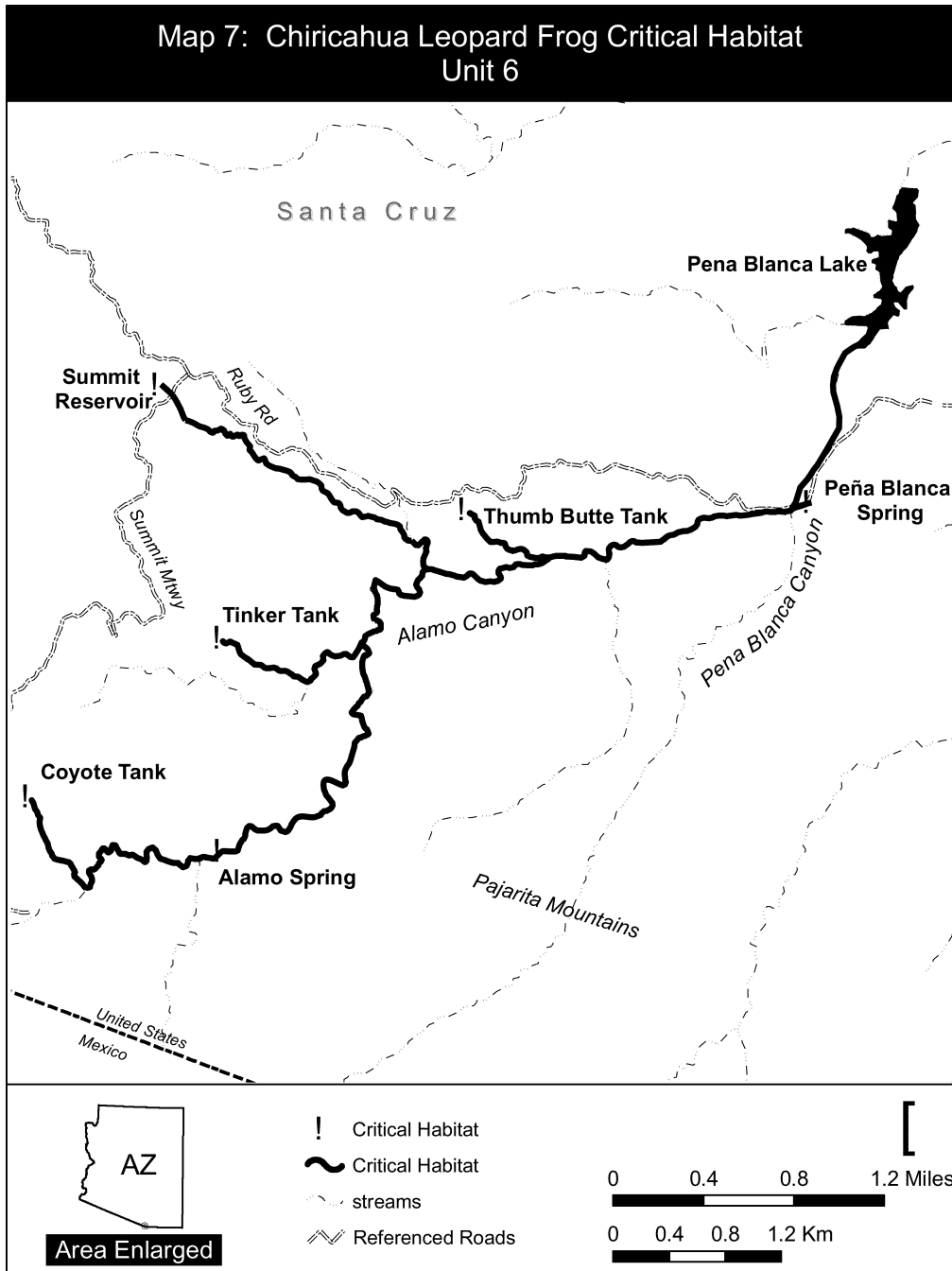
(viii) From Thumb Butte Tank (31.388426 N, 111.118105 W) downstream in an unnamed drainage to its confluence with Alamo Canyon (31.385228 N, 111.112132 W), a distance of approximately 2,494 drainage feet (760 meters).

(ix) From Tinker Tank (31.380107 N, 111.136359 W) downstream in an unnamed drainage to its confluence

with Alamo Canyon (31.379693 N, 111.126053 W), then downstream in Alamo Canyon to the confluence with the drainage from Summit Reservoir (31.384521 N, 111.121496 W), a distance of approximately 1.55 drainage miles (2.50 kilometers).

(x) From Coyote Tank (31.369894 N, 111.150751 W) downstream in an unnamed drainage to its confluence with Alamo Canyon (31.365839 N, 111.138388 W); then downstream in Alamo Canyon to the confluence with the drainage from Tinker Tank (31.379693 N, 111.126053 W), to include Alamo Spring (31.365993 N, 111.137171 W), a distance of approximately 3.09 drainage miles (4.97 kilometers).

(xi) *Note:* Map of Unit 6, Peña Blanca Lake and Spring and Associated Tanks (Map 7), follows:



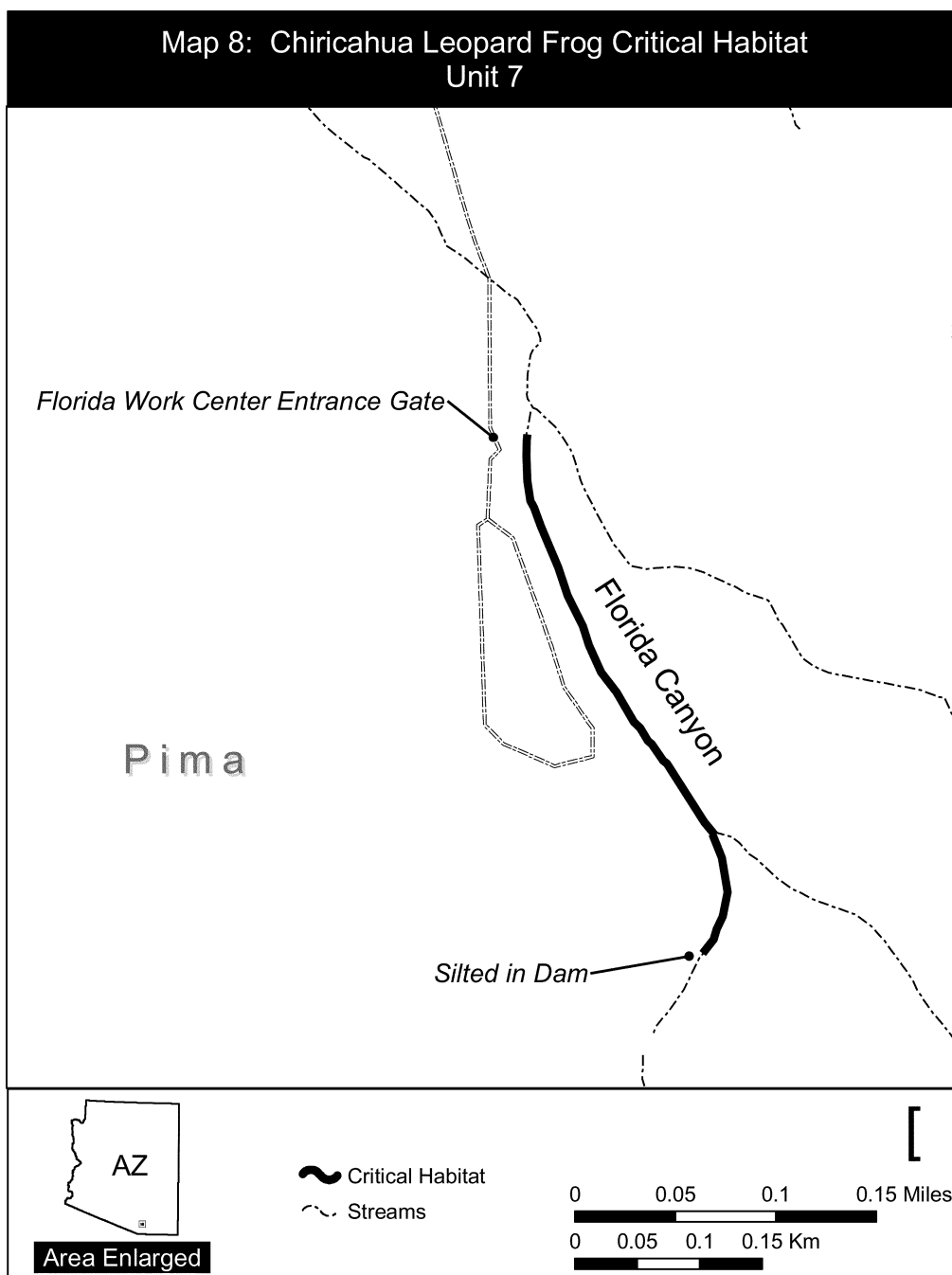
(12) Unit 7: Florida Canyon, Pima County, Arizona.

(i) Florida Canyon from a silted-in dam (31.759444 N, 110.844095 W)

downstream to just east of the Florida Workstation entrance gate (31.763186 N, 110.845511 W), a distance of

approximately 1,521 stream feet (463 meters).

(ii) Note: Map of Unit 7, Florida Canyon (Map 8), follows:



(13) Unit 8: Eastern Slope of the Santa Rita Mountains, Pima County, Arizona.

(i) Two galvanized metal tanks in Louisiana Gulch (31.74865 N, 110.72839 W).

(ii) Greaterville Tank (31.767186 N, 110.759818 W).

(iii) Los Posos Gulch Tank (31.768587 N, 110.731583 W).

(iv) Upper Granite Mountain Tank (31.760914 N, 110.760186 W).

(v) From Los Posos Gulch Tank (31.768587 N, 110.731583 W) upstream to a saddle (31.771463 N, 110.748676 W); then downslope in an unnamed drainage to the confluence with another

unnamed drainage (31.772830 N, 110.752727 W); then upstream and south in that drainage to a saddle (31.768245 N, 110.752891 W); then downslope in an unnamed drainage to its confluence with Ophir Gulch (31.763978 N, 110.751312 W); then upstream in Ophir Gulch to Upper Granite Mountain Tank (31.760914 N, 110.760186 W), to include an ephemeral tank (31.761388 N, 110.759184 W) and a well (31.761584 N, 110.758169 W), a distance of approximately 2.59 drainage miles (4.17 kilometers) and 984 feet (300 meters) overland.

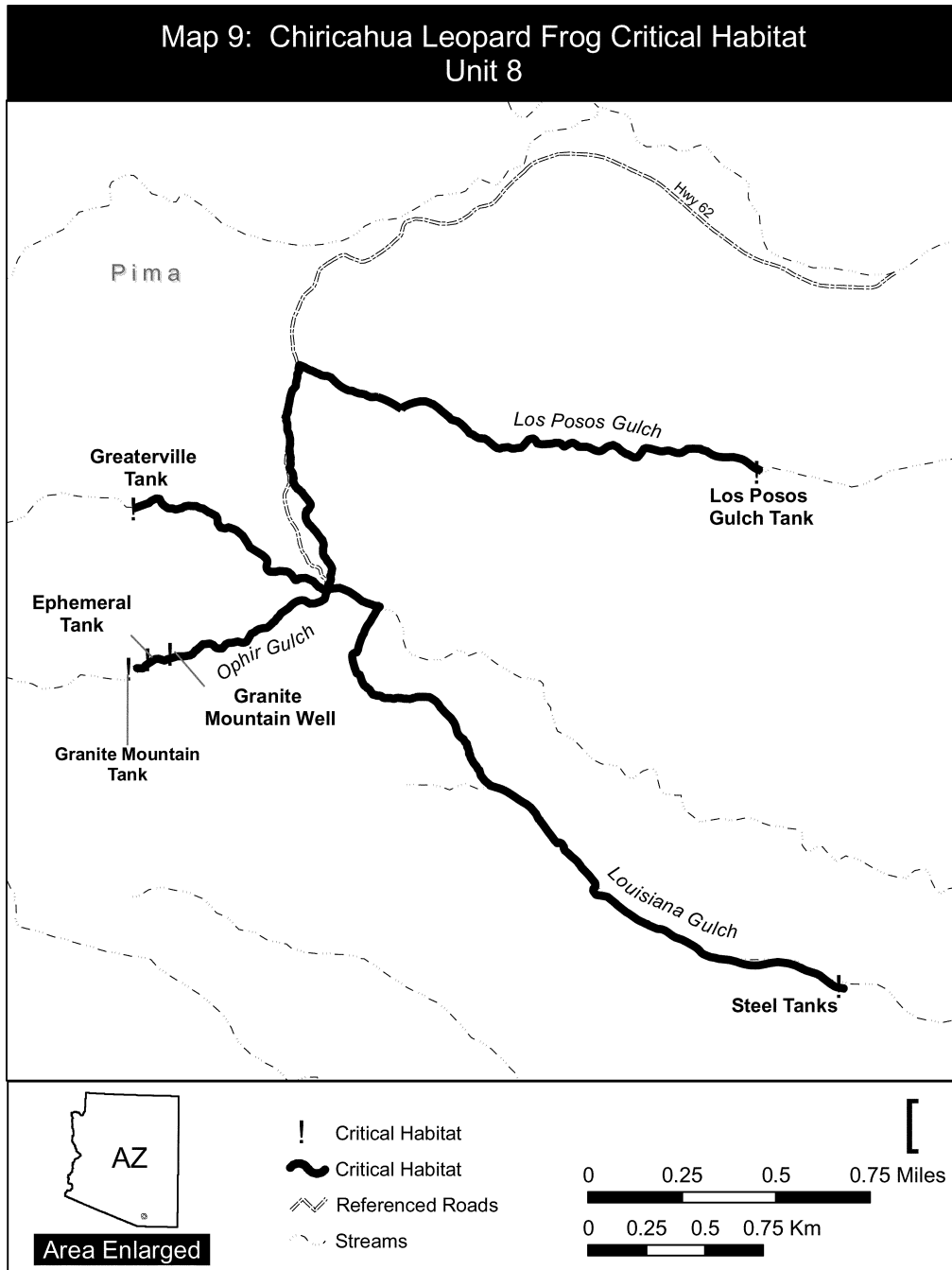
(vi) From Greaterville Tank (31.767186 N, 110.759818 W) downstream in an unnamed drainage to its confluence with Ophir Gulch (31.763978 N, 110.751312 W), a distance of approximately 3,446 drainage feet (1,050 meters).

(vii) Louisiana Gulch from the metal tanks (31.74865 N, 110.72839 W) upstream to the confluence with an unnamed drainage (31.756493 N, 110.744175 W), then upstream in that drainage to its headwaters and across a saddle (31.759879 N, 110.748733 W) and downslope through an unnamed drainage to its confluence with Ophir

Gulch (31.762953 N, 110.749329 W), then upstream in Ophir Gulch to the confluence with the unnamed drainage mentioned in subparagraph (13)(v) of

this entry (31.763978 N, 110.751312 W), a distance of approximately 1.98 drainage miles (3.19 kilometers) and 327 feet (100 meters) overland.

(viii) *Note:* Map of Unit 8, Eastern Slope of the Santa Rita Mountains (Map 9), follows:



(14) Unit 9: Las Cienegas National Conservation Area, Pima County, Arizona.

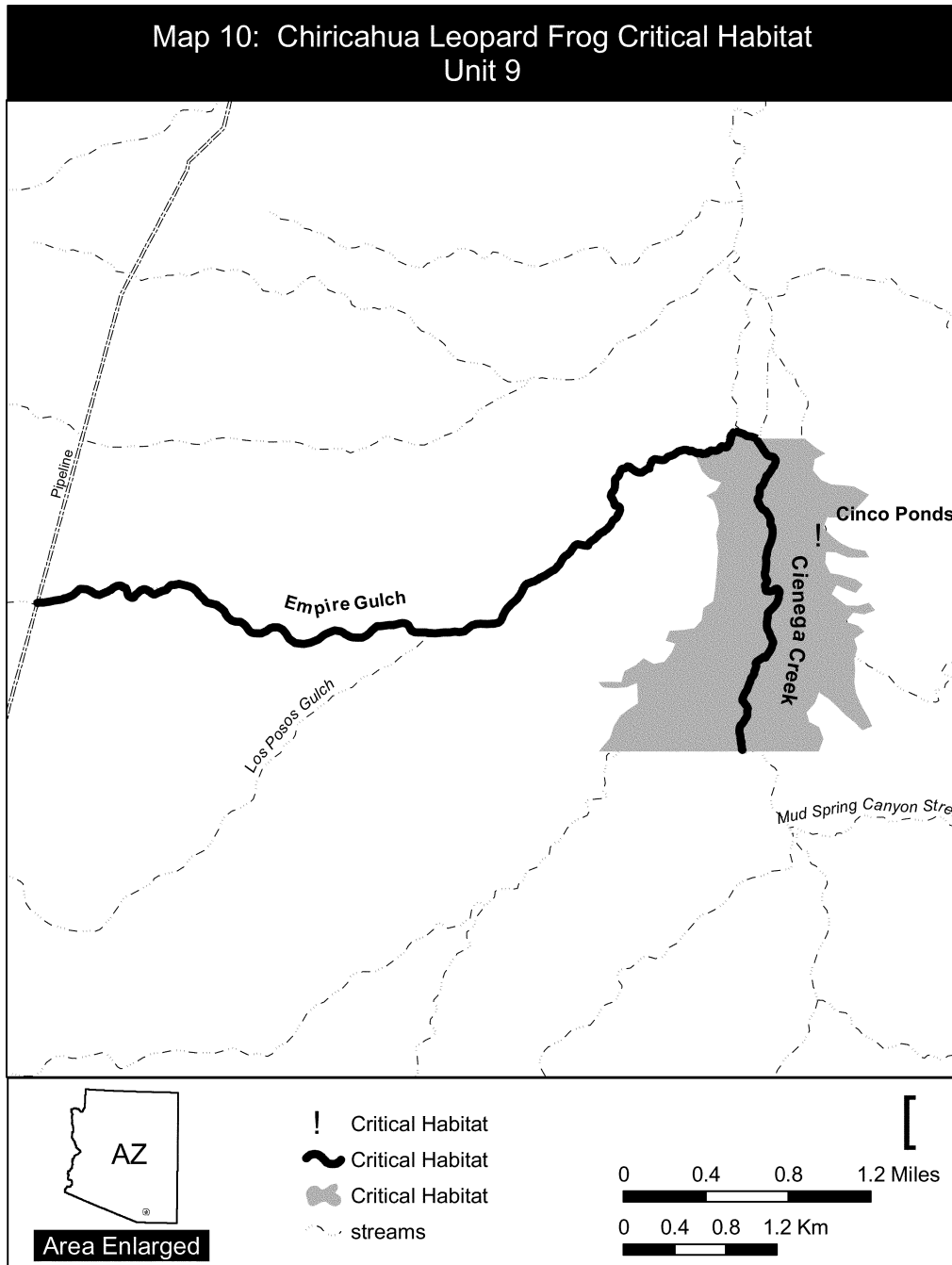
(i) Empire Gulch near Empire Ranch, beginning at a pipeline access road crossing (31.787054 N, 110.648665 W) and continuing downstream to its confluence with Cienega Creek (31.808804 N, 110.589758 W), a

distance of approximately 4.33 stream miles (6.98 kilometers).

(ii) Cienega Creek from the Empire Gulch confluence (31.808804 N, 110.589758 W) upstream to the approximate end of the wetted reach and where the creek bends hard to the east (31.776478 N, 110.590382 W), to include Cinco Ponds (31.793066 N,

110.584422 W) upstream to 31.788559 N, 110.584114 W), a distance of approximately 1.91 stream miles (3.08 kilometers).

(iii) *Note:* Map of Unit 9, Las Cienegas National Conservation Area (Map 10), follows:

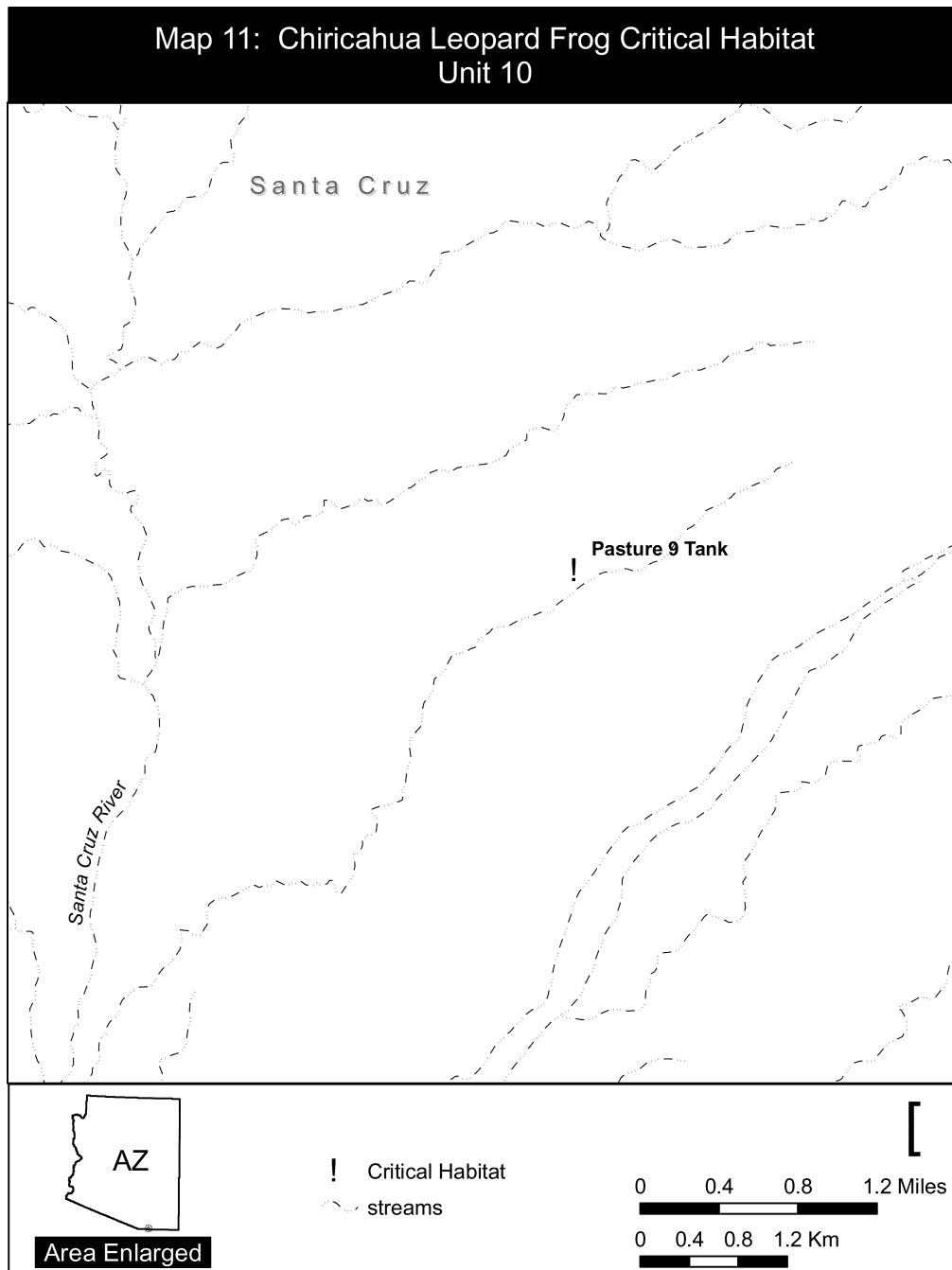


(15) Unit 10: Pasture 9 Tank, Santa Cruz County, Arizona.

(i) Pasture 9 Tank (31.375991 N, 110.548386 E).

(ii) *Note:* Map of Unit 10, Pasture 9 Tank (Map 11), follows:





(16) Unit 11: Scotia Canyon, Cochise County, Arizona.

(i) Peterson Ranch Pond (31.457016 N, 110.397724 W).

(ii) Travertine Seep (31.453466 N, 110.399386 W).

(iii) Creek in Scotia Canyon from just east of Peterson Ranch Pond (31.455723 N, 110.396124 W) downstream to the confluence of an unnamed drainage and

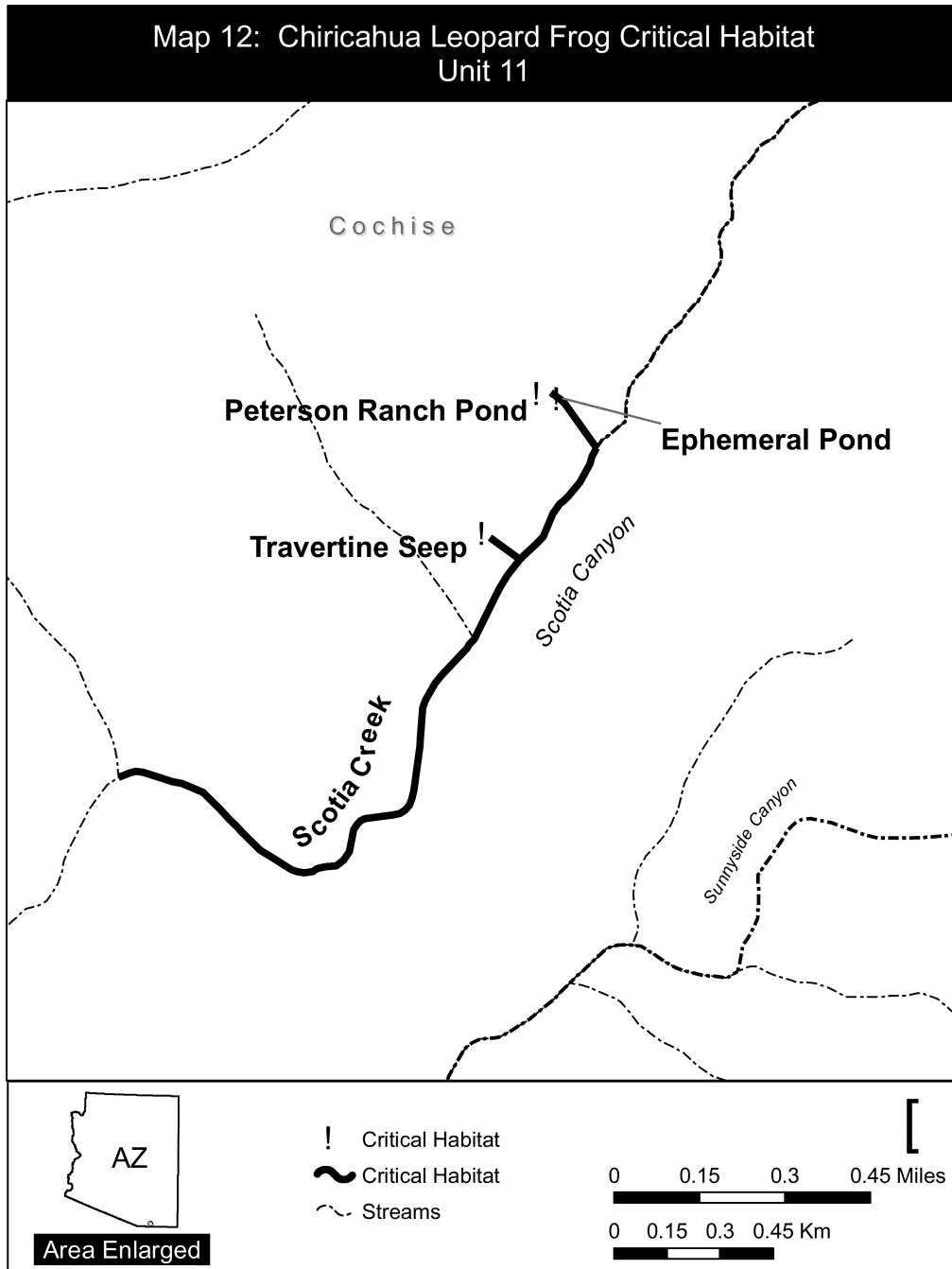
a sharp bend in the canyon to the south (31.447598 N, 110.409884 W), a distance of approximately 1.36 stream miles (2.19 kilometers).

(iv) Overland from Peterson Ranch Pond (31.457016 N, 110.397724 W) to the upper end of the Scotia Creek segment (31.455723 N, 110.396124 W), to include an ephemeral pond (31.456929 N, 110.397120 W), an

overland distance of approximately 671 feet (205 meters).

(v) Overland from the Travertine Seep (31.453466 N, 110.399386 W) directly southeast to Scotia Creek (31.452720 N, 110.398117 W), an overland distance of approximately 348 feet (106 meters).

(vi) *Note:* Map of Unit 11, Scotia Canyon (Map 12), follows:

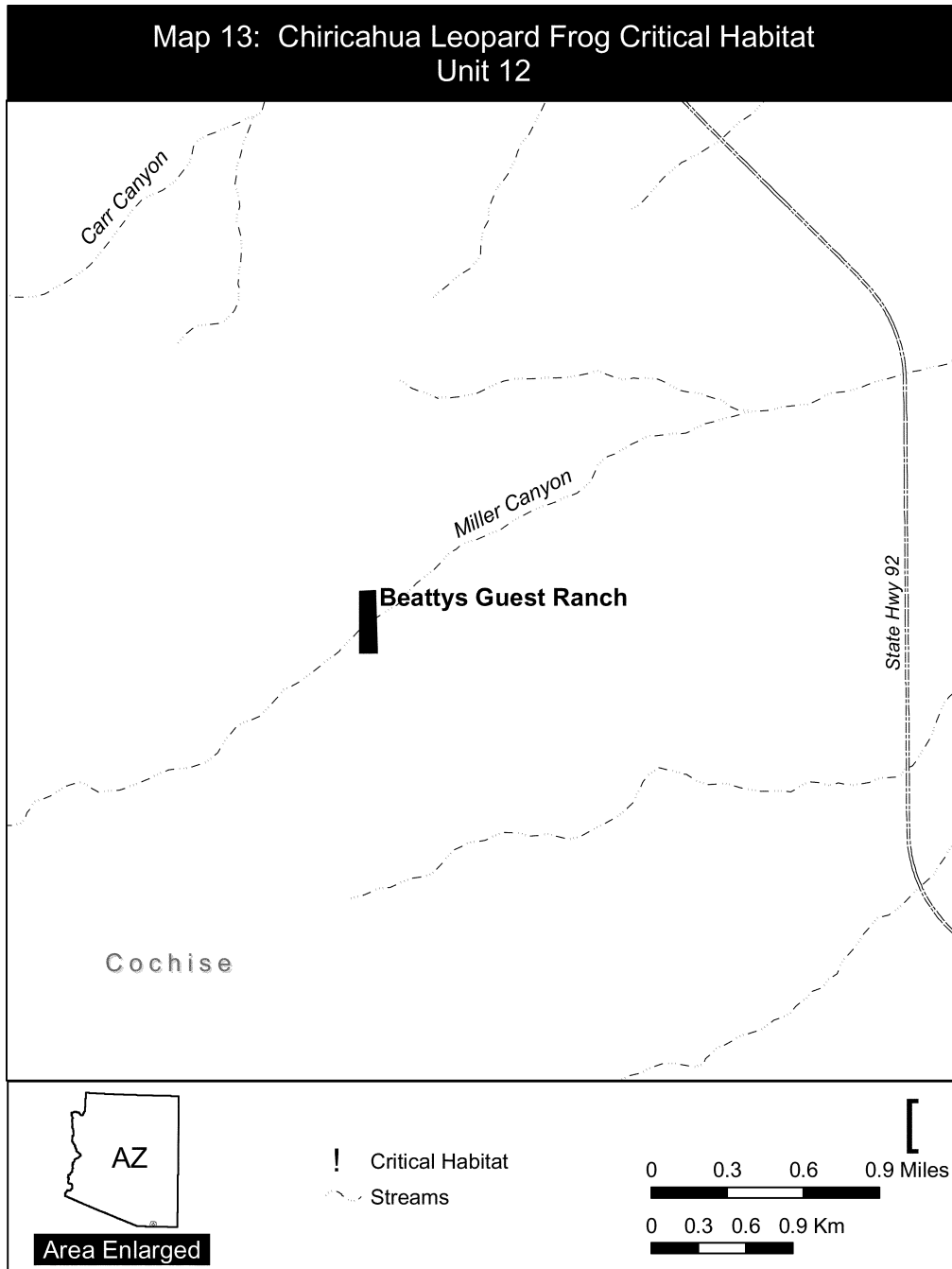


(17) Unit 12: Beatty's Guest Ranch, Cochise County, Arizona.  
 (i) Private inholding defined approximately as follows: Northwest

corner (31.416425 N, 110.277493 W), northeast corner (31.416425 N, 110.276432 W), southeast corner (31.413455 N, 110.276432 W), and

southwest corner (31.413455 N, 110.277493 W).

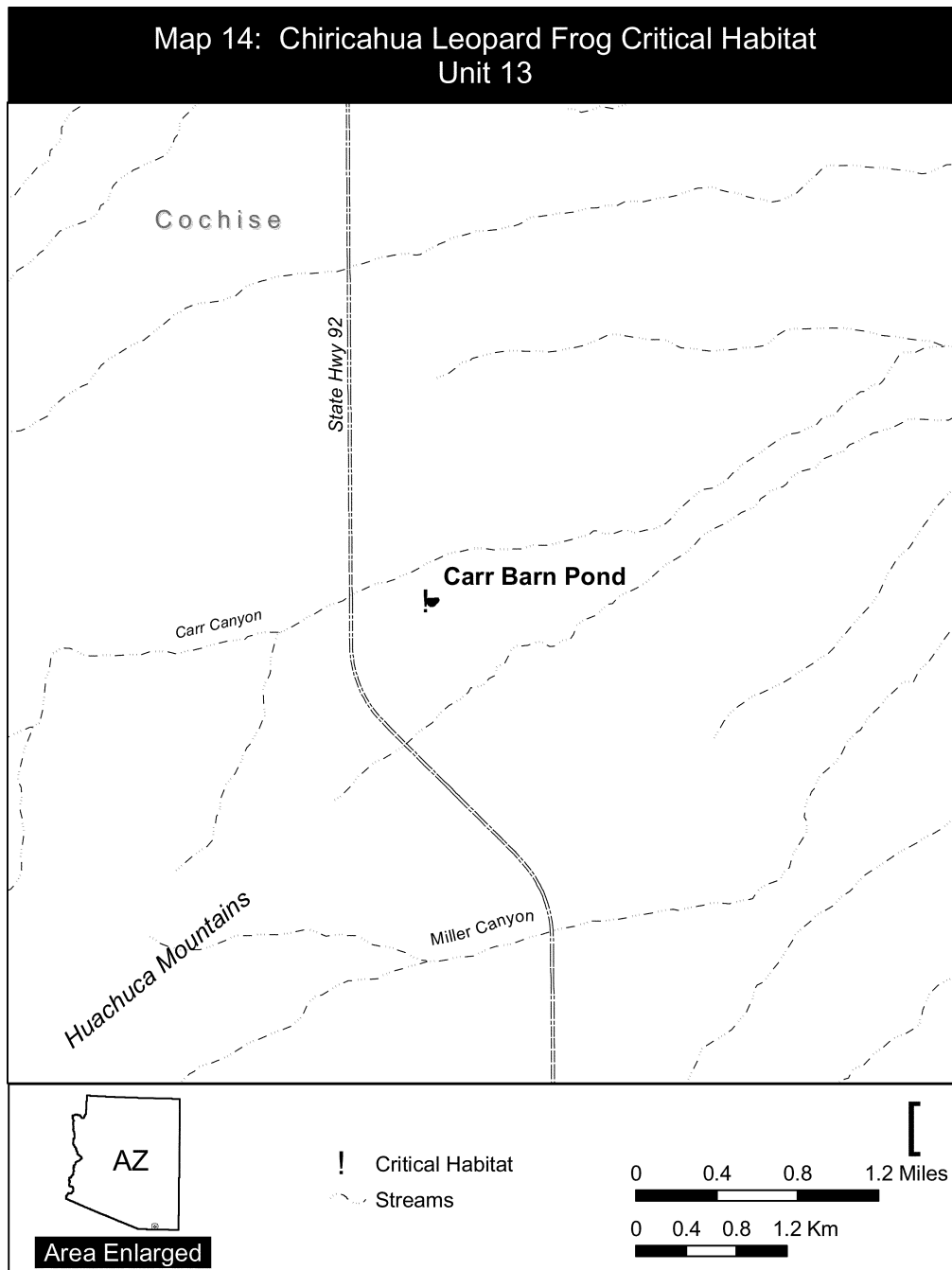
(ii) Note: Map of Unit 12, Beatty's Guest Ranch (Map 13), follows:



(18) Unit 13: Carr Barn Pond, Cochise County, Arizona.

(i) Carr Barn Pond (31.452461 N, 110.250355 W).

(ii) *Note:* Map of Unit 13, Carr Barn Pond (Map 14), follows:



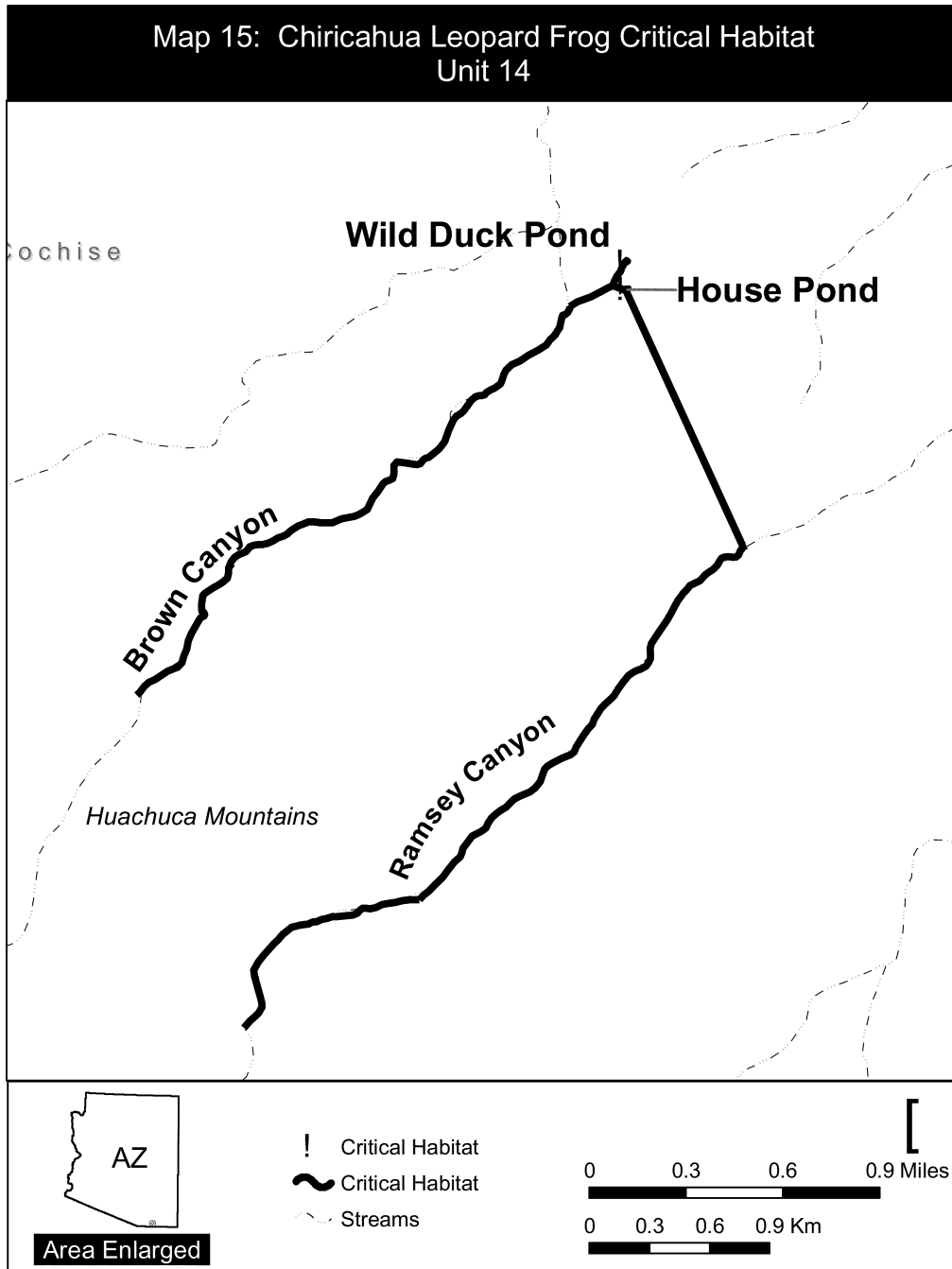
(19) Unit 14: Ramsey and Brown Canyons, Cochise County, Arizona.

(i) Ramsey Canyon from the upper end of The Box (31.440958 N, 110.317879 W) downstream to a dirt road crossing at the mouth of Ramsey Canyon (31.462315 N, 110.291248 W), an approximate stream distance of 2.35 miles (3.79 kilometers).

(ii) Brown Canyon from The Box (31.456016 N, 110.323853 W) downstream to the Wild Duck Pond (31.475355 N, 110.297592 W) and House Pond (31.474068 N, 110.297565 W) on the former Barchas Ranch, an approximate drainage distance of 2.26 miles (3.64 kilometers).

(iii) From the dirt road crossing at the mouth of Ramsey Canyon (31.462315 N, 110.291248 W) directly overland to House Pond (31.474068 N, 110.297565 W) on the former Barchas Ranch, a distance of approximately 4,594 feet (1,400 meters).

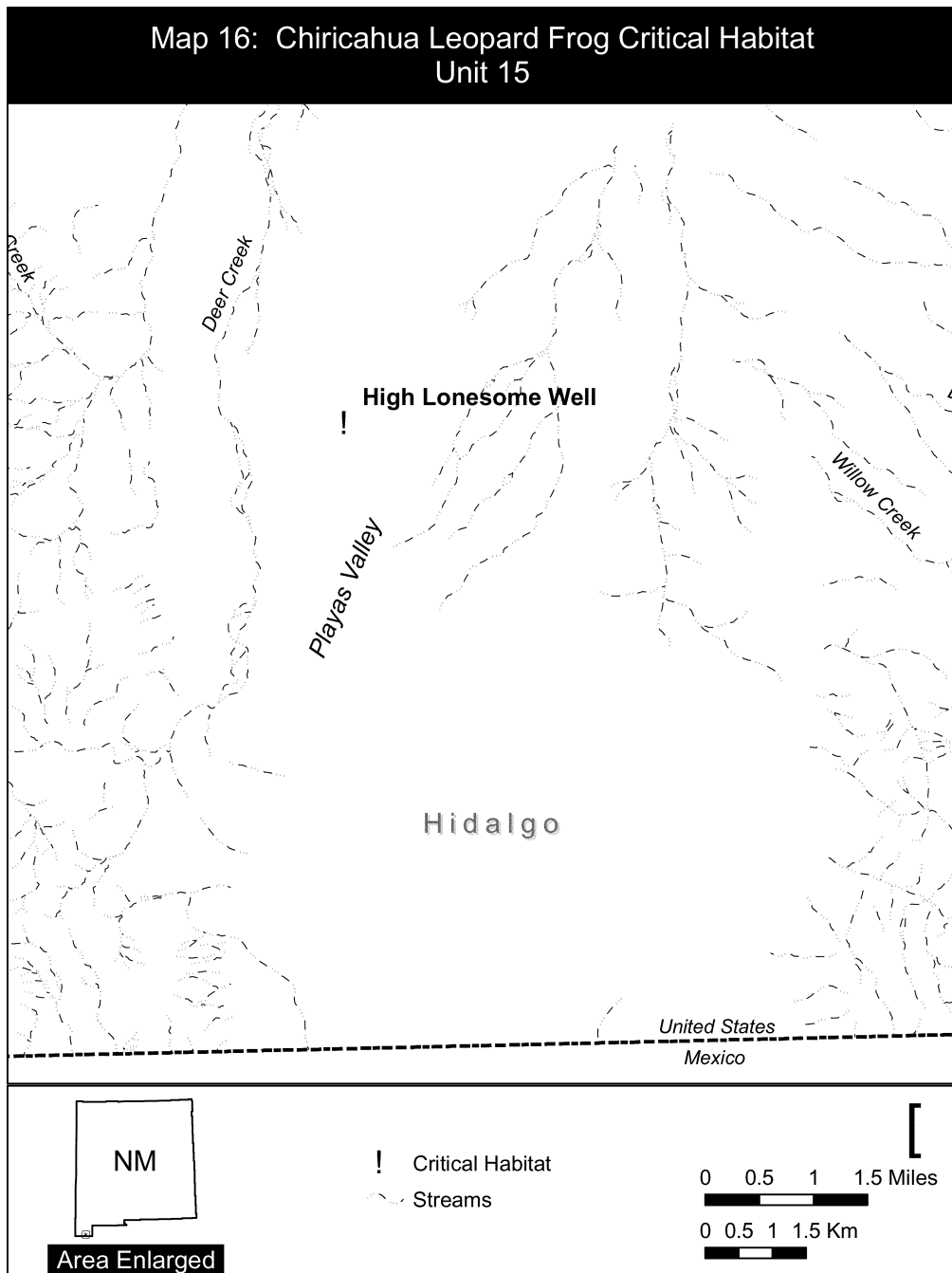
(iv) Note: Map of Unit 14, Ramsey and Brown Canyons (Map 15), follows:



(20) Unit 15: High Lonesome Well, Hidalgo County, New Mexico.

(i) High Lonesome Well (31.417206 N, 108.557791 W).

(ii) Note: Map of Unit 15, High Lonesome Well (Map 16), follows:



(21) Unit 16: Peloncillo Mountains Tanks, Hidalgo County, New Mexico.

(i) Geronimo Tank (31.520685 N, 109.016775 W).

(ii) State Line Tank (31.498451 N, 109.044940 W).

(iii) Javelina Tank (31.484995 N, 109.024970 W).

(iv) Canoncito Ranch Tank (31.449553 N, 109.986836 W).

(v) Maverick Spring (31.469376 N, 109.011142 W).

(vi) Cloverdale Creek from the Canoncito Ranch Tank (31.449553 N, 109.986836 W) downstream, including the cienega, to rock pools (31.432972 N,

108.966535 W) about 630 feet downstream of the Cloverdale road crossing of Cloverdale Creek, an approximate stream distance of 1.91 miles (3.07 kilometers).

(vii) From Geronimo Tank (31.520685 N, 109.016775 W) downstream in an unnamed drainage to its confluence with Clanton Draw (31.520590 N, 109.012263 W), then upstream to the confluence with an unnamed drainage (31.515818 N, 109.018117 W), and upstream in that drainage to its headwaters (31.501854 N, 109.031898 W), across a mesa to the headwaters of an unnamed drainage (31.502220 N,

109.033839 W), then downslope through that drainage to State Line Tank (31.498451 N, 109.044940 W), an approximate drainage distance of 3.07 miles (4.94 kilometers) and 775 feet (236 meters) overland.

(viii) From State Line Tank upstream in an unnamed drainage to a mesa (31.488563 N, 109.036527 W), then directly overland to the headwaters of Cloverdale Creek (31.487477 N, 109.028002 W), and then downstream in Cloverdale Creek to Javelina Tank (31.484995 N, 109.024970 W), an approximate drainage distance of 1.40

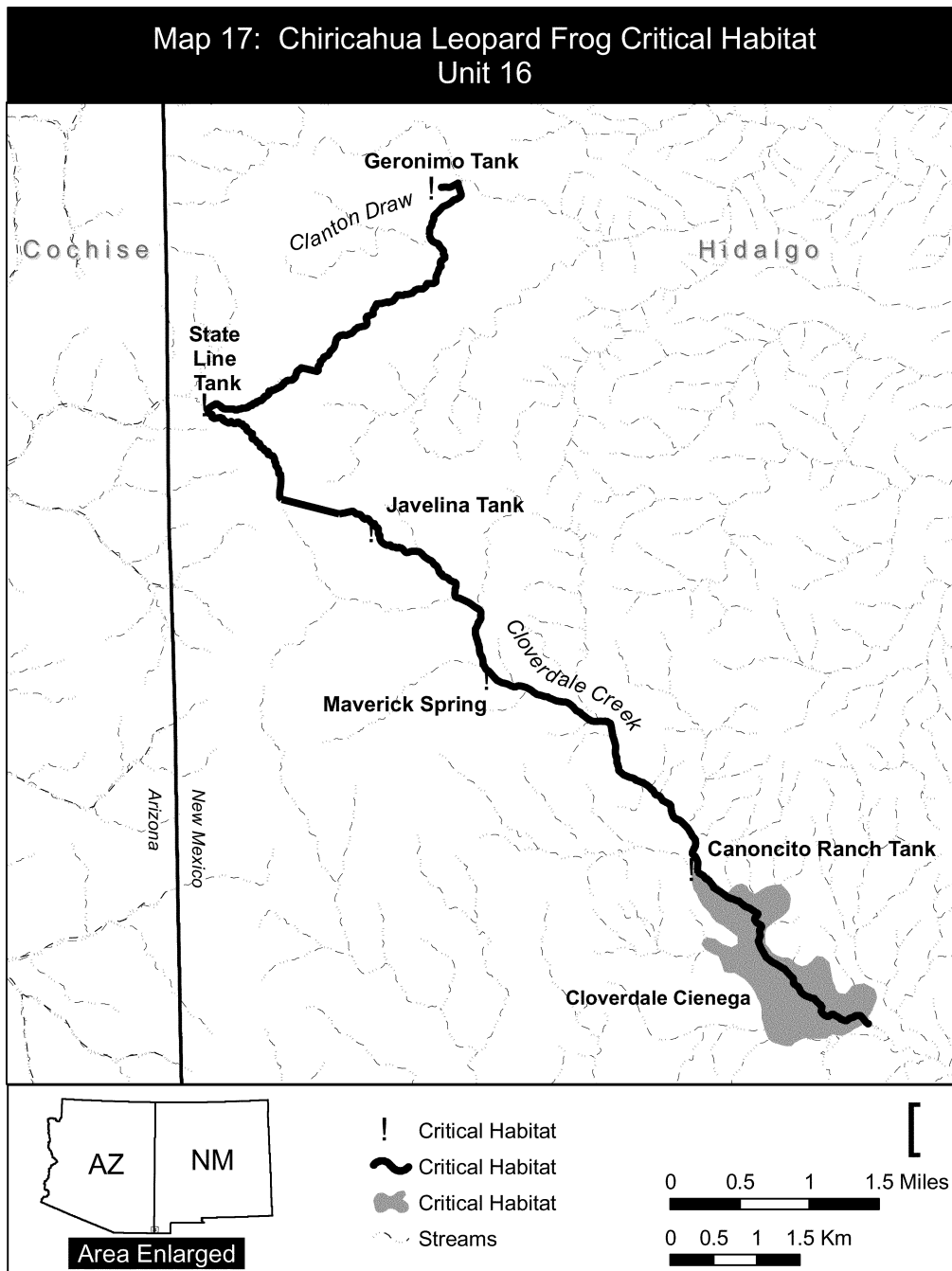
miles (2.26 kilometers) and 2,245 feet (684 meters) overland.

(ix) From Javelina Tank (31.484995 N, 109.024970 W) downstream in

Cloverdale Creek to the Canoncito Ranch Tank (31.449553 N, 109.986836 W), to include Maverick Spring (31.469376 N, 109.011142 W), an

approximate stream distance of 3.88 miles (6.24 kilometers).

(x) Note: Map of Unit 16, Peloncillo Mountains Tanks (Map 17), follows:



(22) Unit 17: Cave Creek, Cochise County, Arizona.

(i) Herb Martyr Pond (31.87243 N, 109.23418 W).

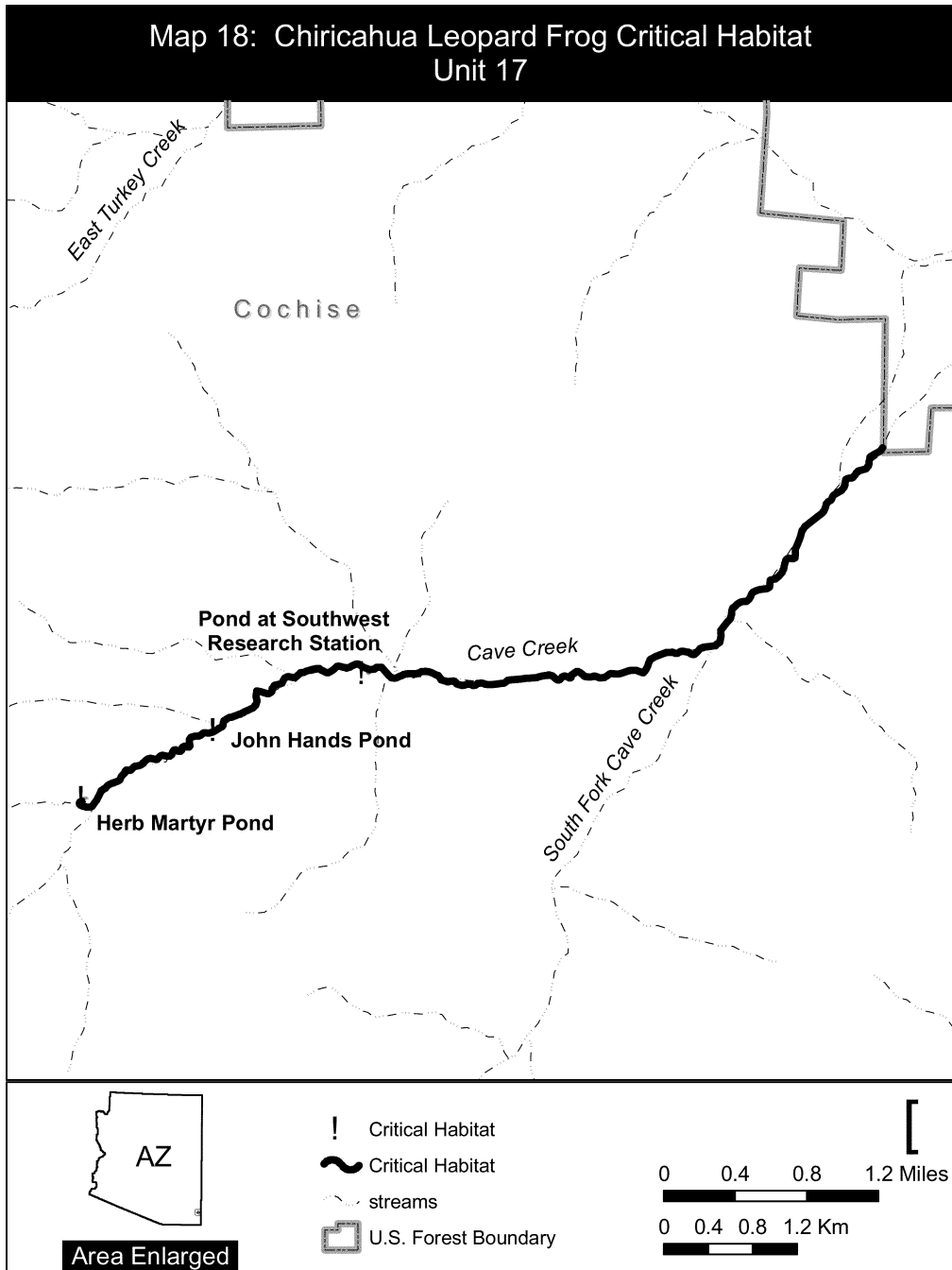
(ii) John Hands Pond below the dam (31.87868 N, 109.20470 W).

(iii) Pond at the Southwest Research Station (31.883235 N, 109.208670 W).

(iv) Cave Creek from Herb Martyr Pond (31.87243 N, 109.23418 W) downstream to the U.S. Forest Service boundary (31.899659 N, 109.159987 W), to include John Hands Pond (31.87868

N, 109.20470 W) and the Pond at the Southwest Research Station (31.883235 N, 109.208670 W), an approximate stream distance of 5.84 miles (9.41 kilometers).

(v) Note: Map of Unit 17, Cave Creek (Map 18), follows:

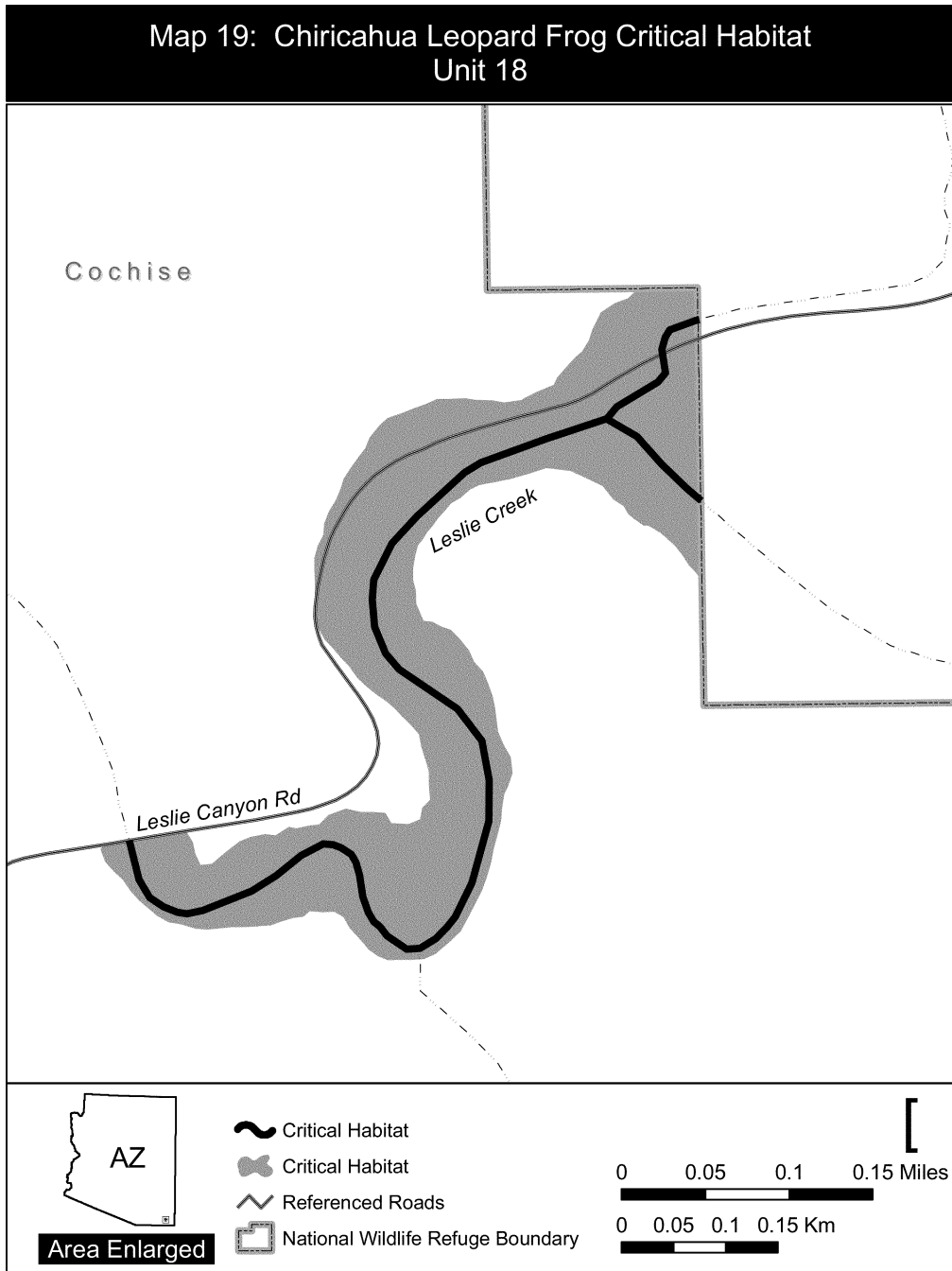


(23) Unit 18: Leslie Creek, Cochise County, Arizona.  
 (i) Leslie Creek from the upstream National Wildlife Refuge boundary

(31.591072 N, 109.505311 W) downstream to the Leslie Canyon Road crossing (31.588510 N, 109.511598 W),

an approximate stream distance of 4,094 feet (1,248 meters).  
 (ii) *Note:* Map of Unit 18, Leslie Creek (Map 19), follows:





(24) Unit 19: Rosewood and North Tanks, Cochise County, Arizona.

(i) Rosewood Tank (31.374888 N, 109.143796 W).

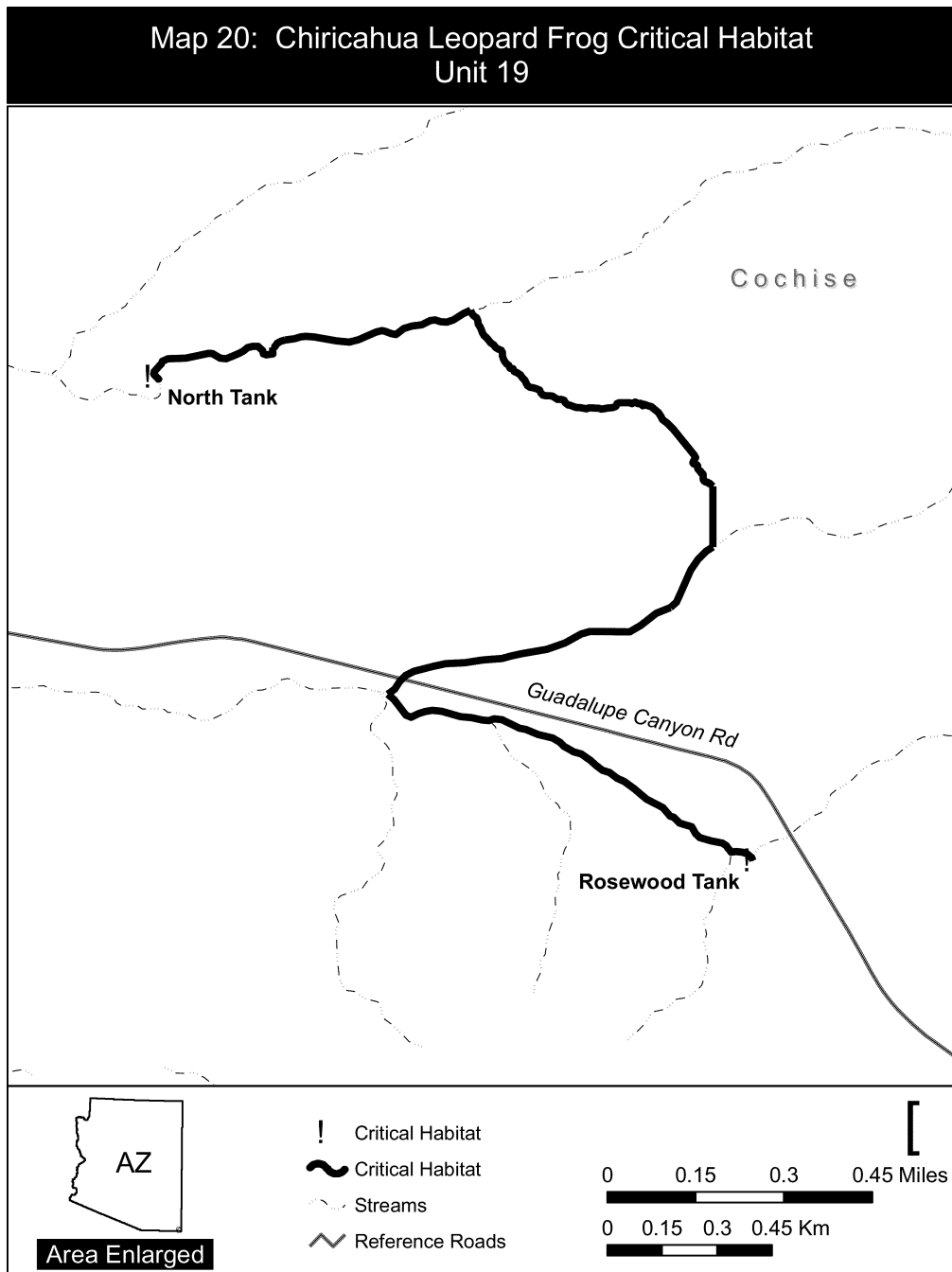
(ii) North Tank (31.38696 N, 109.16115 W).

(iii) From Rosewood Tank (31.374888 N, 109.143796 W) downstream in an unnamed drainage that is parallel to and just south of Guadalupe Canyon Road to its confluence with a large unnamed

drainage (31.379088 N, 109.154754 W), then upstream in that drainage, under Guadalupe Canyon Road and east to its confluence with a minor unnamed drainage (31.384072 N, 109.144919 W), then upstream in that unnamed minor drainage to its headwaters (31.384820 N, 109.145383 W), then overland to the headwaters of another unnamed drainage (31.385462 N, 109.145980 W),

then downstream in that drainage to its confluence with the drainage containing North Tank (31.388383 N, 109.151692 W), and then downstream in that drainage to North Tank, an approximate distance of 2.57 drainage miles (4.14 kilometers) and 543 feet (166 miles) overland.

(iv) *Note:* Map of Unit 19, Rosewood and North Tanks (Map 20), follows:



(25) Unit 20: Deer Creek, Graham County, Arizona.

(i) Home Ranch Tank (32.656879 N, 110.274556 W).

(ii) Penney Mine Tanks, which includes a series of 10 small impoundments in a drainage from approximately 32.668795 N, 110.257763 W downstream to 32.670055 N, 110.257310 W.

(iii) Clifford Tank (32.67130 N, 110.264877 W).

(iv) Vermont Tank (32.676883 N, 110.262404 W).

(v) Middle Tank (32.679691 N, 110.252180 W).

(vi) Deer Creek from a point where it exits a canyon and turns abruptly to the east (32.683937 N, 110.255290 W) upstream to its confluence with an unnamed drainage (32.673318 N, 110.262748 W); then upstream in that drainage to a confluence with four other drainages (32.671318 N, 110.262600 W); then upstream from that confluence in the western drainage to Clifford Tank (32.67130 N, 110.264877 W); then upstream from that confluence in the west-central drainage to an unnamed tank (32.666108 N, 110.269204 W); then directly overland southeast to another unnamed tank (32.665124 N,

110.265580 W); then downstream from that tank in an unnamed drainage to the aforementioned confluence (32.671318 N, 110.262600 W), and upstream in that unnamed drainage to a saddle (32.662529 N, 110.265717 W); then downstream from that saddle in an unnamed drainage to its confluence with an unnamed tributary to Gardner Creek (32.660409 N, 110.265303 W); and upstream in that unnamed tributary to Home Ranch Tank (32.656879 N, 110.274556 W), a distance of approximately 3.28 drainage miles (5.27 kilometers) and 1,216 feet (371 meters) overland.

(vii) From the largest of the Penney Mine Tanks (32.669696 N, 110.257652 W) directly overland to an unnamed tank (32.688150 N, 110.260309 W), and downstream in an unnamed drainage to the aforementioned confluence (32.671318 N, 110.262600 W), including another unnamed tank (32.669324 N, 110.261672 W) situated in that drainage,

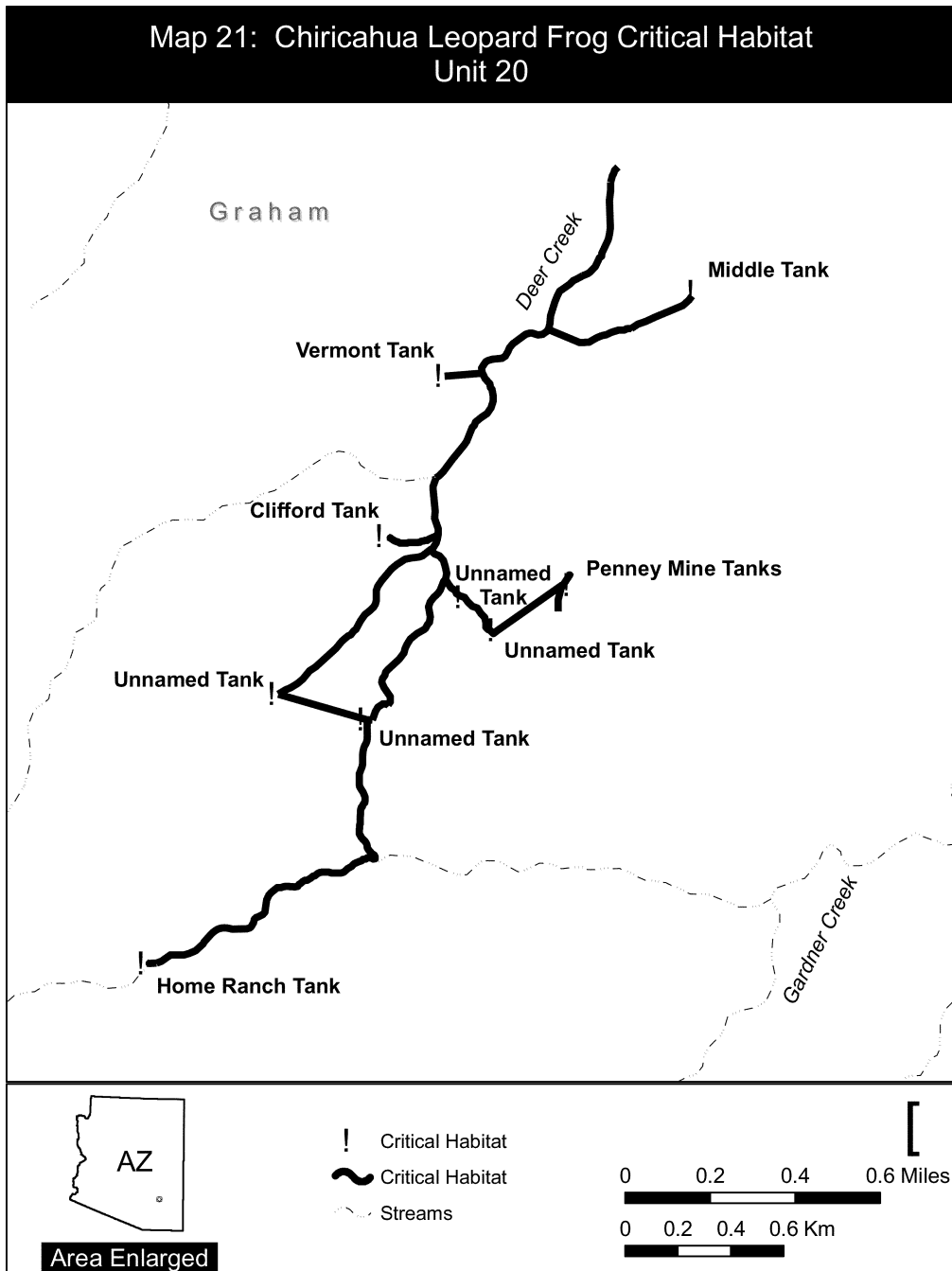
a distance of approximately 948 drainage feet (289 meters) and 1,051 feet (320 meters) overland.

(viii) From Vermont Tank (32.676883 N, 110.262404 W) directly overland for approximately 468 feet (143 meters) to Deer Creek (32.677037 N, 110.260815 W).

(ix) From Middle Tank (32.679691 N, 110.252180 W) upstream in an unnamed

drainage to a saddle (32.677989 N, 110.256915 W), then directly downslope to Deer Creek (32.678307 N, 110.258257 W), an approximate drainage distance of 1,530 feet (466 meters) and 436 feet (133 meters) overland.

(x) *Note:* Map of Unit 20, Deer Creek (Map 21), follows:

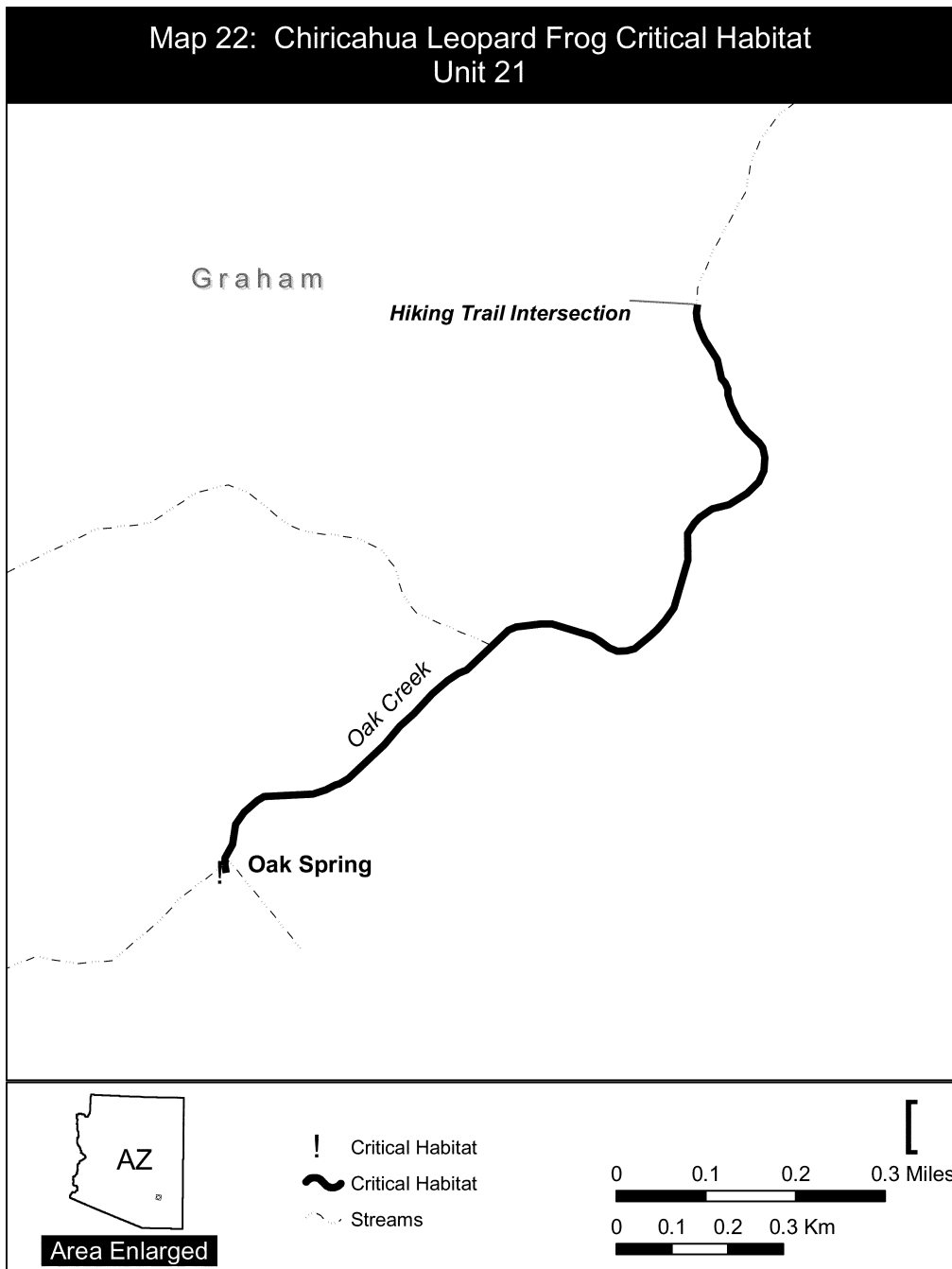


(26) Unit 21: Oak Spring and Oak Creek, Graham County, Arizona.

(i) Oak Creek from Oak Spring (32.673538 N, 110.293214 W)

downstream to where a hiking trail intersects the creek (32.682618 N, 110.283915 W), an approximate stream distance of 1.06 miles (1.71 kilometers).

(ii) *Note:* Map of Unit 21, Oak Spring and Oak Creek (Map 22), follows:



(27) Unit 22: Dagoon Mountains, Cochise County, Arizona.

(i) Shaw Tank (31.906230 N, 109.958350 W).

(ii) Tunnel Spring (31.881018 N, 109.948182 W).

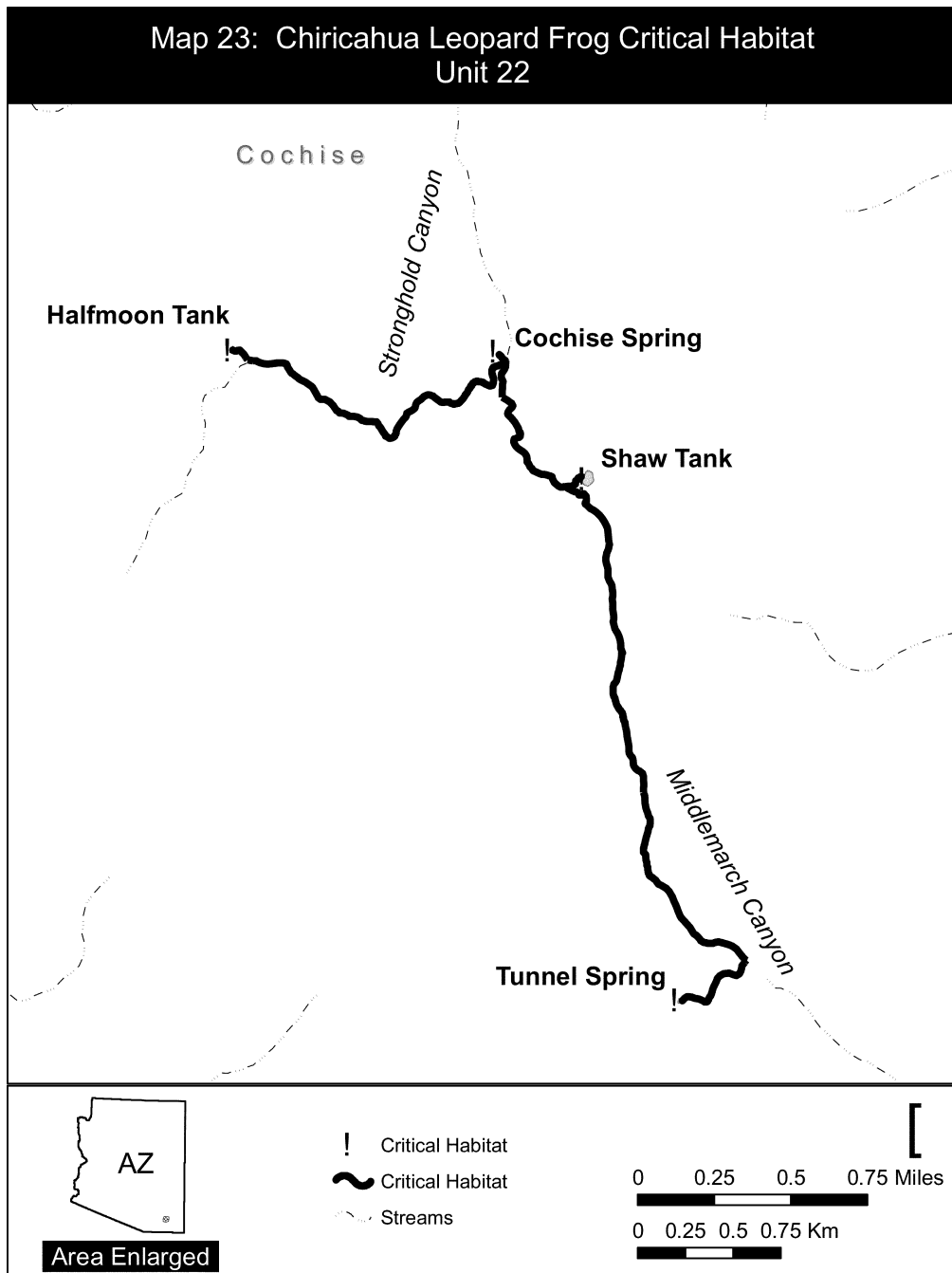
(iii) Halfmoon Tank (31.912453 N, 109.977963 W).

(iv) Stronghold Canyon from Halfmoon Tank (31.912453 N,

109.977963 W) downstream to Cochise Spring (31.912026 N, 109.963266 W), then upstream in an unnamed canyon to Shaw Tank (31.906230 N, 109.958350 W), and continuing upstream to the headwaters of that unnamed canyon (31.898491 N, 109.956589 W), then across a saddle and directly downslope to Middlemarch Canyon (31.894591 N, 109.956429 W), downstream in

Middlemarch Canyon to its confluence with an unnamed drainage (31.883322 N, 109.949925 W), then upstream in that drainage to Tunnel Spring (31.881018 N, 109.948182 W), an approximate distance of 3.71 drainage miles (5.97 kilometers) and 1,300 feet (396 meters) overland.

(v) *Note:* A Map of Unit 22, Dagoon Mountains (Map 23), follows:



(28) Unit 23: Buckskin Hills, Yavapai County, Arizona.

(i) Sycamore Basin Tank (34.481619 N, 111.641676 W).

(ii) Middle Tank (34.473076 N, 111.624488 W).

(iii) Walt's Tank (34.455959 N, 111.638497 W).

(iv) Partnership Tank (34.452241 N, 111.646271 W).

(v) Black Tank (34.462968 N, 111.623554 W).

(vi) Buckskin Tank (34.472660 N, 111.652468 W).

(vii) Doren's Defeat Tank (34.446271 N, 111.641269 W).

(viii) Needed Tank (34.461023 N, 111.631271 W).

(ix) From Middle Tank (34.473076 N, 111.624488 W) downstream in Boulder Canyon to its confluence with an unnamed drainage that comes in from the northwest (34.455688 N, 111.625895 W), to include Black Tank (34.462968 N, 111.623554 W); then upstream in that unnamed drainage to a saddle (34.464120 N, 111.633633 W), to include Needed Tank (34.461023 N, 111.631271 W); then downstream from the saddle in an unnamed drainage to its confluence with another unnamed drainage (34.466209 N, 111.636096);

then downstream in that drainage to the confluence with an unnamed drainage (34.450688 N, 111.638111 W), to include Walt's Tank (34.455959 N, 111.638497 W), and upstream in that unnamed drainage to Partnership Tank (34.452241 N, 111.646271 W); then upstream from the aforementioned confluence (34.466209 N, 111.636096) in the unnamed drainage that includes Walt's Tank to a point where the drainage turns east towards Boulder Canyon (34.469911 N, 111.630080 W), an approximate distance of 3.65 drainage miles (5.87 kilometers) and 425 feet (130 meters) overland.

(x) From Doren's Defeat Tank (34.446271 N, 111.641269 W) upstream in an unnamed drainage to Partnership Tank (34.452241 N, 111.646271 W), an approximate drainage distance of 3,310 feet (1,009 meters).

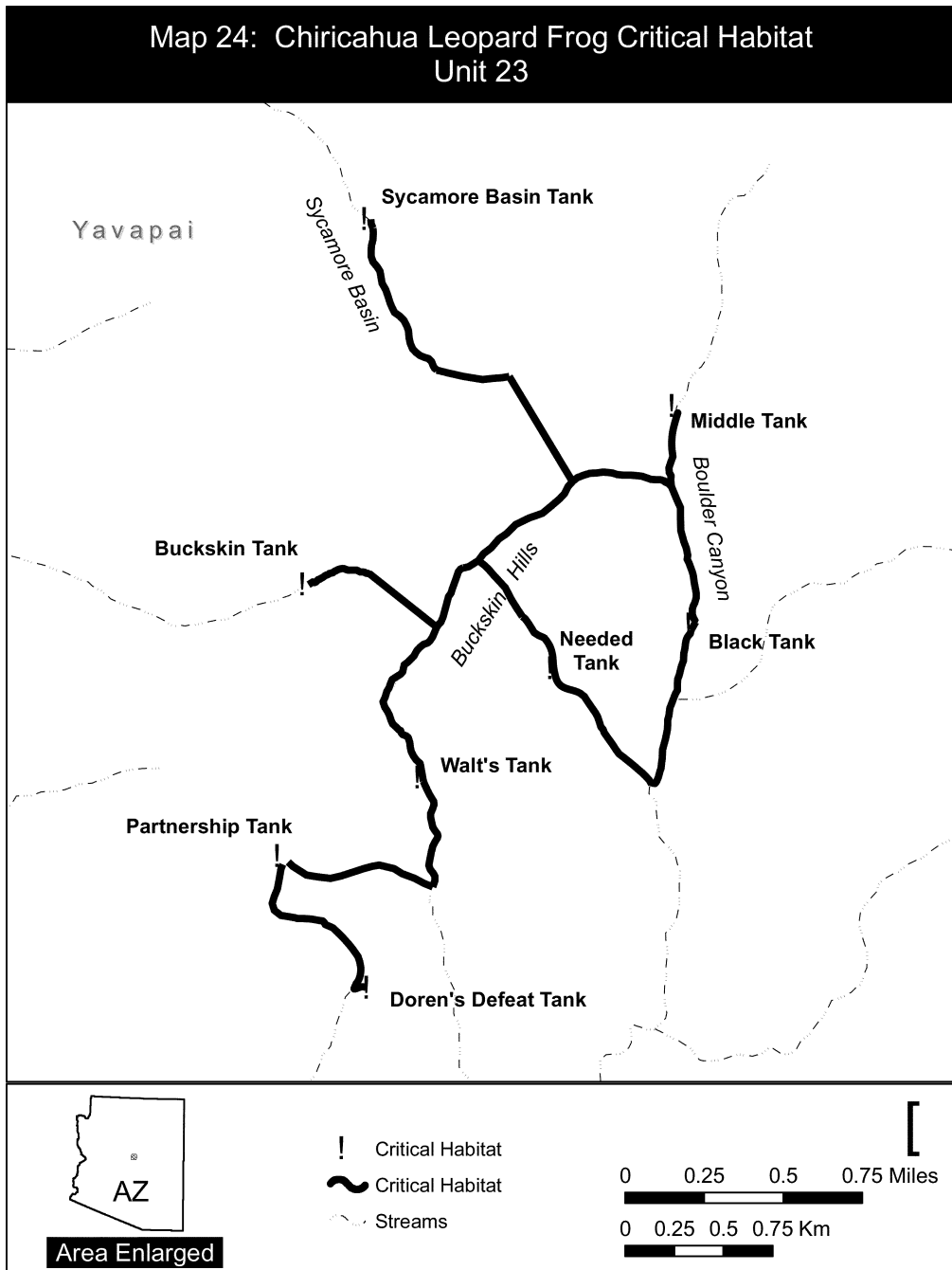
(xi) From the confluence of an unnamed drainage with Boulder Canyon (34.469515 N, 111.624979 W) west to a point where the drainage turns southwest (34.469911 N, 111.630080

W), then directly overland to the top of Sycamore Basin (34.473970 N, 111.633584 W), and then downstream in Sycamore Basin to Sycamore Basin Tank (34.481619 N, 111.641676 W), an approximate distance of 4,658 drainage feet (1,420 meters) and 1,827 feet (557 meters) overland.

(xii) From Buckskin Tank upstream in an unnamed drainage to the top of that drainage (34.465121 N, 111.641428 W),

then directly overland to an unnamed drainage (34.462851 N, 111.637797 W) that contains Walt's Tank, an approximate distance of 1,109 drainage feet (338 meters) and 1,429 feet (435 meters) overland.

(xiii) *Note:* Map of Unit 23, Buckskin Hills (Map 24), follows:



(29) Unit 24: Crouch, Gentry, and Cherry Creeks, and Parallel Canyon, Gila County, Arizona.

(i) Trail Tank (34.176747 N, 110.812383 W).

(ii) HY Tank (34.148580 N, 110.831331 W).

(iii) Carroll Spring (34.133090 N, 110.838673 W).

(iv) West Prong of Gentry Creek from the confluence with an unnamed drainage (34.133243 N, 110.827755 W) downstream to a point (34.123475 N, 110.827872 W) where the creek turns southwest and is directly east of a saddle, then west overland across that saddle to Cunningham Spring (34.121883 N, 110.841424 W), an approximate distance of 3,837 drainage feet (1,169 meters) and 1,883 feet (574 meters) overland.

(v) Pine Spring (34.148580 N, 110.831331 W).

(vi) Bottle Spring (34.145180 N, 110.837515 W).

(vii) Cherry Creek from Rock Spring (34.155505 N, 110.852478 W) upstream

to its confluence with an unnamed drainage (34.166956 N, 110.815587 W), then upstream in that drainage and across a saddle (34.176129 N, 110.808920 W), then downstream in an unnamed drainage to Trail Tank (34.176747 N, 110.812383 W), an approximate distance of 3.77 drainage miles (6.07 kilometers) and 975 feet (297 meters) overland.

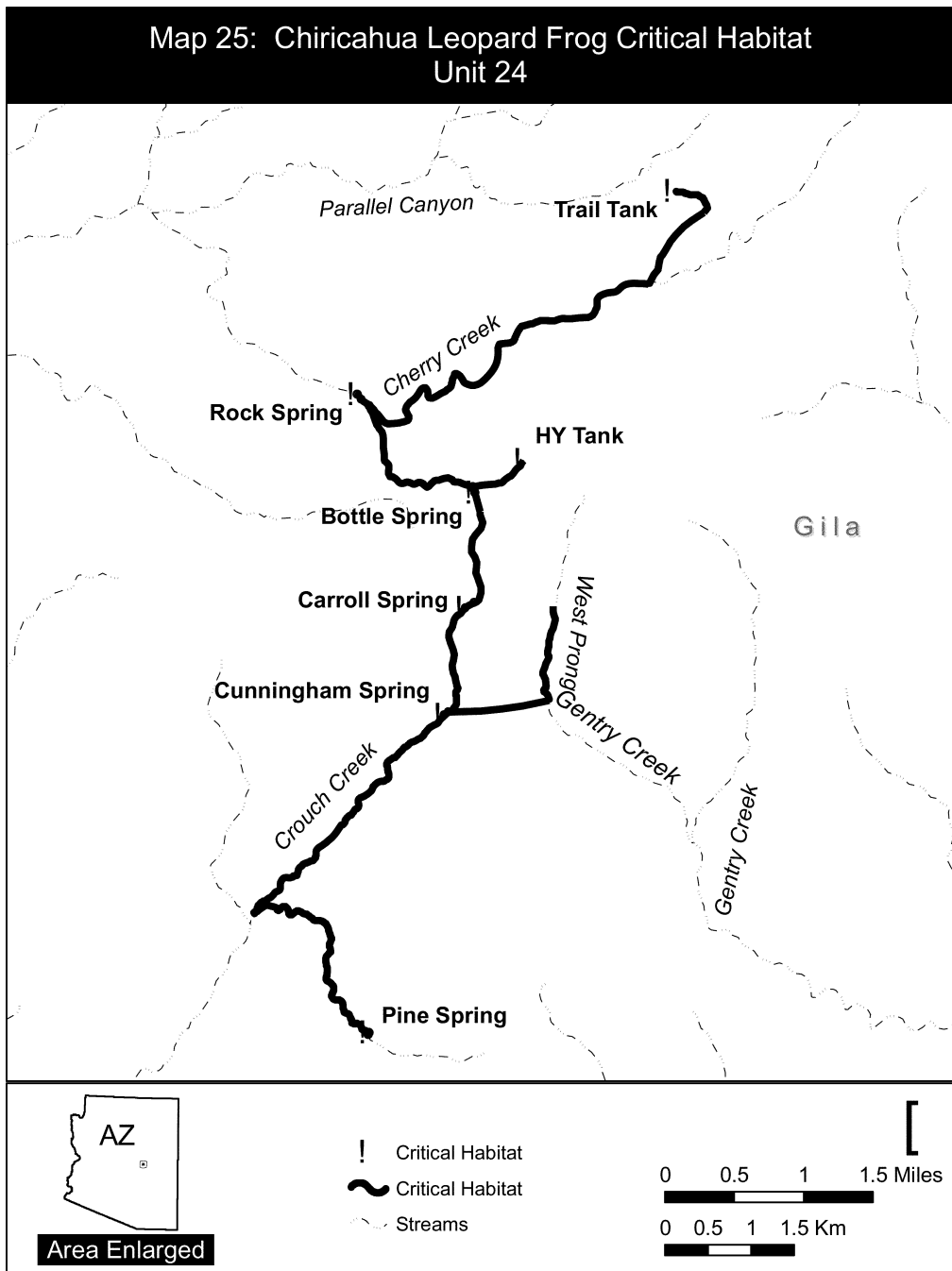
(viii) Crouch Creek from its headwaters just south of Highway 288 (34.143151 N, 110.836876 W) downstream to an unnamed drainage leading to Pine Spring (34.102235 N, 110.864341 W), to include Cunningham Spring and Carroll Spring; then upstream in that unnamed drainage from Crouch Creek to Pine Spring (34.148580 N, 110.831331 W), an

approximate drainage distance of 5.48 miles (8.82 kilometers).

(ix) From HY Tank (34.176747 N, 110.812383 W) downstream in an unnamed drainage to its confluence with Cherry Creek (34.154309 N, 110.85077 W), to include Bottle Spring (34.145180 N, 110.837515 W), an approximate stream distance of 1.66 miles (2.67 kilometers).

(x) From Bottle Spring (34.145180 N, 110.837515 W) south over a low saddle to the headwaters of Crouch Creek (34.143151 N, 110.836876 W), an approximate distance of 762 feet (232 meters) overland.

(xi) *Note:* Map of Unit 24, Crouch, Gentry, and Cherry Creeks, and Parallel Canyon (Map 25), follows:



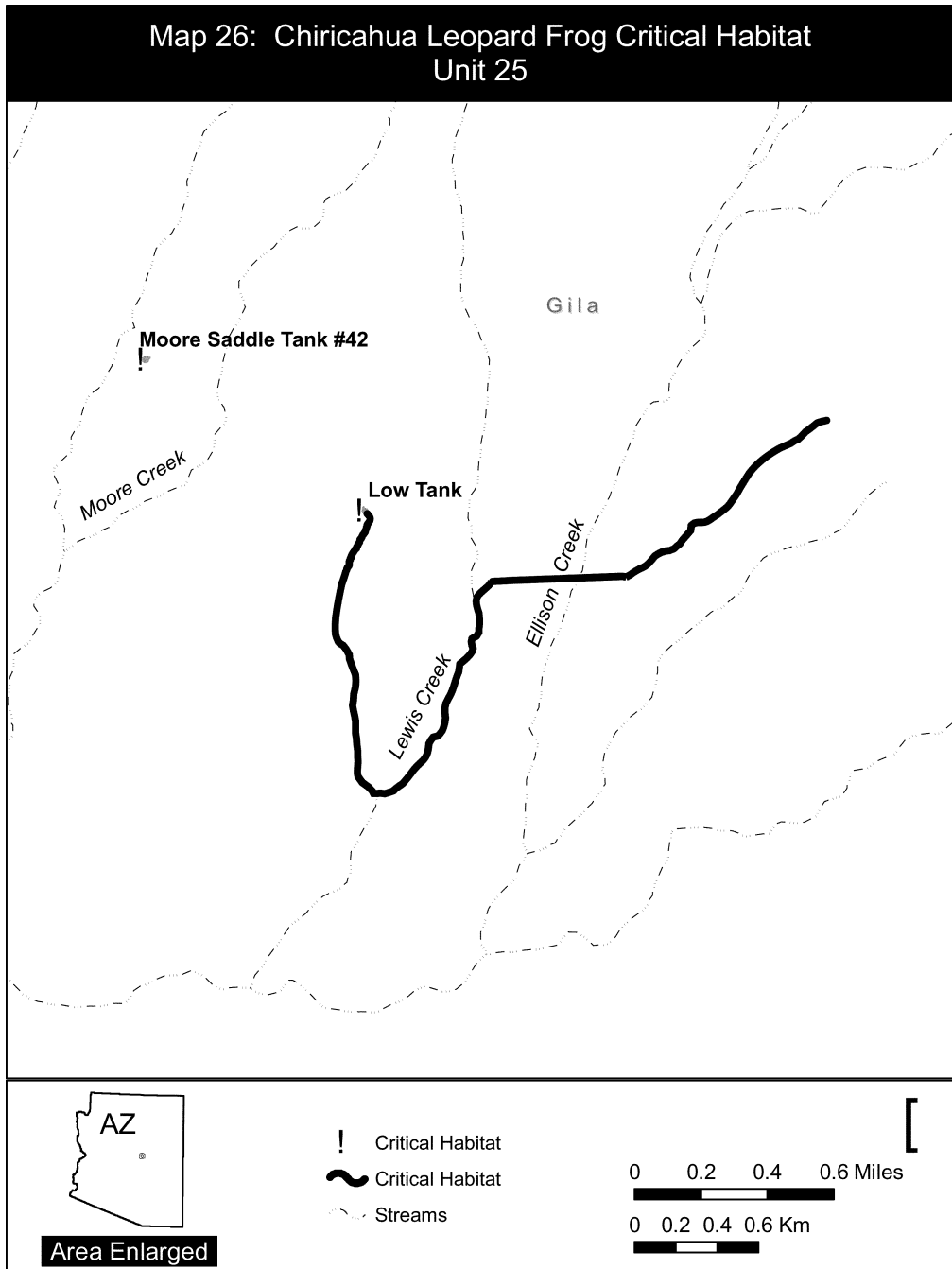
(30) Unit 25: Ellison and Lewis Creeks, Gila County, Arizona.  
 (i) Moore Saddle Tank #42 (34.374063 N, 111.205040 W).  
 (ii) Low Tank (34.36768 N, 111.19347 W).  
 (iii) Unnamed tributary to Ellison Creek from its confluence with an unnamed drainage (34.371458 N,

111.169111 W) downstream to Ellison Creek below Pyle Ranch (34.364667 N, 111.179966 W), then directly west across the Ellison Creek floodplain and over a low saddle to Lewis Creek below Pyle Ranch (34.364391 N, 111.186742 W), then downstream in Lewis Creek to its confluence with an unnamed

drainage (34.354912 N, 111.192547 W), and then upstream in that unnamed drainage to Low Tank (34.36768 N, 111.19347 W), an approximate distance of 2.52 drainage miles (4.05 kilometers) and 1,070 feet (326 meters) overland.

(iv) *Note:* Map of Unit 25, Ellison and Lewis Creeks (Map 26), follows:

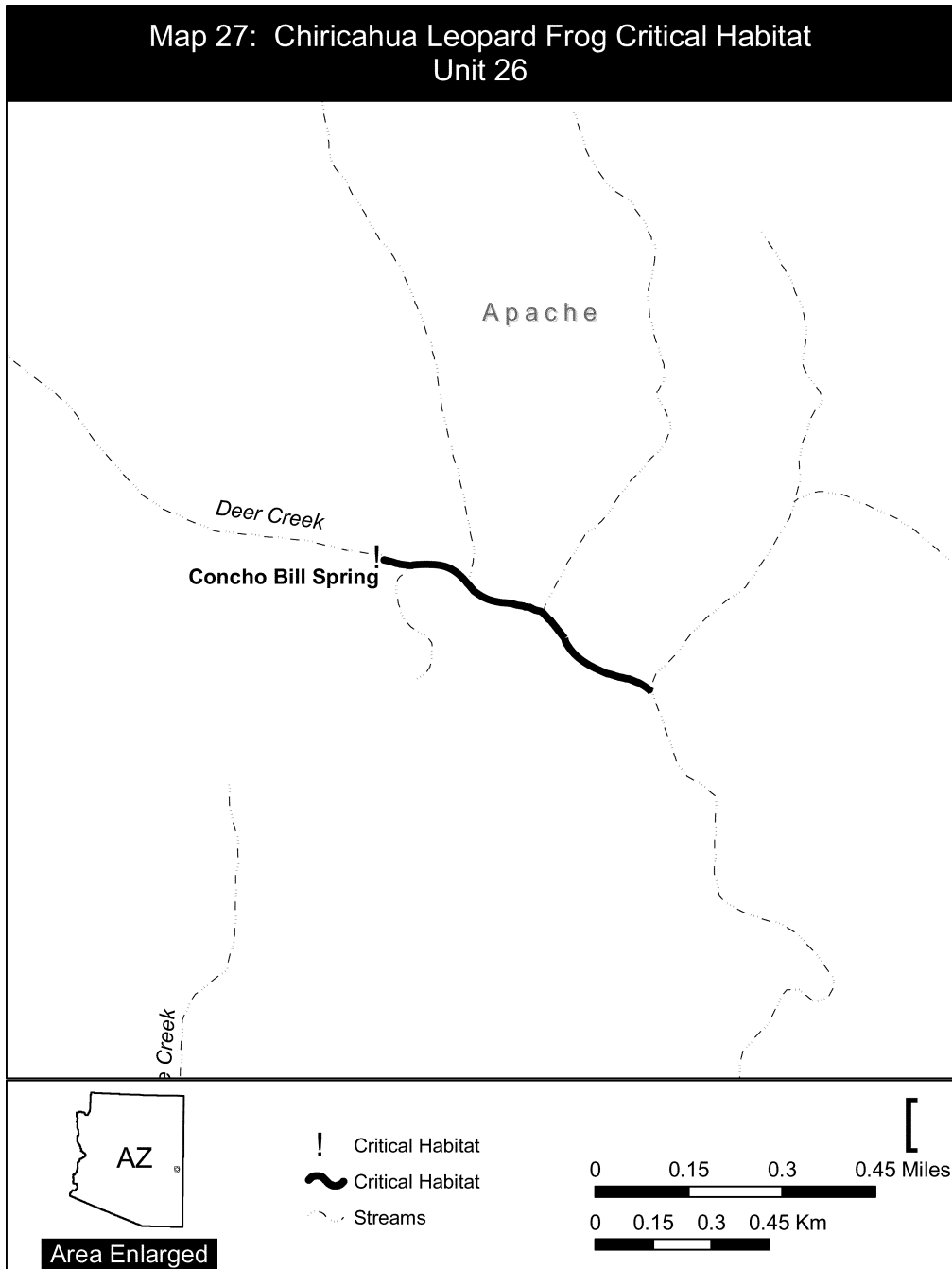




(31) Unit 26: Concho Bill and Deer Creek, Apache County, Arizona.  
 (i) From Concho Bill Spring (33.830088 N, 109.366540 W)

downstream in Deer Creek to its confluence with an unnamed drainage (33.827115 N, 109.359495 W), an

approximate drainage distance of 2,667 feet (813 meters).  
 (ii) *Note:* Map of Unit 26, Concho Bill and Deer Creek (Map 27), follows:



(32) Unit 27: Campbell Blue and Coleman Creeks, Greenlee County, Arizona.

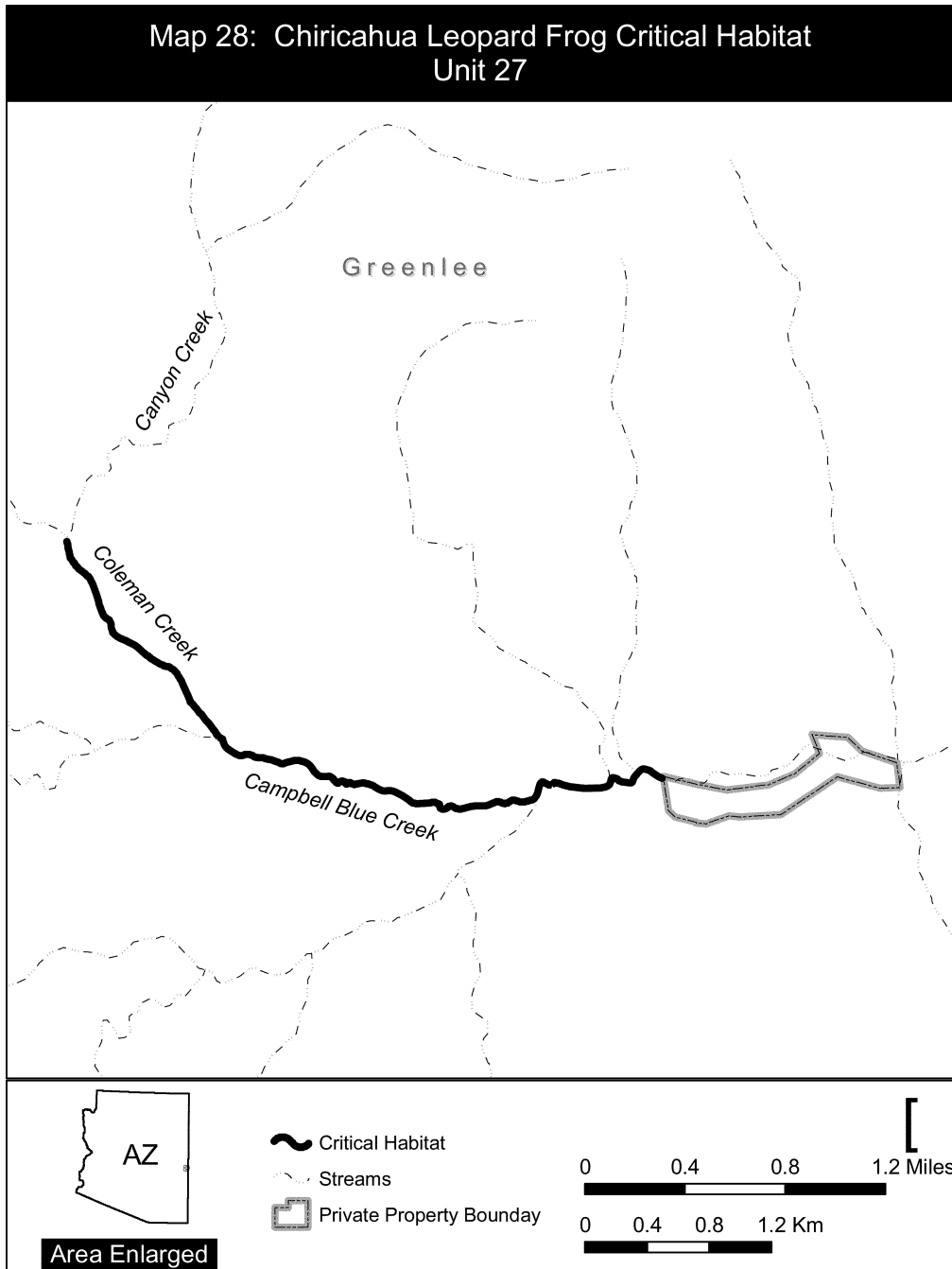
(i) Campbell Blue Creek from the upstream boundary of Luce Ranch (33.735956 N, 109.127746 W) upstream to its confluence with Coalman Creek

(33.738560 N, 109.158679 W), an approximate stream distance of 2.04 miles (3.28 kilometers).

(ii) Coleman Creek from its confluence with Campbell Blue Creek (33.738560 N, 109.158679 W) upstream to its confluence with Canyon Creek

(33.750139 N, 109.168850 W), an approximate stream distance of 1.04 miles (1.68 kilometers).

(iii) *Note:* Map of Unit 27, Campbell Blue and Coleman Creeks (Map 28), follows:



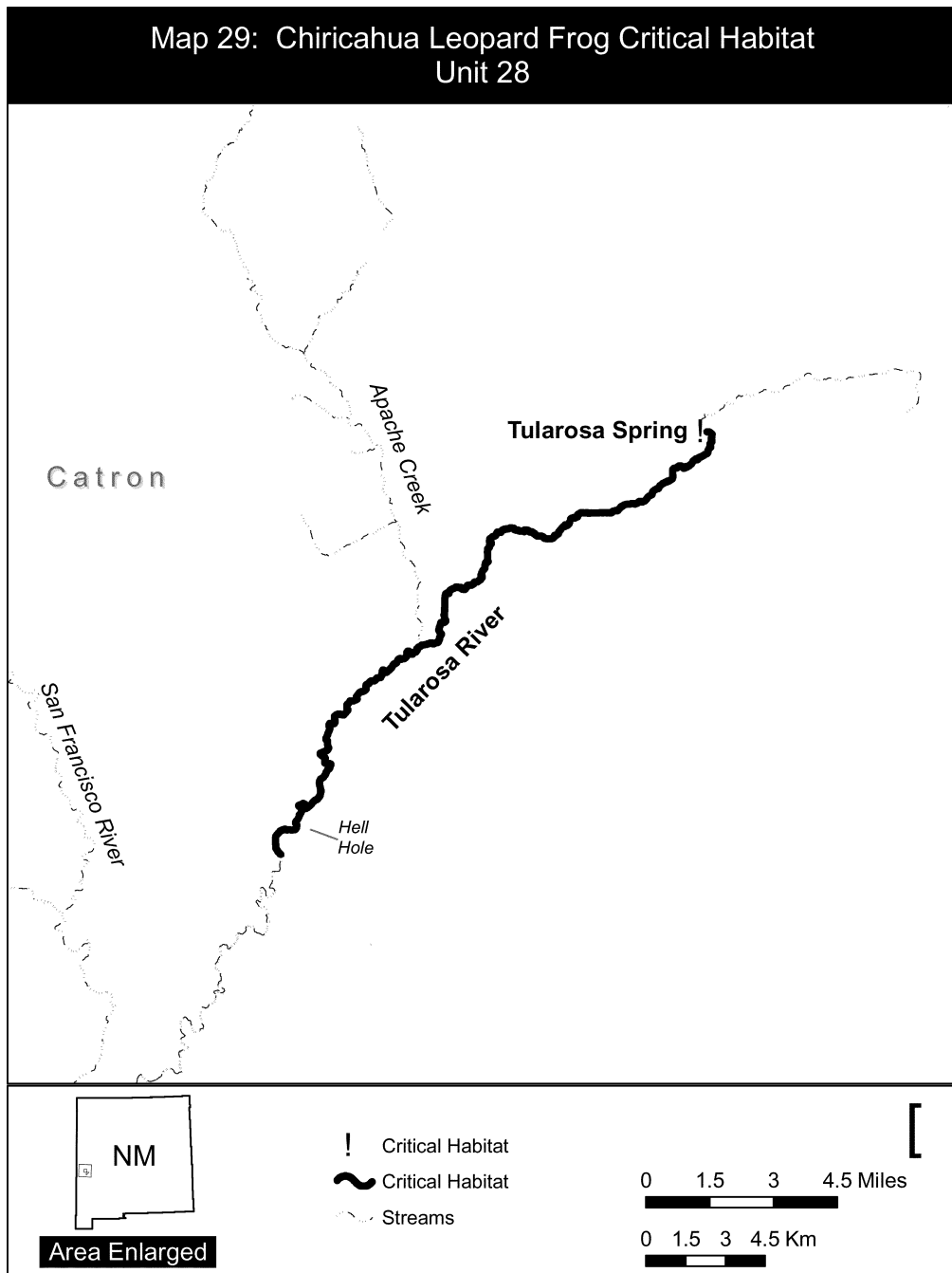
(33) Unit 28: Tularosa River, Catron County, New Mexico.

(i) Tularosa River from the upper end of Tularosa Spring (33.903798 N,

108.501926 W) downstream to the entrance to the canyon downstream of Hell Hole (33.762737 N, 108.681551 W),

an approximate river distance of 19.31 miles (31.08 kilometers).

(ii) Note: Map of Unit 28, Tularosa River (Map 29), follows:



(34) Unit 29: Deep Creek Divide Area, Catron County, New Mexico.

(i) Long Mesa Tank (33.551664 N, 108.686841 W).

(ii) Cullum Tank (33.554864 N, 108.676961 W).

(iii) Burro Tank (33.571146 N, 108.638682 W).

(iv) North Fork of Negrito Creek from its confluence with South Fork of Negrito Creek (33.607082 N, 108.631340 W) upstream to its confluence with an unnamed drainage (33.612529 N, 108.614731 W), an approximate stream distance of 1.37 miles (2.20 kilometers).

(v) South Fork of Negrito Creek from its confluence with North Fork of Negrito Creek (33.607082 N, 108.631340 E) upstream to an impoundment (33.599047 N, 108.621300 W), including three other impoundments along the channel (33.601890 N, 108.622227 W; 33.602845 N, 108.622764 W; and 33.603810 N, 108.623971 W), an approximate stream distance of 4,821 feet (1,469 meters).

(vi) From Burro Tank (33.571146 N, 108.638682 W) downstream in Burro Canyon to Negrito Creek (22.609589 N, 108.638448 W), then upstream in Negrito Creek to the confluence of North

and South Forks of Negrito Creeks (33.607082 N, 108.631340 W), an approximate stream distance of 3.80 miles (6.12 kilometers).

(vii) From Long Mesa Tank (33.551664 N, 108.686841 W) directly overland and east to Shotgun Canyon (33.550816 N, 108.681110 W), then downstream in that canyon to Cullum Tank (33.554864 N, 108.676961 W), an approximate distance of 2,003 drainage feet (610 meters) and 1,801 feet (549 meters) overland.

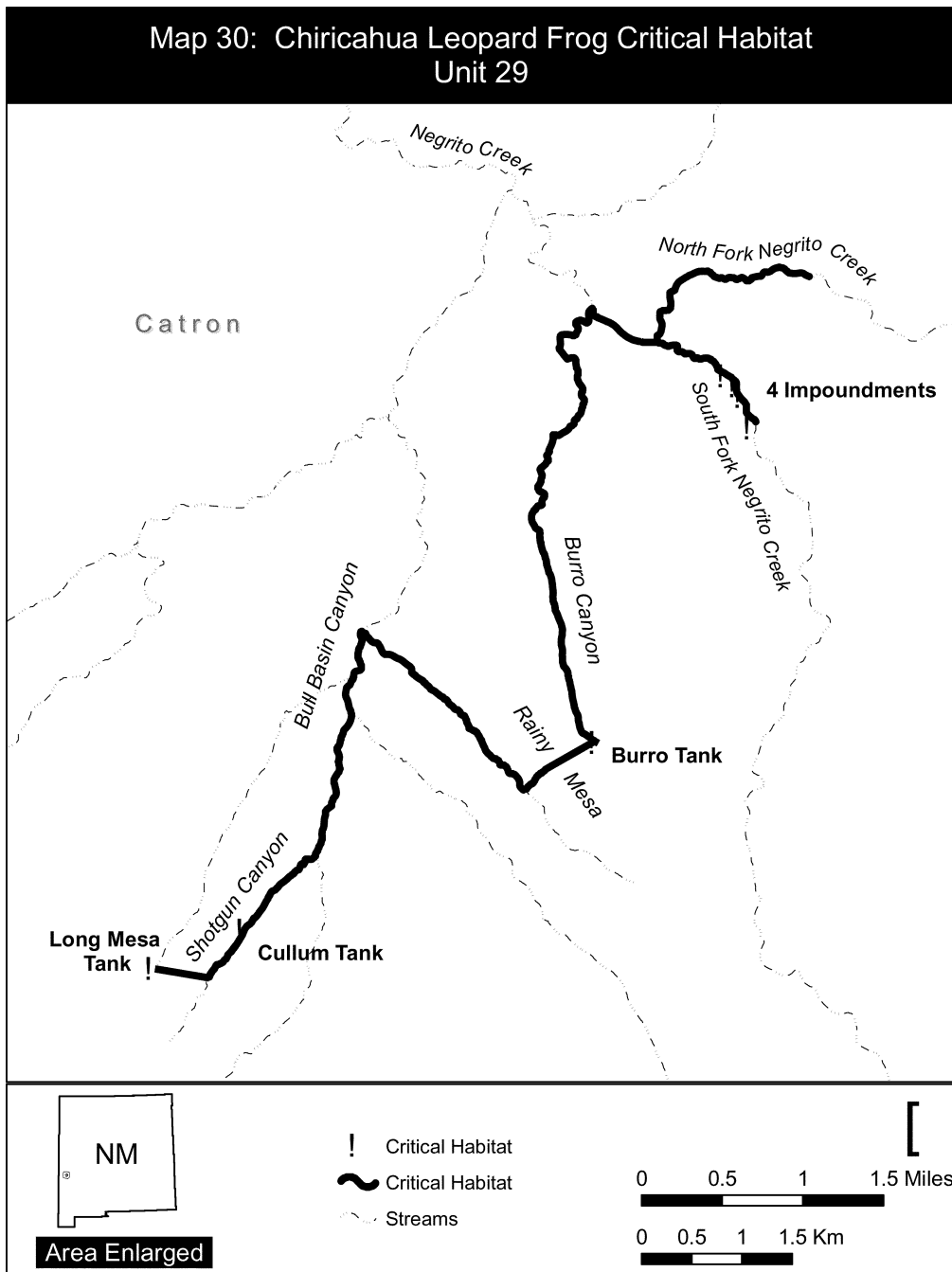
(viii) From Cullum Tank (33.554864 N, 108.676961 W) downstream in Shotgun and Bull Basin Canyons to a

confluence with an unnamed drainage (33.581626 N, 108.663624 W), then upstream in that drainage to the confluence with a minor drainage leading off Rainy Mesa from the east-

northeast (33.567121 N, 108.646776 W), then upstream in that drainage and directly east-northeast across Rainy Mesa to Burro Tank (33.571146 N, 108.638682 W), an approximate

distance of 3.88 drainage miles (6.24 kilometers) and 1,863 feet (568 meters) overland.

(ix) *Note:* Map of Unit 29, Deep Creek Divide Area (Map 30), follows:



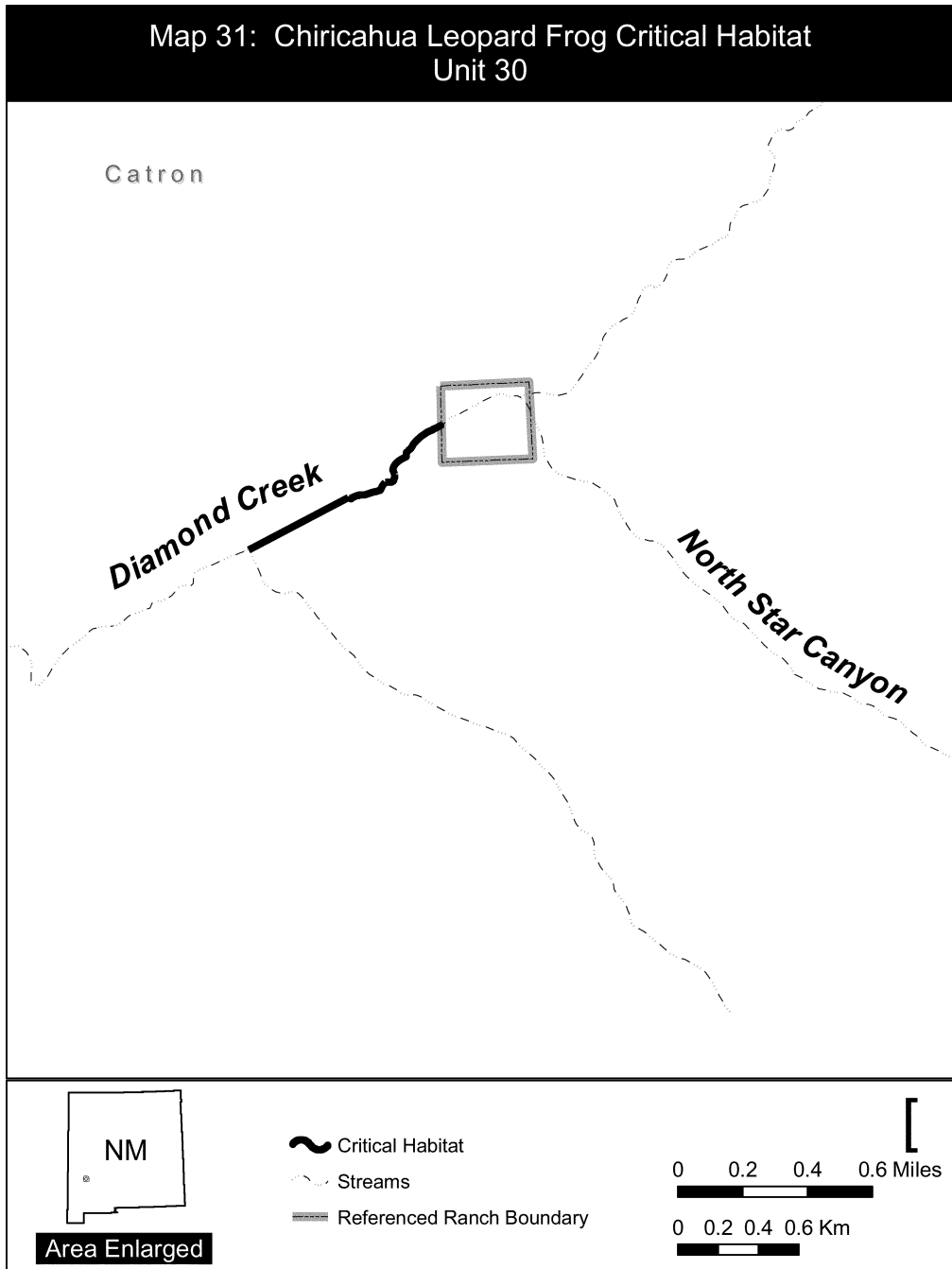
(35) Unit 30: Main Diamond Creek, Catron County, New Mexico.

(i) Main Diamond Creek, from the downstream boundary of Links Ranch (33.269512 N, 108.105542 W)

downstream to the confluence with an unnamed drainage that comes in from the south, which is also where Main Diamond Creek enters a canyon (33.264514 N, 108.116019 W), an

approximate stream distance of 3,980 feet (1,213 meters).

(ii) *Note:* Map of Unit 30, Main Diamond Creek (Map 31), follows:

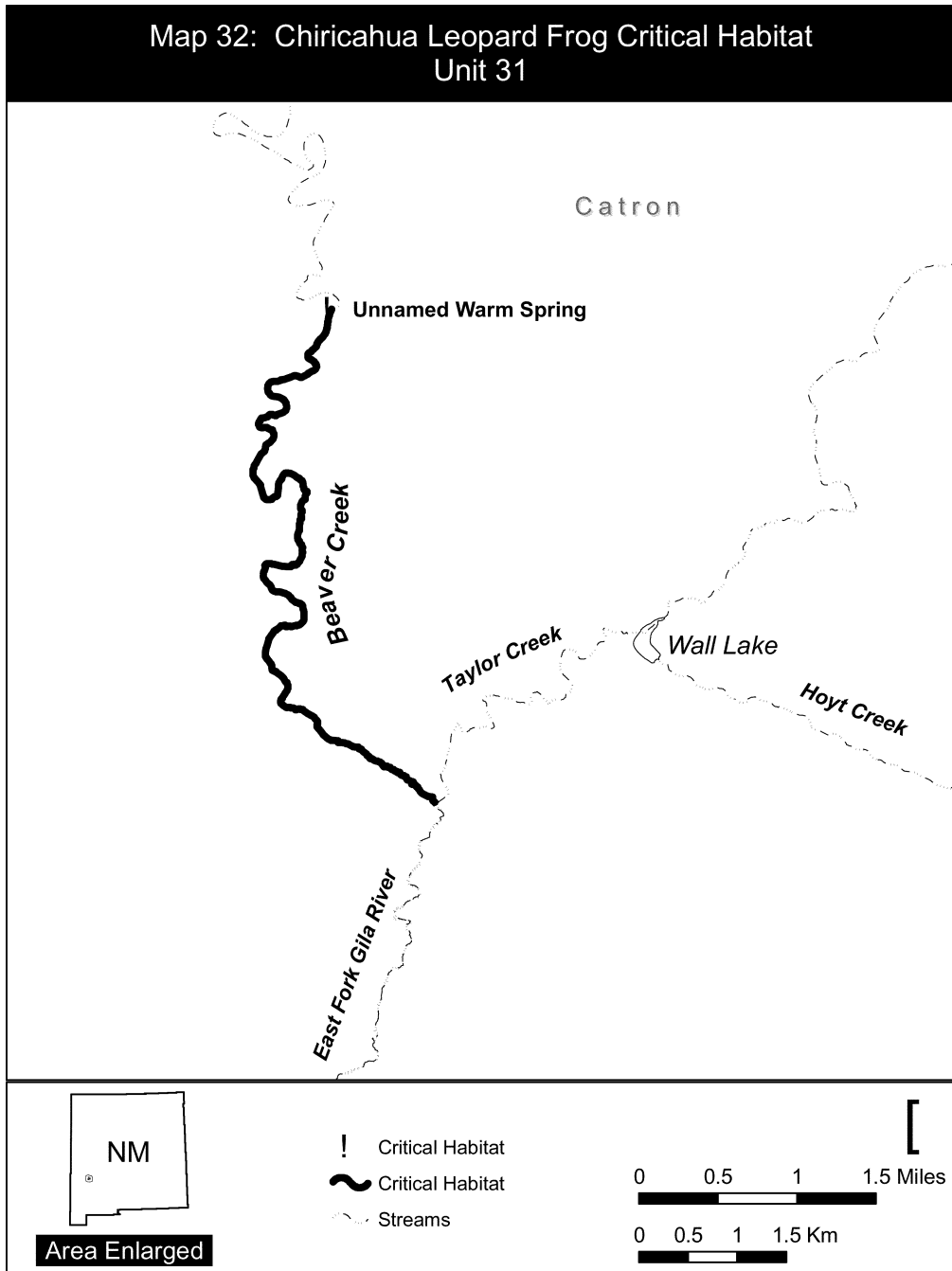


(36) Unit 31: Beaver Creek, Catron County, New Mexico.

(i) Beaver Creek from an unnamed warm spring (33.380952 N, 108.111761

W) downstream to its confluence with Taylor Creek (33.334694 N, 108.101543 W), an approximate stream distance of 5.59 miles (8.89 kilometers).

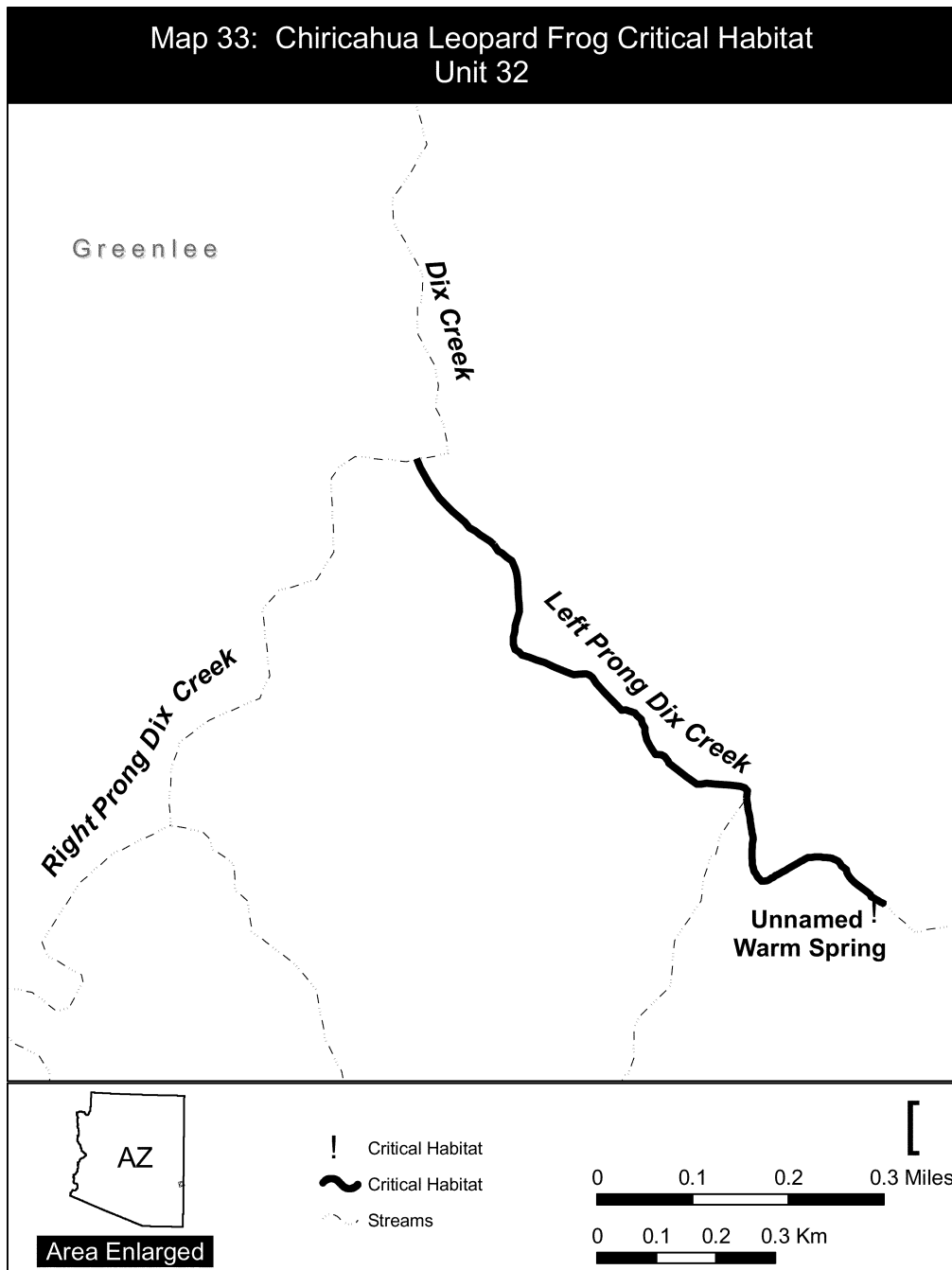
(ii) *Note:* Map of Unit 31, Beaver Creek (Map 32), follows:



(37) Unit 32: Left Prong of Dix Creek, Greenlee County, Arizona.  
 (i) Left prong of Dix Creek from an unnamed warm spring (33.179413 N,

109.149176 W) above "The Hole" downstream to its confluence with the right prong of Dix Creek (33.186657 N,

109.157754 W), an approximate stream distance of 4,248 feet (1,295 meters).  
 (ii) Note: Map of Unit 32, Left Prong of Dix Creek (Map 33), follows:



(38) Unit 33: Rattlesnake Pasture Tank and Associated Tanks, Greenlee County, Arizona.

(i) Rattlesnake Pasture Tank (33.093987 N, 109.151714 W).

(ii) Rattlesnake Gap Tank (33.098497 N, 109.162152 W).

(iii) Buckhorn Tank (33.105613 N, 109.155506 W).

(iv) From Rattlesnake Pasture Tank (33.093987 N, 109.151714 W)

downstream in an unnamed drainage to

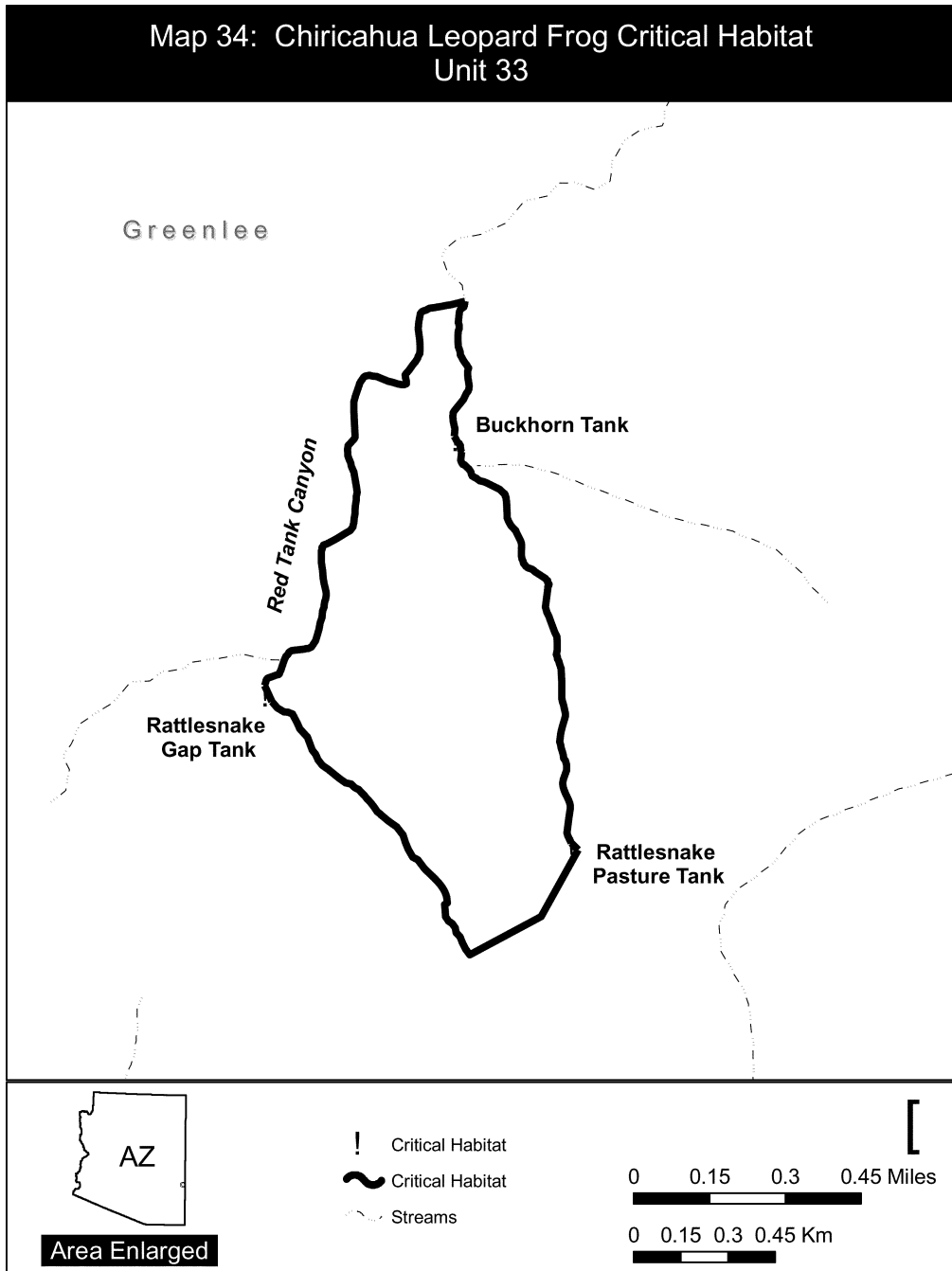
its confluence with Red Tank Canyon (33.109603 N, 109.155549 W), to include Buckhorn Tank (33.105613 N, 109.155506 W); then upstream in Red Tank Canyon to Rattlesnake Gap Tank (33.098497 N, 109.162152 W), an approximate drainage distance of 2.27 miles (3.65 kilometers).

(v) From Rattlesnake Gap Tank (33.098497 N, 109.162152 W) upstream in an unnamed drainage to its confluence with a minor drainage

(33.090898 N, 109.155386 W), then directly upslope to a saddle (33.091771 N, 109.152380), and across that saddle and directly downslope to Rattlesnake Pasture Tank (33.093987 N, 109.151714 W), an approximate distance of 3,722 drainage feet (1,134 meters) and 1,645 feet (501 meters) overland.

(vi) *Note:* Map of Unit 33, Rattlesnake Pasture Tank and Associated Tanks (Map 34), follows:

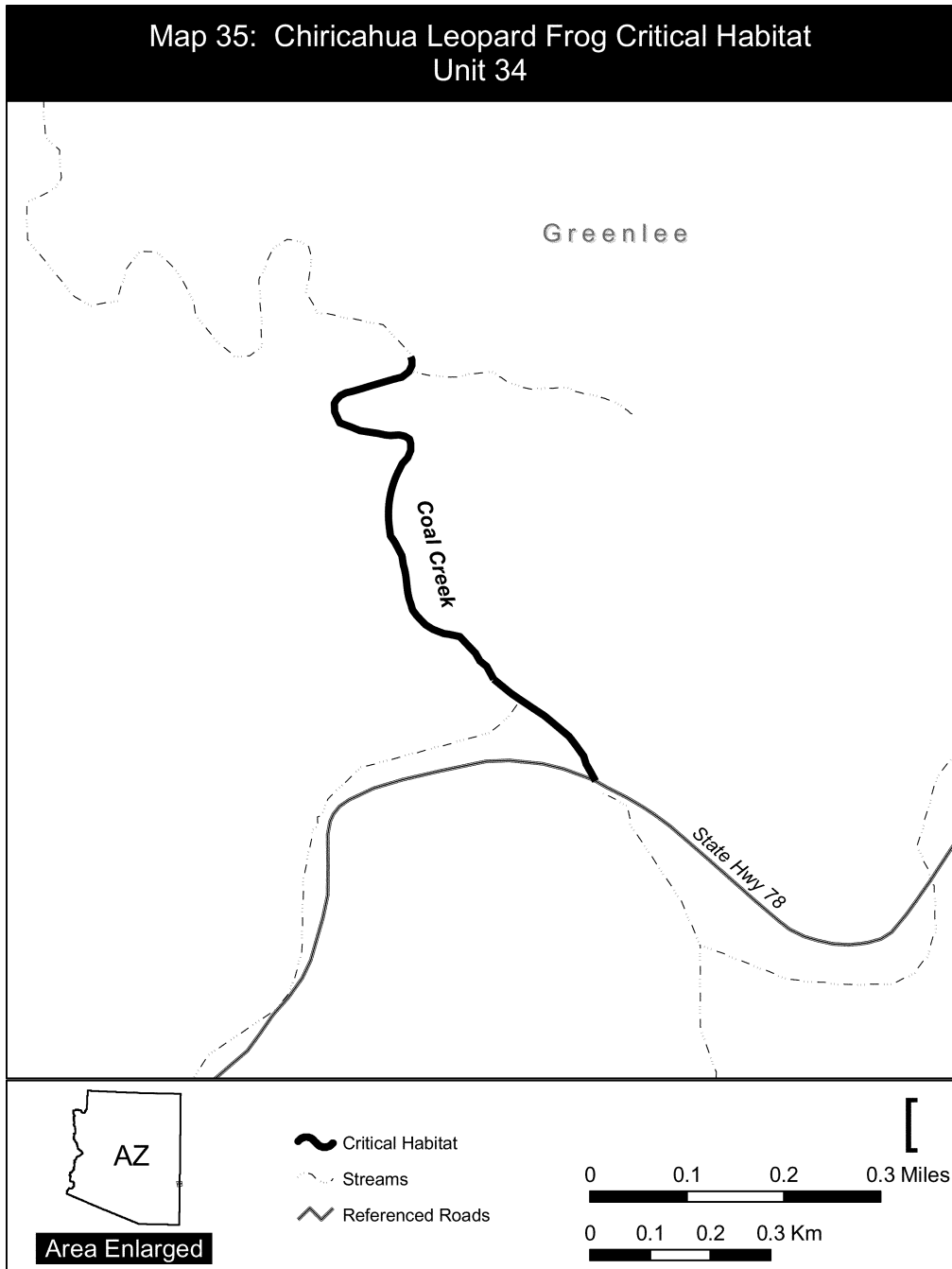




(39) Unit 34: Coal Creek, Greenlee County, Arizona.  
 (i) Coal Creek from the Highway 78 crossing (33.103667 N, 109.062458 W)

downstream to the confluence with an unnamed drainage (33.110025 N, 109.065847 W), an approximate stream distance of 3,447 feet (1,051 meters).

(ii) *Note:* Map of Unit 34, Coal Creek (Map 35), follows:



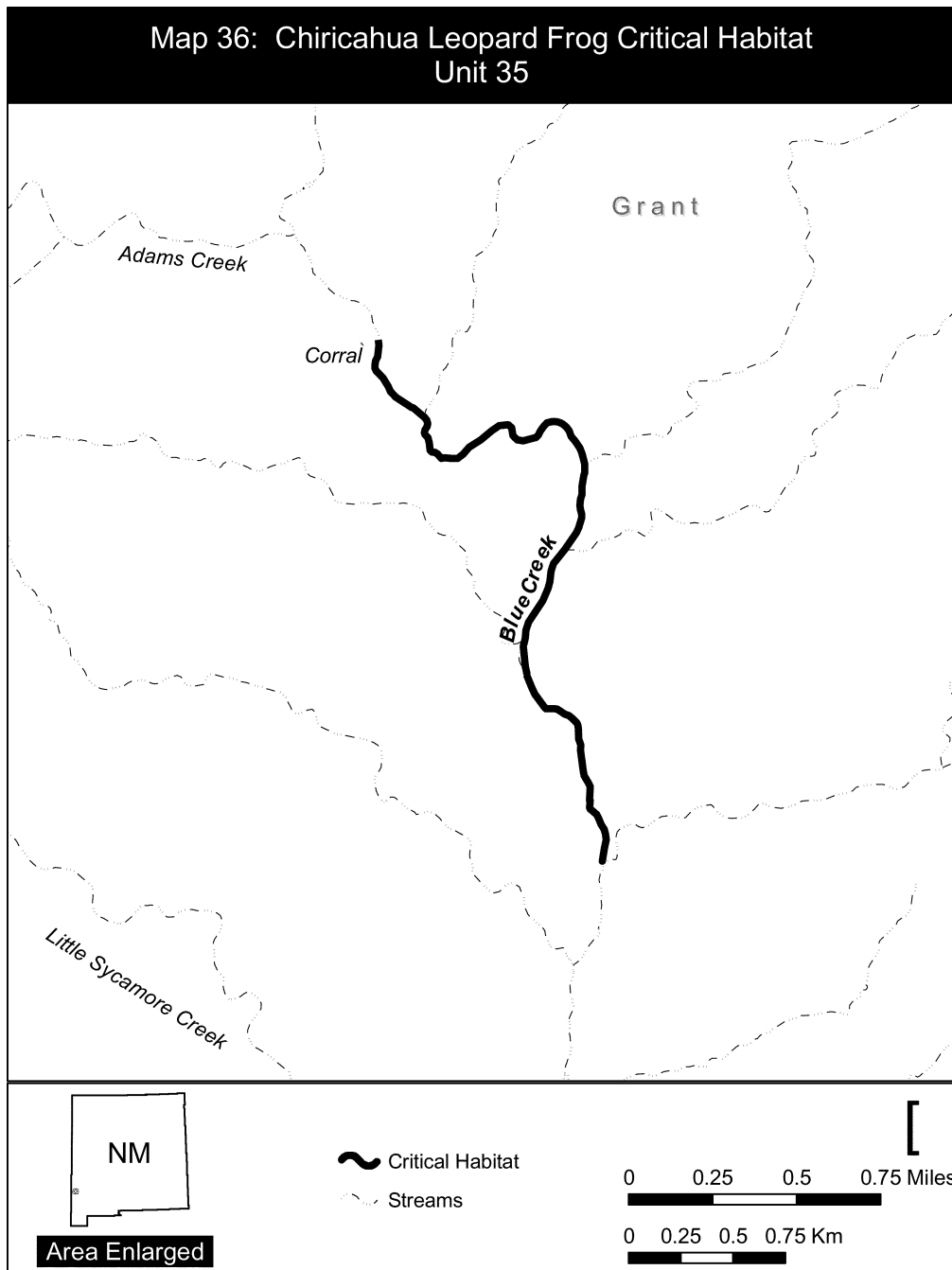
(40) Unit 35: Blue Creek, Grant County, New Mexico.

(i) Blue Creek from just east of a corral on private lands (32.848702 N,

108.835761 W) downstream to its confluence with an unnamed drainage that comes in from the east (32.825785 N, 108.824742 W), an approximate

stream distance of 2.37 miles (3.81 kilometers).

(ii) *Note:* Map of Unit 35, Blue Creek (Map 36), follows:



(41) Unit 36: Seco Creek, Sierra County, New Mexico.

(i) North Seco Creek from Sawmill Well (33.112052 N, 107.760165 W) downstream to its confluence with South Seco Creek (33.097239 N, 107.624649 W), to include Sucker Ledge (33.113545 N, 107.747370 W), Davis Well (33.112421 N 107.728650 W), North Seco Well (33.114416 N, 107.689934 W), Pauge Well (33.109714 N, 107.657965 W), and LM Bar Well (33.097906 N, 107.629301 W), an

approximate drainage distance of 8.93 miles (14.39 kilometers).

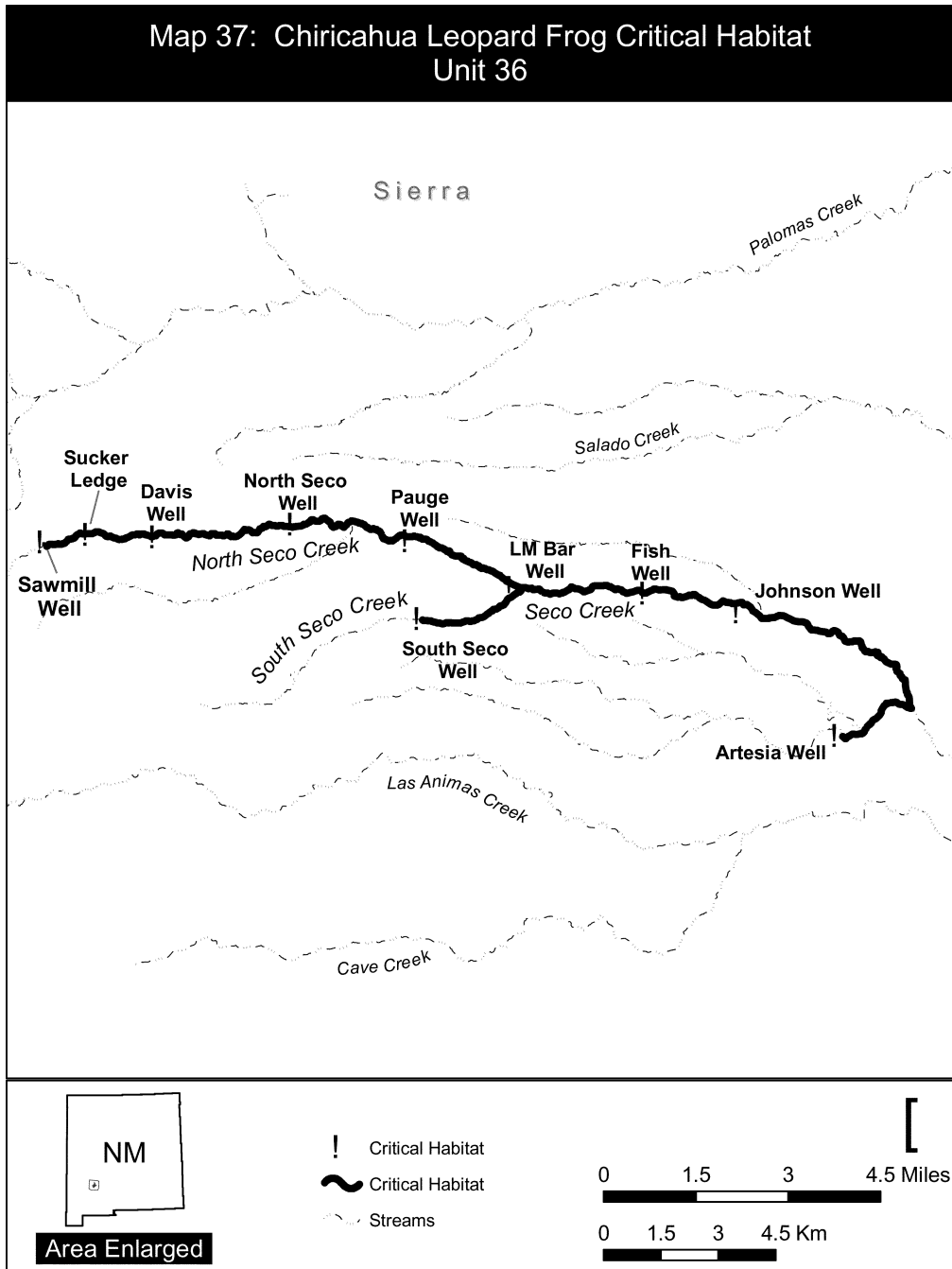
(ii) South Seco Creek from South Seco Well (33.091214 N, 107.655347 W) downstream to its confluence with the North Seco Creek (33.097239 N, 107.624649 W), an approximate drainage distance of 1.87 miles (3.01 kilometers).

(iii) Seco Creek from the confluence with North and South Seco creeks (33.097239 N, 107.624649 W) downstream to its confluence with Ash Creek (33.066837 N, 107.519939 W), to

include Fish Well (33.095461 N, 107.592109 W) and Johnson Well (33.090439 N, 107.566035 W), an approximate drainage distance of 7.84 miles (12.62 kilometers).

(iv) Ash Creek from Artesia Well (33.060469 N, 107.539670 W) downstream to its confluence with Seco Creek (33.066660 N, 107.519804 W), an approximate drainage distance of 1.48 miles (2.38 kilometers).

(v) *Note:* Map of Unit 36, Seco Creek (Map 37), follows:



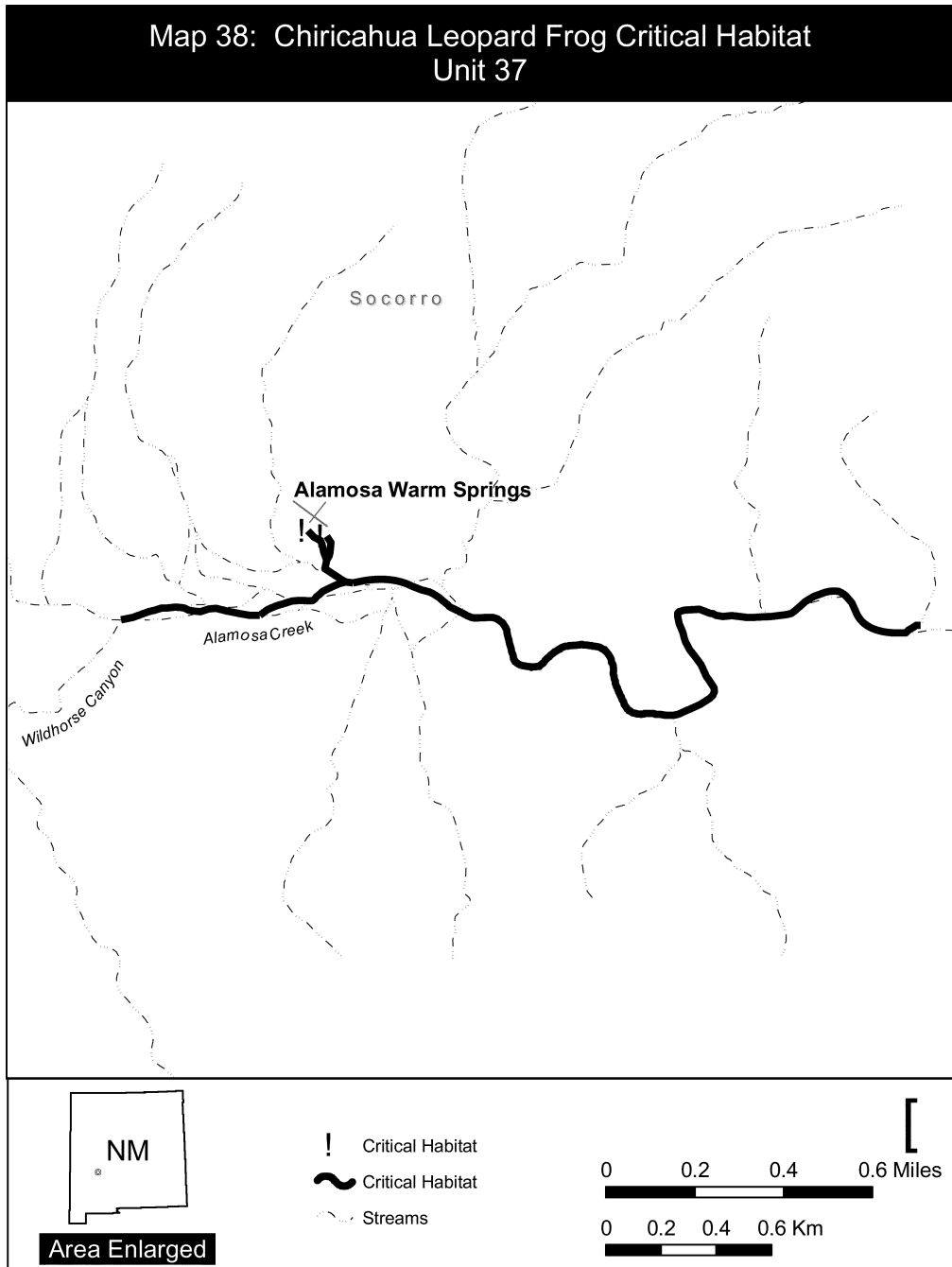
(42) Unit 37: Alamosa Warm Springs, Socorro County, New Mexico.

(i) From the confluence of Wildhorse Canyon and Alamosa Creek (33.570315 N, 107.608474 W) downstream in

Alamosa Creek to the confluence with an unnamed drainage that comes in from the north (33.569199 N, 107.577137 W), to include Alamosa Warm Springs (33.572365 N,

107.600153 W), an approximate stream distance of 4,974 feet (1,516 meters).

(ii) *Note:* Map of Unit 37, Alamosa Warm Springs (Map 38), follows:

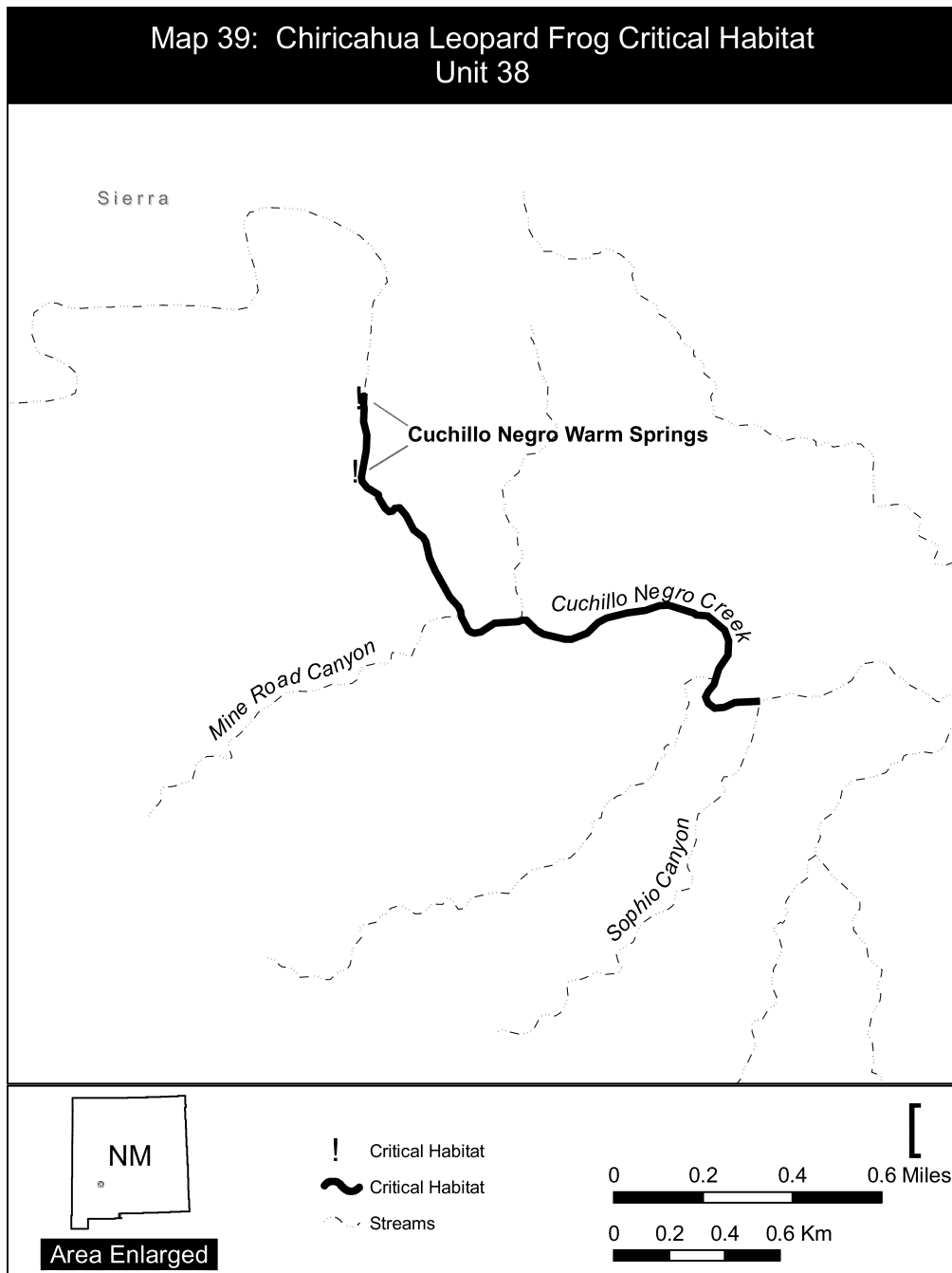


(43) Unit 38: Cuchillo Negro Warm Springs and Creek, Sierra County, New Mexico.

(i) From the upper of the two Cuchillo Negro Warm Springs (33.268403 N,

107.563619 W) downstream in Cuchillo Negro Creek to its confluence with Sophio Canyon (33.268403 N, 107.548630 W), an approximate stream distance of 1.58 miles (2.54 kilometers).

(ii) *Note:* Map of Unit 38, Cuchillo Negro Warm Springs (Map 39), follows:



(44) Unit 39: Ash and Bolton Springs, Grant County, New Mexico.

(i) Ash Spring (32.715625 N, 108.071980 W).

(ii) Unnamed spring in Bolton Canyon locally known as Bolton Springs (32.713419 N, 108.099679 W).

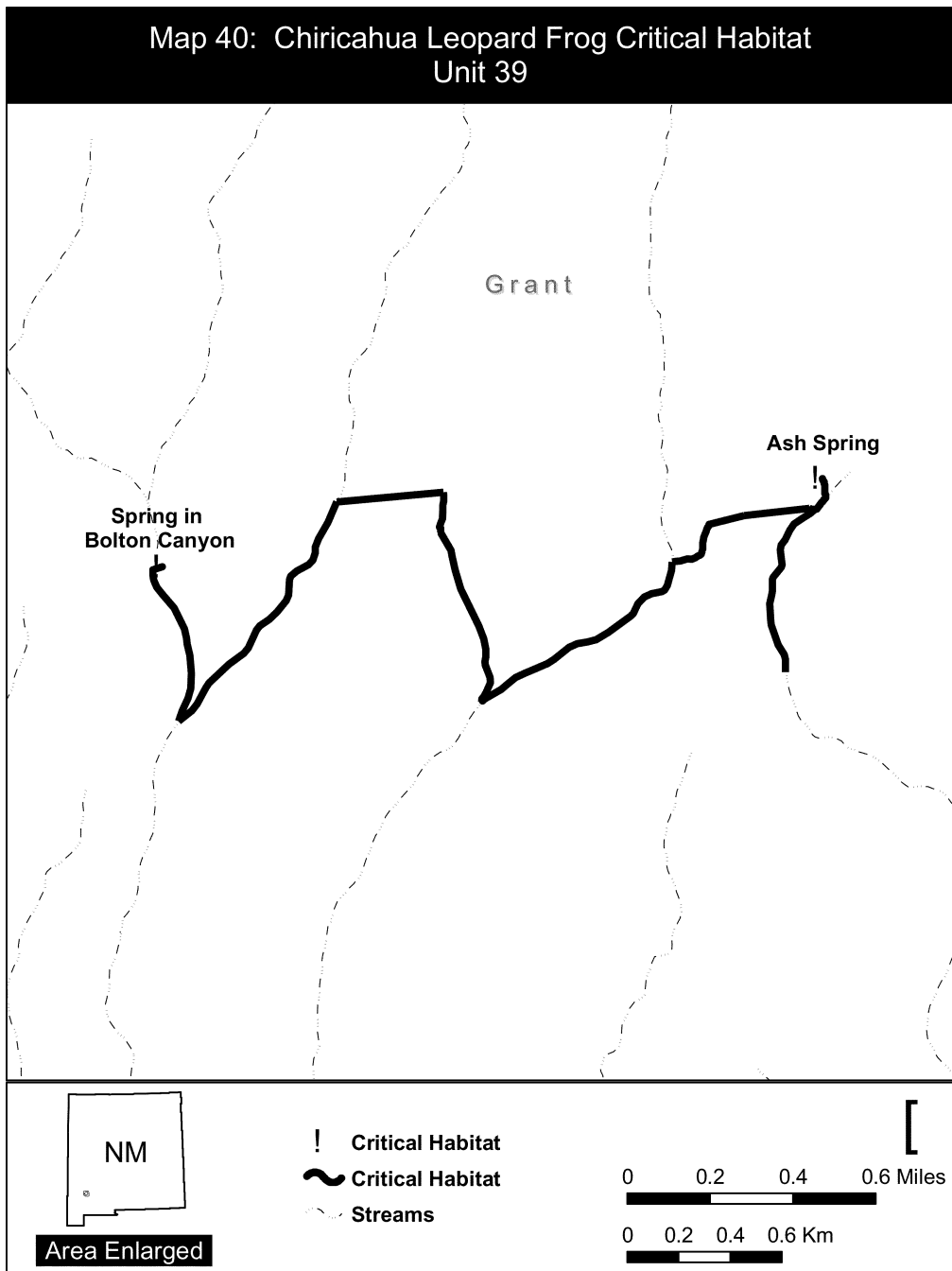
(iii) From the spring box at Ash Spring (32.715625 N, 108.071980 W) downstream to a dirt road crossing of the drainage (32.708769 N, 108.073579 W), an approximate stream distance of 2,830 feet (863 meters).

(iv) From the the ruins of a house in the Ash Spring drainage (32.714562 N,

108.072542 W) west to a low saddle (32.714373 N, 108.075263 W) and directly downslope into an unnamed drainage (32.713983 N, 108.076665 W), then downstream in that drainage to its confluence with another unnamed drainage (32.712829 N, 108.078131 W), then downstream in that unnamed drainage its confluence with another unnamed drainage (32.708210 N, 108.086360 W), then upstream in that unnamed drainage to the top of that drainage (32.715476 N, 108.087719 W) and directly downslope and west to

another unnamed drainage (32.715207 N, 108.092094 W), then downstream in that unnamed drainage to its confluence with Bolton Canyon (32.707844 N, 108.099267 W), and then upstream in Bolton Canyon to the locally known Bolton Springs (32.713419 N, 108.099679 W), an approximate distance of 2.41 drainage miles (3.87 kilometers) and 2,650 feet (808 meters) overland.

(v) *Note:* Map of Unit 39, Ash and Bolton Springs (Map 40), follows:



(45) Unit 40: Mimbres River, Grant County, New Mexico.

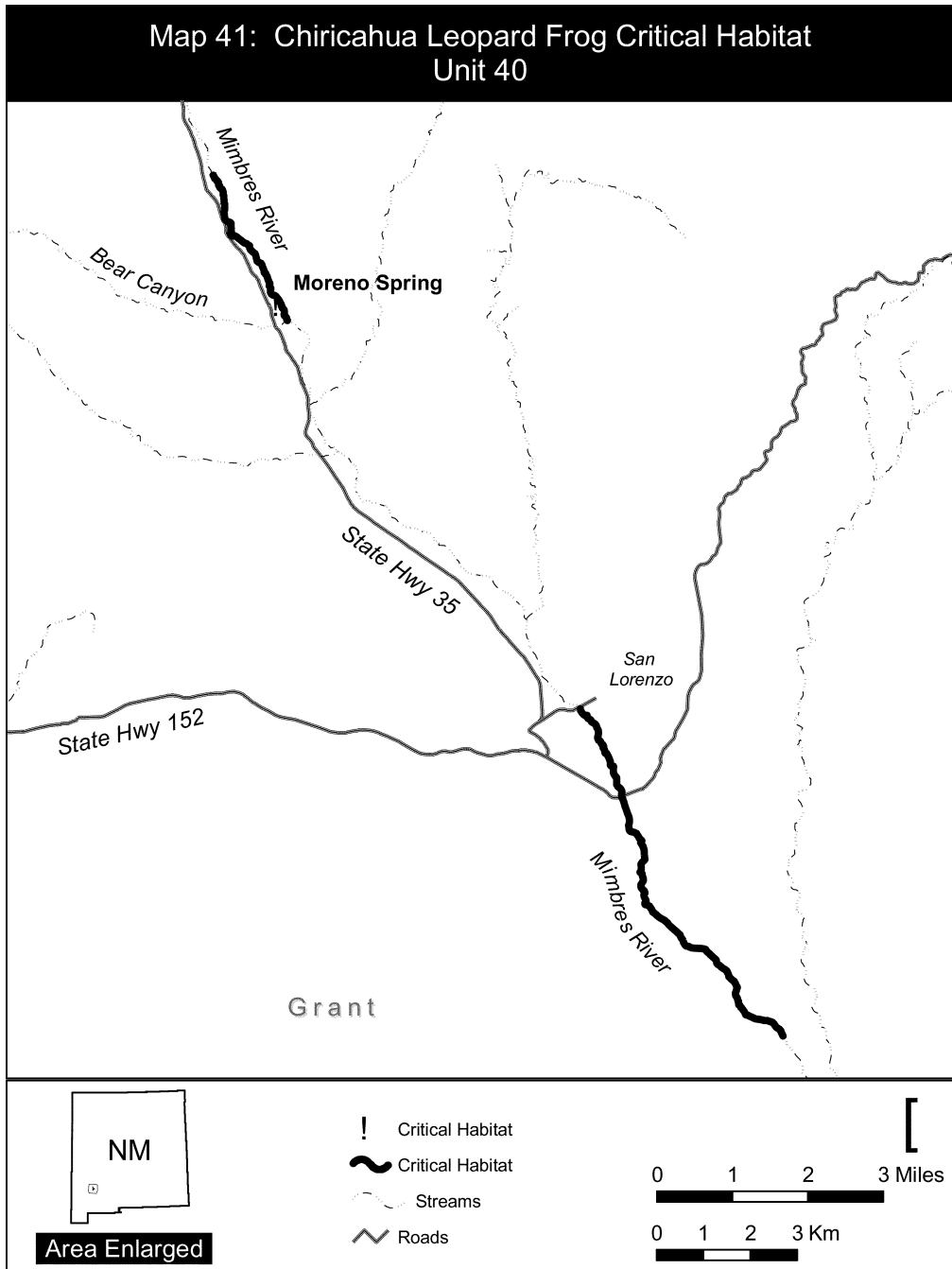
(i) The Mimbres River from the upstream Nature Conservancy property boundary (32.912474 N, 108.004529 W) downstream to its confluence with Bear Canyon (32.883751 N, 107.988036 W), to include Moreno Spring (32.887107 N,

107.989492 W) and ponds at Emory Oak Ranch, an approximate river distance of 2.42 miles (3.89 kilometers).

(ii) The Mimbres River from the bridge just west of San Lorenzo (32.808190 N, 107.924589 W) downstream to the downstream boundary of The Nature Conservancy's

Disert property near Faywood (32.743884 N, 107.880297 W), an approximate river distance of 5.82 miles (9.36 kilometers).

(iii) *Note:* Map of Unit 40, Mimbres River (Map 41), follows:



\* \* \* \* \*

Dated: February 23, 2011.

**Will Shafroth**

*Acting Assistant Secretary for Fish and  
Wildlife and Parks.*

[FR Doc. 2011-4997 Filed 3-14-11; 8:45 am]

**BILLING CODE 4310-55-C**





# FEDERAL REGISTER

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Part III

Department of the Interior

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Fish and Wildlife Service

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule To List the Flat-Tailed Horned Lizard as Threatened; Proposed Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R8-ES-2010-0008; MO 92210-0-0008]

RIN 1018-AX07

**Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule To List the Flat-Tailed Horned Lizard as Threatened****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), determine that the listing of the flat-tailed horned lizard (*Phrynosoma mcallii*) as a threatened species under the Endangered Species Act of 1973, as amended (Act), is not warranted, and we therefore withdraw our November 29, 1993, proposed rule to list it under the Act. We made this determination in this withdrawal because threats to the species as identified in the 1993 proposed rule are not as significant as earlier believed, and available data do not indicate that the threats to the species and its habitat, as analyzed under the five listing factors described in section 4(a)(1) of the Act, are likely to endanger the species in the foreseeable future throughout all or a significant portion of its range.

**DATES:** The November 29, 1993 (58 FR 62624), proposal to list the flat-tailed horned lizard as a threatened species is withdrawn as of March 15, 2011.

**ADDRESSES:** This withdrawal of the proposed rule is available on the Internet at <http://www.regulations.gov>. Comments and materials received, as well as supporting documentation for this rulemaking is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760-431-9440; facsimile 760-431-9624.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Background**

The flat-tailed horned lizard (*Phrynosoma mcallii*) is a small, spiny

lizard found in the Sonoran Desert of the southwestern United States and northwestern Mexico. All of the species of lizards in the genus *Phrynosoma*—the horned lizards—have dorso-ventrally flattened, “pancake-like” bodies; spiny scales; head spines or “horns”; cryptic coloration; and certain similar behavioral traits (Sherbrooke 2003, pp. 4-17; Stebbins 2003, p. 299; Leaché and McGuire 2006, p. 629).

Among horned lizard species, the flat-tailed horned lizard has particularly long and sharp horns (Funk 1981, p. 281.1; Sherbrooke 2003, p. 40; Young *et al.* 2004a, p. 65). Other characteristics that help distinguish flat-tailed horned lizards from other members of the genus include a dark line down the middle of the back (vertebral stripe), lack of external ear openings, two rows of fringe scales, an unspotted vent, and—as indicated by its common name—a long, broad, flattened tail (Funk 1981, p. 281.1; Sherbrooke 2003, p. 40). The flat-tailed horned lizard is average in size when compared to other horned lizard species. Flat-tailed horned lizards become adults when about 60 to 64 millimeters (mm) (2.4 to 2.5 inches (in)) long, not including the tail (snout-to-vent length), and may grow to be about 87 mm (3.4 in) long (Young and Young 2000, p. 34; Rorabaugh and Young 2009, p. 182). The dorsal coloration of flat-tailed horned lizards varies and closely matches the colors of the desert soils on which they live, ranging from pale gray to light rust-brown, while their ventral coloration is white or cream-colored (Funk 1981, p. 281.1; Flat-tailed Horned Lizard Interagency Coordinating Committee [FTHLIC] 2003, p. 1; Stebbins 2003, p. 304). First described by Hallowell in 1852, no subspecies have been described or are recognized for the flat-tailed horned lizard (Crother *et al.* 2008, p. 35).

The flat-tailed horned lizard occurs within the range of the desert horned lizard (*Phrynosoma platyrhinos*). Additionally, Goode’s horned lizard (*P. [platyrhinos] goodie*), which Klauber (1935, p. 179) considered to be a subspecies of the desert horned lizard (Klauber 1935, p. 179), also occurs within the range of the flat-tailed horned lizard in the portion southeast of the confluence of the Gila and Colorado Rivers (Mulcahy *et al.* 2006, p. 1823). Recent genetic analyses support Goode’s horned lizard as a differentiable evolutionary species (Mulcahy *et al.* 2006, pp. 1807-1826). Hybrids between flat-tailed and Goode’s horned lizards, exhibiting a mix of morphological and genetic characters, have been observed southeast of Yuma, Arizona (Mulcahy *et al.* 2006, p. 1810), while apparent

hybrids between flat-tailed and desert horned lizards have been observed in the vicinity of Ocotillo, California (Stebbins 2003, p. 302). Additionally, the regal horned lizard (*P. solare*) also occurs in northwestern Sonora, Mexico (Rorabaugh 2008, p. 39); we are not aware of hybridization with this species.

**Life History**

Flat-tailed horned lizards are oviparous (egg-laying), are early maturing, and may produce multiple clutches within a breeding season (Howard 1974, p. 111; Turner and Medica 1982, p. 819), which, when it occurs, results in two groups of individuals in a single year that are all generally the same age (that is, two cohorts). However, some authors question whether the observed two cohorts is the result of individual females producing two clutches in a year or whether different groups of females lay eggs at different times (Muth and Fisher 1992, p. 46; Young and Young 2000, p. 11). Flat-tailed horned lizards produce relatively small clutches of eggs (mean clutch size = 4.7; range = 3 to 7) (Howard 1974, p. 111) compared to most other horned lizards (Sherbrooke 2003, p. 139). The first cohort hatches in July to August (Muth and Fisher 1992, p. 19; Young and Young 2000, p. 13), and when it occurs, the second cohort may be produced in September (Howard 1974, p. 111; Muth and Fisher 1992, p. 19). Hatchlings from the first cohort may reach sexual maturity after their first winter season, whereas individuals that hatch later may require an additional growing season to mature (Howard 1974, p. 111). Flat-tailed horned lizards typically live for 4 years, or rarely even 6 years, in the wild (FTHLIC 2003a, p. 10).

A *home range* is the area in which an animal (as an individual) typically lives. Flat-tailed horned lizards can have relatively large home ranges compared to other species of lizards of similar size (FTHLIC 2003a, p. 9). Muth and Fisher (1992, p. 34) found the mean home range size was 2.7 hectares (ha) (6.7 acres (ac)) on the West Mesa, California. In the Yuma Desert of Arizona, Young and Young (2000, p. 54) found mean home ranges for males differed between drought and wet years, while those of females did not. The mean home range size for males was 2.5 ha (6.2 ac) during a dry year versus 10.3 ha (25.5 ac) during a wet year. Female mean home ranges were smaller at 1.3 ha (3.2 ac) and 1.9 ha (4.7 ac) in dry and wet years, respectively (Young and Young 2000, p. 54). Young and Young (2000, p. 55) noted a wide variation in movement

patterns, with a few home ranges estimated at greater than 34.4 ha (85 ac).

Flat-tailed horned lizards are not known to drink standing water (FTHLICC 2003a, p. 8), but they apparently do rain-harvest (Grant 2005, pp. 66–67), which is a behavior that some horned lizard species use to channel precipitation or condensation collected on the lizard's body to its mouth for consumption (Sherbrook 2003, p. 104). Thus, nearly all of the water consumed by flat-tailed horned lizards is from the food they eat (preformed water) (FTHLICC 2003a, p. 8; Grant 2005, pp. 66–67). Most horned lizard species, including the flat-tailed horned lizard, are ant-foraging specialists (Pianka and Parker 1975, pp. 141–162; Sherbrooke and Schwenk 2008, pp. 447–459). More than 95 percent of the diet of flat-tailed horned lizards is composed of ants, with species of harvester ants (genera *Messor* and *Pogonomyrmex*) predominating in most areas of the lizard's range, but species of *Dorymyrmex*, *Pheidole*, and *Myrmecocystus* are also consumed (Pianka and Parker 1975, p. 148; Turner and Medica 1982, p. 820; Young and Young 2000, p. 38; FTHLICC 2003a, p. 8).

Flat-tailed horned lizards, typical of reptiles, obtain their body heat from the surrounding environment (ectothermic) (Mayhew 1965, p. 104; Sherbrooke 2003, pp. 75–81). To gain body heat, they bask in the sun, often on rocks or other substrates that are warmed by insolation. During the heat of the day, to escape extreme surface temperatures, flat-tailed horned lizards may bury themselves just below the surface (Norris 1949, pp. 178–179) or retreat to a burrow made by other organisms (Young and Young 2000, p. 12). Adult flat-tailed horned lizards are reported to be obligatory hibernators (*i.e.*, an organism that must enter a dormant period regardless of environmental conditions) (Mayhew 1965, p. 103). Hibernation may begin as early as October and end as late as March (Muth and Fisher 1992, p. 33), although individuals have been noted on the surface during January and February (FTHLICC 2003a, p. 9). Hibernation burrows appear to be self-constructed (as opposed to using burrows constructed by other animals) and are typically within 10 centimeters (cm) (3.9 in) of the surface (Muth and Fisher 1992, p. 33). Mayhew (1965, p. 115) found that the majority of lizards hibernated within 5 cm (2 in) of the surface, with one as deep as 20 cm (8 in) below the surface.

Flat-tailed horned lizards generally lie close to the ground and remain

motionless when approached (Wone and Beauchamp 1995, p. 132); however, they may occasionally bury themselves in loose sand if it is available (Norris 1949, p. 176), and even more rarely, flee (Young and Young 2000, p. 12). Their propensity to remain motionless and bury in the sand, along with their cryptic coloration and flattened body, make them difficult to detect visually, which serves as a way to evade predators but also makes them difficult for surveyors to find in the field (FTHLICC 2003a, pp. 9, 65; Grant and Doherty 2007, p. 1050) (see also "Population Dynamics" section, below).

Additional life-history information is available in the Flat-tailed Horned Lizard Rangewide Management Strategy (FTHLICC 2003a, pp. 6–11).

#### Setting and Habitat

The flat-tailed horned lizard is endemic (restricted) to the Salton Trough and the region north of the Gulf of California in northwest Sonora, Mexico, both of which lie within the Lower Colorado Subdivision of the Sonoran Desert (Shreve and Wiggins 1964, p. 6). The climatic conditions over the range of the flat-tailed horned lizard are characterized by hot summer temperatures, mild winter temperatures, and little rainfall. Winter rainfall predominates in the western portion of the species' range while summer rainfall predominates in the eastern portion of the species' range (Shreve and Wiggins 1964, pp. 17–20, 49, 50; Johnson and Spicer 1985, p. 14). Periods of drought are not uncommon (Shreve and Wiggins 1964, p. 18).

Although the region in northwest Sonora, Mexico, represents roughly half of the current range of the flat-tailed horned lizard, its distribution within the Salton Trough has been more dynamic. As discussed below, the geologic and land use changes in the Salton Trough have substantially shaped the status of the species today.

To better understand population trends of the flat-tailed horned lizard relative to the geologic setting and its current distribution within sandy habitat, we are providing a summary of the recent geologic history of the area in the following paragraphs (summarized from Parish 1914, pp. 85–114; Sykes 1914, pp. 13–20; Durham and Alison 1960, pp. 47–91; van de Kamp 1973, pp. 827–848; Waters 1983, pp. 373–387; Blount and Lancaster 1990, pp. 724–728; Blount *et al.* 1990, pp. 15,463–15,482; Stokes *et al.* 1997, pp. 63–75; Patten *et al.* 2003, pp. 1–6; Li *et al.* 2008, pp. 182–197).

The Salton Trough (Trough) is a low-elevation valley that represents the

northwestward continuation of the Gulf of California. During the period starting at least several million years ago, as sea levels rose and fell, the Gulf of California filled the present-day Salton Trough, often extending the Gulf northward into the present-day San Geronio Pass, east of Cabazon, California. The Colorado River flowed into the Gulf at roughly the same geographical area as today, but with the Gulf extending to a more northerly point, the river flowed into the Gulf mid-way along its length.

The Colorado River, which originates in the Rocky Mountains and flows through the Grand Canyon, historically transported large quantities of fine-grained sediment. Where the river joined the Gulf, sediments were deposited forming a broad delta. These sediments continued to increase and created a barrier that divided the Gulf into a land-locked northern portion (the Trough) and a marine-linked southern portion (the Gulf). The northern portion, which remains below sea level but without a direct connection with the ocean, eventually dried out. However, the Colorado River continued to meander across its delta and seasonal flooding promoted avulsion (*i.e.*, abandonment of an old river channel and the creation of a new one). Thus, the river would sometimes flow into the Gulf and sometimes into the Trough, the lowest point of which—referred to as the Salton Basin—is about minus 84 meters (m) elevation (277 feet (ft) below sea level).

Water from the meandering Colorado River periodically filled the Salton Basin to varying depths (and areal extent), depositing sediments in the process. The lake that periodically formed, especially in its recent but prehistoric incarnations, is referred to by most authors as Lake Cahuilla. Its maximum depth depended on elevation of the delta, which is now about 12 m elevation (39 ft above sea level). The Lake was full as recently as the early 1600s, but smaller, shallower manifestations were present at various times since then (including the modern Salton Sea, discussed below). When Lake Cahuilla was full, the Colorado River water flowed into the Basin from the southeast, marked today by the Alamo River and New River channels, and exited the Basin farther west along a southerly route, marked today by the Río Hardy channel, ultimately emptying into the Gulf of California. Floodwaters and sediments also periodically flowed into Laguna Salada, in northwestern Baja California, Mexico. Thus, even areas of the present-day Imperial, Mexicali, and San Luis Valleys that

were never or were less-frequently inundated by Lake Cahuilla, were regularly influenced by hydrologic forces associated with the Colorado River. Despite being in the middle of one of the driest deserts in North America, some of these areas were, at least periodically, part of an intricate water distribution system of channels, sloughs, and lagoons.

Water also flowed into the Trough from surrounding highlands, bringing locally derived sediments with it. One notable inflow is marked by the present-day Whitewater River that flows into the Basin from the north. Water from the local sources would occasionally result in standing water in the Basin, but these sources could not compete with the sheer volume the Colorado River periodically provided.

After flowing into the Trough for a period of time, the Colorado River would eventually meander back and once again flow into the Gulf. Over time, Lake Cahuilla would then become dry and the transported sediments would become exposed, with local sediment sources predominating the north end of the Trough, and Colorado River-derived sediments predominating the south end of the Trough. During dry periods, the fine-grained sediments in the Trough would be transported and sorted by prevailing winds. Thus, much of the Trough outside of those areas that were regularly influenced by the flooding and meandering of the Colorado River was ultimately blanketed with soft, friable (crumbly) or arenaceous (sandy) soils. Similarly, sediments deposited in the Colorado River delta and along the northeast shore of the Gulf of California were transported by winds where they formed areas of soft, friable (crumbly) or arenaceous (sandy) soils, including the "sand sea" of the Gran Desierto de Altar.

As a result, typical flat-tailed horned lizard habitat today includes areas of these sandy flats as well as the associated valleys created by these geologic events. Turner *et al.* (1980, p. 14) stated the best habitats are generally low-relief areas with surface soils of packed, fine sand or low-relief areas of pavement (hardpan) overlain with loose, fine sand. However, the available scientific information indicates that flat-

tailed horned lizards may occur in areas with soil substrates and plant associations that differ from these generalizations, as described below.

Flat-tailed horned lizards are also known to occur at the edges of vegetated sand dunes, on barren clay soils, and within sparse *Atriplex* spp. (saltbush) plant communities. Although Turner *et al.* (1980, p. 15) suspected that these recorded occurrences were actually individuals that had dispersed from more suitable habitats, Wone *et al.* (1991, p. 16) questioned this conclusion (see also Wone and Beauchamp 1995, p. 132; Beauchamp *et al.* 1998, p. 213), suggesting instead that flat-tailed horned lizards regularly occupy at least some of these areas.

Within a creosote plant community in the West Mesa area, Muth and Fisher (1992, p. 61) found that flat-tailed horned lizards preferred sandy substrates with white bursage and *Psorothamnus emoryi* (Emory dalea), and avoided areas with creosote and *Tiquilia plicata* (fanleaf crinklemat). In Arizona, Rorabaugh *et al.* (1987, p. 103) found flat-tailed horned lizard abundance correlated with *Pleuraphis rigida* (big galleta grass) and sandy substrates, but they suggested that the presence of sandy substrates was more important than grass.

Several researchers have investigated the relationship between density of perennial plants and flat-tailed horned lizard abundance. The observed relationships varied among studies. For example, Altman *et al.* (1980, p. ii) and Turner and Medica (1982, p. 815) found the relative abundance of flat-tailed horned lizards was significantly and positively correlated with perennial plant density in creosote-white bursage plant communities (that is, horned lizard abundance increased as perennial plant density increased). In contrast, Beauchamp *et al.* (1998, p. 210) found flat-tailed horned lizards to be present in higher densities in sparsely vegetated areas with large patches of concretions (i.e., a volume of sedimentary rock in which a mineral cement fills the spaces between the sediment grains), gravel, and silt, than in areas that were sandy or densely vegetated. Altman *et al.*

(1980, p. 7) also reported finding flat-tailed horned lizards in desert pavement

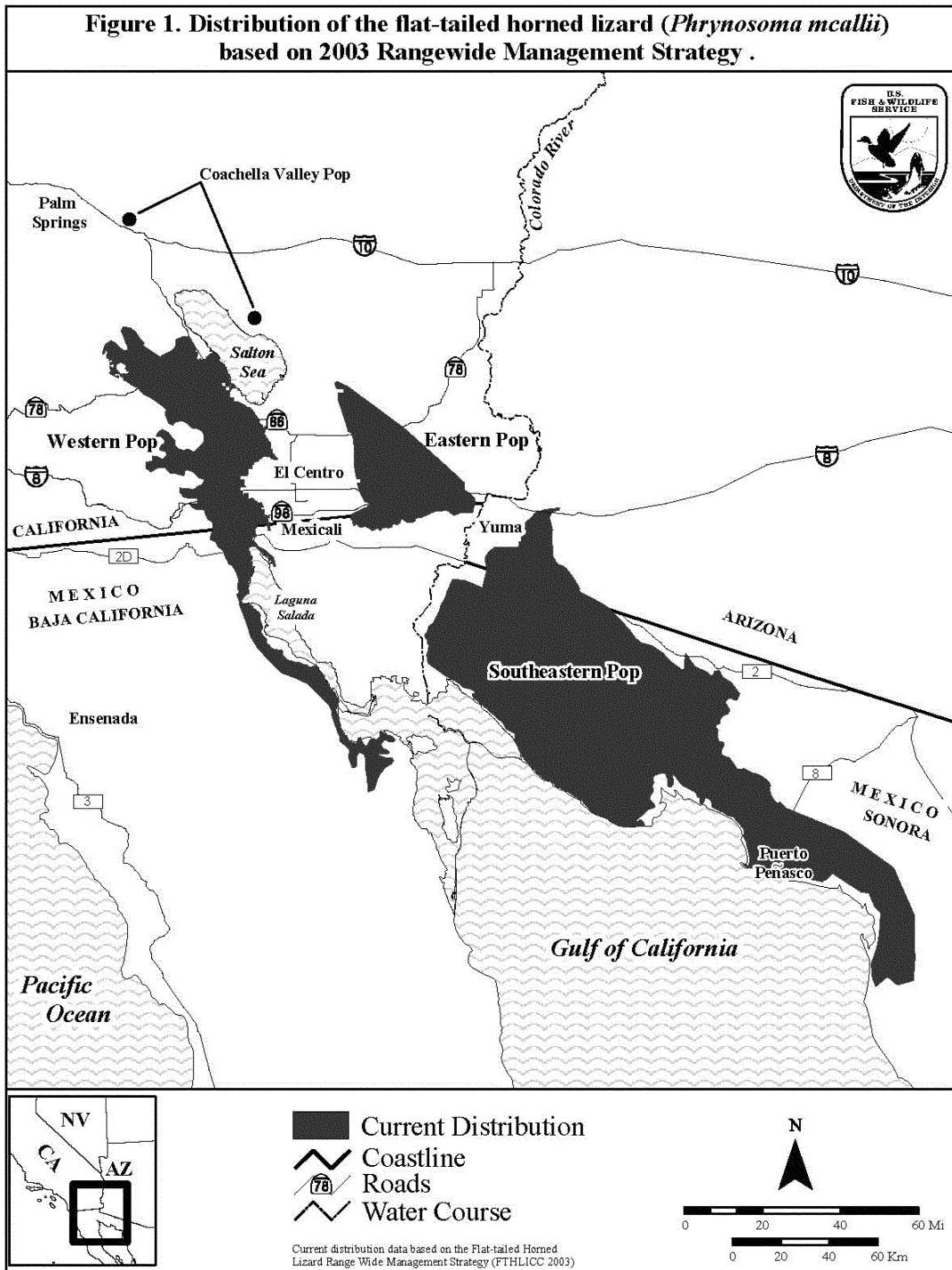
areas. Foley (2002, p. 54) found little correlation in substrate texture and distribution of flat-tailed horned lizards, when using three experimental treatments consisting of sandy, rocky and mixed substrates. However, Wright and Grant (2003, p. 3) found flat-tailed horned lizard abundance was positively correlated with percentage of sand cover. Thus, flat-tailed horned lizard habitat includes a variety of soils and other plant associations, but the habitat is best characterized as sandy flats and valleys in a creosote-white bursage plant association.

Plants and harvester ants are important components to flat-tailed horned lizard habitat because they comprise its primary food chain. Seeds make up the primary food of harvester ants (Johnson 2000, p. 92). The ants often collect seeds from annual plants, including some nonnative species (Rissing 1988, p. 362), but they also gather seeds from perennial plants (Gordon 1980, p. 72). Thus, a simplified food chain for the flat-tailed horned lizard may be described as follows: Plants produce seeds, harvester ants eat the seeds, and flat-tailed horned lizards eat harvester ants.

#### *Range and Distribution*

A species' range is the region over which it is distributed. The range of the flat-tailed horned lizard includes the Salton Trough and the region north of the Gulf of California. In general, this range includes portions of southeastern California (eastern San Diego County, central Riverside County, and southwestern Imperial County) and southwestern Arizona (southwestern Yuma County) in the United States, and northeastern Baja California and northwestern Sonora in Mexico (Turner and Medica 1982, p. 815) (Figure 1). Within its range, the flat-tailed horned lizard is limited to areas below an upper elevation. Although the species has been recorded as high as 520 m (1,706 ft) above sea level (Turner *et al.* 1980, p. 13), flat-tailed horned lizards are more commonly found below about 230 m (about 750 ft) in elevation (FTHLICC 2003a, p. 3).

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Extensive manmade changes, chiefly for agriculture, have occurred over a large portion of the land within the Salton Trough. Below we present a summary of the history of agricultural development in the Salton Trough (summarized from Furnish and Ladman 1975, pp. 83–107; Woerner 1989, pp. 109–112; Imperial Irrigation District [IID] 2002, pp. 3.1–66 to 3.1–77; Patten *et al.* 2003, pp. 1–6).

Near the start of the 20th century, a canal was built to import water to the Salton Trough from the Colorado River. The Salton Basin is below sea level and much of the rest of the Salton Trough is at a lower elevation than where the head of the canal was located. Thus, with the regionally abundant sunshine and river-sediment soils, the importation of water by a gravity-fed system allowed agriculture to proliferate. For example, by 1904 approximately 60,700 ha (150,000 ac) were in cultivation.

Unlike the current canal, the original canal was poorly designed because it had no headgate to regulate flows into the canal. Prior to extensive dams on the Colorado River, the river was prone to flooding. The high waters of one such flood during the winter of 1904–05 flowed into the canal. Soon, nearly the entire Colorado River flowed through the canal, releasing water into the Salton Basin. Part of the flow followed the two historical riverbeds (the Alamo River and the New River) that were deepened and widened by the torrent. Despite heroic efforts, the flow continued until 1907. The Salton Basin filled to a depth of about 22 m (72 ft) (at its deepest point) and covered about 121,400 ha (300,000 ac), thus creating the modern Salton Sea.

Although the “creation” of the Salton Sea is often times described as an accident, the inundation of the Salton Basin by water flowing from the Colorado River from 1905 to 1907 was merely the most recent of many such inundations over historical and prehistorical times (*see “Setting and Habitat”* section above). Even without the canal, the flood of 1905 may have naturally flowed into the Basin.

Since the formation of the modern Salton Sea, agricultural practices in the region have maintained the water levels of the Salton Sea. If too much irrigation water is allowed to evaporate in the fields, salt levels, which are high in Colorado River water, build up in the soil, making it inhospitable for crops. To prevent this hypersalinization of the soils, a surplus of water is used for irrigation. The excess water drains by gravity from the fields through a network of ditches into the Salton Sea. Even with the high evaporation rates in

the desert climate, inflow rates of drainage water have been high enough to maintain, and, for a time, even increase, the surface water elevation of the Salton Sea.

Efforts to bring irrigation water to the region continued through the 1900s, and the system of irrigation canals was eventually improved and expanded. In addition to the Imperial Valley, the Coachella Canal was constructed to bring water to the southern Coachella Valley, allowing irrigated agriculture to develop north of the Salton Sea. Similar canal systems were built in Mexico, allowing agriculture to develop and expand in the Mexicali and San Luis Valleys. Because these systems were gravity fed, the distribution canals within the region were dictated by elevation, which in turn, determined where irrigated agricultural development occurred. Thus, the majority of agricultural development was confined within the outer-most (highest elevation) canals. Moreover, croplands (and associated urbanization and infrastructure) were contiguous in the Salton Trough region, with little to no intervening undeveloped natural areas. Additionally, smaller amounts of agricultural development using pumped groundwater have occurred on a smaller scale outside these areas.

The geographically confined agricultural growth in the region is currently limited by the amount of water available from the Colorado River, which is dependent on annual precipitation in the Upper and Lower Colorado River Basins. The amount of irrigation water that can be delivered to the Salton Trough from the Colorado River is limited by interstate and international agreements (Furnish and Ladman 1975, pp. 83–107). Water conservation and transfer agreements completed in 2003 with the San Diego County Water Authority, Imperial Irrigation District, Metropolitan Water District of Southern California, and Coachella Valley Water District has reduced the amount of water available in the Imperial Valley and some fields have been fallowed, resulting in a decrease in the amount of irrigated agriculture in this region (IID 2006, p. 1).

Aerial and satellite imagery (Carlsbad Fish and Wildlife Office geographic information system (GIS) files) illustrates the development of active cultivation and associated urbanization and infrastructure extending from the present-day delta of the Colorado River, with a longer fork extending north-northwest through the Mexicali and Imperial Valleys to the Coachella Valley (punctuated by the Salton Sea), and a

smaller fork extending northeast through the eastern Mexicali Valley and the San Luis Valley (Lower Colorado River Valley) to Yuma. Although there are specimens of flat-tailed horned lizards collected historically from within the now-altered region (Funk 1981, p. 281.1; Johnson and Spicer 1985, pp. 14–24), areas of agricultural and urban development do not constitute habitat for the flat-tailed horned lizard, and this continuous swath of altered land use is no longer occupied by flat-tailed horned lizards.

The current distribution of the flat-tailed horned lizard is often described within four, geographically descriptive “populations.” We use the term population in this document to refer to a loosely bounded, regionally distributed collection of individuals of the same species. These four populations are defined as:

- (1) The Coachella Valley Population, including those individuals northwest of the Salton Sea, California;
- (2) The Western Population, including those individuals in the areas west of the Salton Sea and the Imperial Valley, California, and west of the Mexicali Valley, Baja California, Mexico;
- (3) The Eastern Population, including those individuals in the areas east of the Salton Sea and the Imperial Valley but west of the Colorado River; and
- (4) The Southeastern Population, including those individuals in the areas east of the Colorado River, extending from Yuma south into Mexico and east to the Gulf of California.

These current designations closely follow the description of populations discussed in our January 3, 2003, analysis (68 FR 331), although in that document we used the United States-Mexico border to further divide the populations (see Figure 1 above). Additionally, these populations roughly correspond to those used by Mulcahy *et al.* (2006, pp. 1807–1826) in their analysis of flat-tailed horned lizard genetic data (see below for details). At the end of the Background section, below, we summarize these four populations in greater detail. We also use these four population names to identify the geographical habitat they occupy.

#### *Populations and Genetics*

The separation of the four populations of flat-tailed horned lizards described above in the “Range and Distribution” section is supported by genetic data, to varying degrees. Analyses of mitochondrial DNA data (Mulcahy *et al.* 2006, pp. 1807–1826; see also Mendelson *et al.* 2004, pp. 1–42) and nuclear microsatellite data (Culver and

Dee 2008, pp. 1–14) revealed significant differences in the prevalence of certain alleles in flat-tailed horned lizard populations on either side of the Colorado River; that is, the Southeastern Population differs from the other three populations. These analyses also showed that more gene flow has occurred near the Colorado River delta, suggesting the shifting course of the river over time in this area posed less of a barrier than the more stable portions of the river channel farther north (Mulcahy *et al.* 2006, p. 1822; Culver and Dee 2008, p. 11). Although Culver and Dee (2008, p. 10) noted genetic variation in some individuals across the Southeastern Population, they found that flat-tailed horned lizards in Arizona are “not genetically isolated from neighboring populations in Mexico.” Thus, the flat-tailed horned lizards east of the Colorado River (i.e., the Southeastern Population) may be considered one population that is significantly and genetically distinct from the populations west of the river (i.e., the Coachella Valley, Western, and Eastern Populations).

The three populations west of the Colorado River also showed varying levels of genetic differentiation. Mulcahy *et al.* (2006, p. 1821) noted the Eastern Population “was significantly differentiated from [the Western and Coachella Valley Populations], suggesting that there has not been substantial gene flow across the Imperial Valley since the drying of Lake Cahuilla.” However, the difference between the Coachella Valley and Western Populations was less pronounced. Although their difference was supported by the presence of haplotypes unique to the Coachella Valley Population (Mulcahy *et al.* 2006, Table 1 on p. 1811, and p. 1817), the difference between the Western and Coachella Valley Populations was not statistically significant (the other populations had unique haplotypes, too). This lack of significant difference suggested to the authors that the Coachella Valley Population “had more recent gene flow” with the Western Population (Mulcahy *et al.* 2006, p. 1821). Thus, genetic data readily support three of the four geographic populations described above, but the distinction between the Western and Coachella Valley Populations is weak or equivocal. This suggests that the Coachella Valley Population was not a

separate population historically, but is one now because it was “created” by an artificial barrier resulting from past agricultural and urban development.

#### *Management and Populations*

Three notable management mechanisms are in place within the U.S. portion of the flat-tailed horned lizard range: the Interagency Conservation Agreement, which includes the Flat-tailed Horned Lizard Rangewide Management Strategy (Rangewide Management Strategy); the Coachella Valley Multiple Species Habitat Conservation Plan (Coachella Valley MSHCP); and the Lower Colorado River Multi-Species Conservation Plan (Lower Colorado MSCP). Implementation of the Interagency Conservation Agreement has recently positively affected and is anticipated to continue to positively affect the status of flat-tailed horned lizard populations in the United States and, to a lesser extent, in Mexico. The recently permitted Coachella Valley MSHCP is also worth noting because it is a regional habitat conservation plan (HCP) developed under section 10 of the Act that covers the flat-tailed horned lizard in the Coachella Valley, an area addressed at length in our previous withdrawals. Additionally, the Lower Colorado MSCP is also an HCP that addresses the flat-tailed horned lizard.

#### *Interagency Conservation Agreement and Flat-tailed Horned Lizard Rangewide Management Strategy*

In June of 1997, the Service, Bureau of Land Management (BLM), Bureau of Reclamation (BOR), U.S. Marine Corps, U.S. Navy, Arizona Game and Fish Department, California Department of Fish and Game (CDFG), and California Department of Parks and Recreation (CDPR) entered into an Interagency Conservation Agreement. All signatories agreed to:

- (1) Further develop and implement the objectives, strategies, and tasks of the Flat-tailed Horned Lizard Rangewide Management Strategy [original, FTHLICG 1997, pp. 1–106; revised: FTHLICG 2003a, p. 104; see below];
- (2) As needed for the conservation effort, and as available, provide program personnel with facilities, equipment, logistical support, and access to lands under their control;
- (3) Participate regularly in Interagency Coordinating Committee and Management Oversight Group meetings

to enhance communication and cooperation, and to help develop annual or other work plans and reports;

(4) Develop and distribute public information and educational materials on the conservation effort;

(5) Provide ongoing review of, and feedback on, the conservation effort;

(6) Cooperate in development of major media releases and media projects;

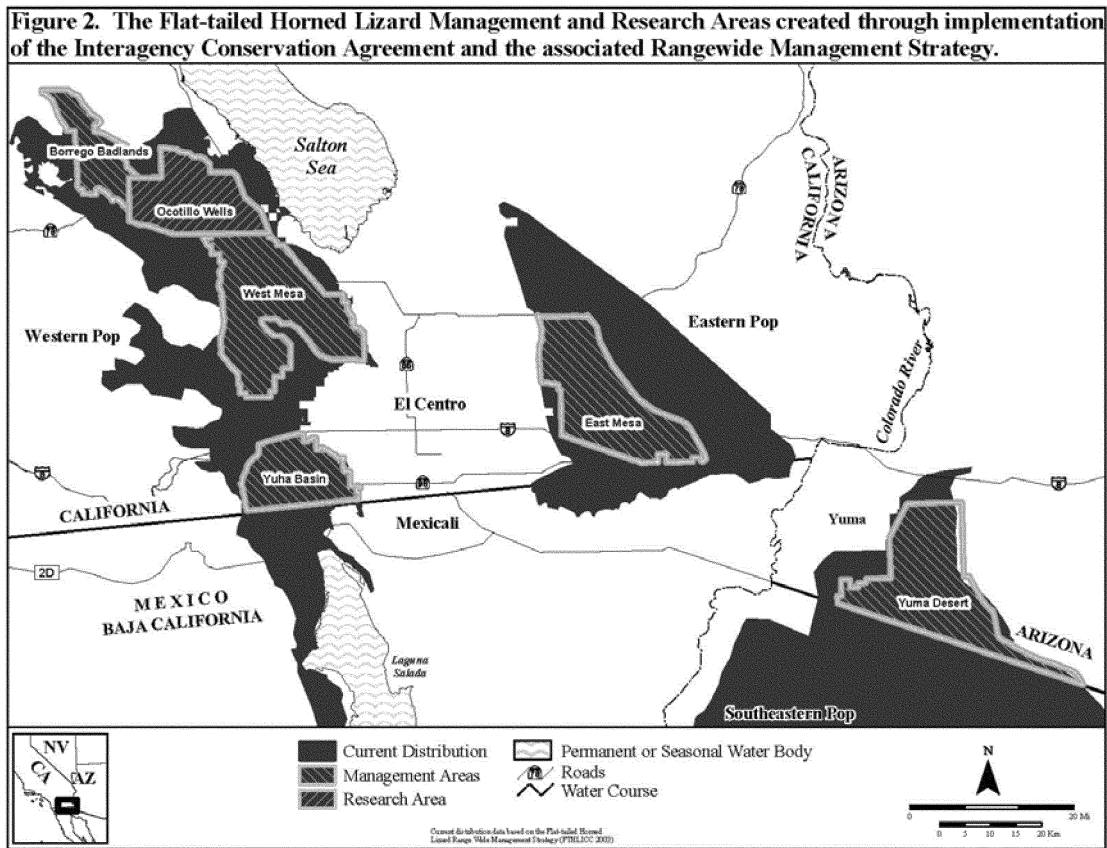
(7) Keep local governments, communities, the conservation community, citizens, and other interested and affected parties informed on the status of the conservation effort, and solicit their input on issues and actions of concern or interest to them;

(8) Whenever possible, develop voluntary opportunities and incentives for local communities and private landowners to participate in the conservation effort; and

(9) Assist in generating the funds necessary to implement the conservation effort.

The purpose of the Rangewide Management Strategy is to provide a framework for conserving sufficient habitat to maintain several viable populations of the flat-tailed horned lizard throughout the range of the species in the United States. The Rangewide Management Strategy was developed by an interagency working group over a 2-year period. Despite being a voluntary agreement, many of the measures to conserve flat-tailed horned lizards are formally incorporated into planning documents of participating agencies, such as the Bureau of Land Management’s California Desert Conservation Area Plan.

As part of the Interagency Conservation Agreement, agencies delineated specific areas under their jurisdiction as Management Areas. As of 2009, approximately 185,653 ha (458,759 ac) of the flat-tailed horned lizard habitat managed by signatories of the Interagency Conservation Agreement exists within five Management Areas (see Table 1 below) (FTHLICG 2009, p. 10). These Management Areas include the Borrego Badlands, West Mesa, and Yuha Desert (also referred to as the Yuha Basin) in the Western Population, the East Mesa in the Eastern Population, and the Yuma Desert in the Southeastern Population (Figure 2). Additionally, the Ocotillo Wells State Vehicular Recreation Area (SVRA) was designated as a research area.



The five Management Areas were designed to include large areas of public land in the United States where flat-tailed horned lizards have been found, and to include most flat-tailed horned lizard habitat identified by the FTHLICC (1997, p. 35) as “key” areas for survival as determined in previous studies (Turner *et al.* 1980, pp. 1–47; Turner and Medica 1982, pp. 815–823; Rorabaugh *et al.* 1987, pp. 103–109). Management Areas were proposed based on standard principles of preserve design, utilizing the best information available at the time (FTHLICC 2003a, p. 47).

The Management Areas were delineated to include areas as large as possible, while avoiding extensive, existing and predicted management conflicts (such as off-highway vehicle (OHV) open areas). The Management Areas are meant to be the core areas for maintaining self-sustaining populations of flat-tailed horned lizards in the United States (FTHLICC 2003a, p. 24). The Management Areas constitute roughly 42 percent of the U.S. current distribution. Although the majority of lands within each Management Area are State or federally owned, some private

inholdings occur within Management Area boundaries.

The 2003 Rangewide Management Strategy includes measures to avoid, minimize, and compensate impacts to the flat-tailed horned lizard and its habitat from construction projects and other development activities permitted by signatory agencies. As described in detail in the Rangewide Management Strategy (FTHLICC 2003a, pp. 58–60), the avoidance and minimization measures include (in part) avoidance of flat-tailed horned lizard Management Areas and the Research Area, project oversight and compliance measures, minimized project footprint, use of existing roads rather than creating new roads, use of barrier fencing, and project-specific habitat restoration. The Rangewide Management Strategy outlines avoidance, minimization, and mitigation measures intended to limit the impacts from permitted projects within the Management Areas to a maximum of 1 percent of the total area of each Management Area (FTHLICC 2003a, pp. 24–43). Additionally, the Rangewide Management Strategy (FTHLICC 2003a, pp. 60–62) describes compensation measures for projects within and outside the Management

Areas where residual effects would occur after all reasonable on-site mitigation has been applied. The goal of compensation under the Rangewide Management Strategy is to “prevent the net loss of [flat-tailed horned lizard] habitat and make the net effect of a project neutral or positive to [flat-tailed horned lizards] by maintaining a habitat [baseline]” (FTHLICC 2003a, p. 61). Compensation funds may be used “to acquire, protect, or restore [flat-tailed horned lizard] habitat both within and contiguous with [Management Areas]” (FTHLICC 2003a, p. 60). Compensation ratios range from one-to-one to six-to-one (meaning, in latter ratio for instance, that six acres-worth of compensation will be required for every one acre of impact), depending on the location and nature of the impacts (FTHLICC 2003a, p. 61). Funds obtained through compensation associated with implementation of the Rangewide Management Strategy are being used to consolidate land ownership within the Management Areas or to enhance flat-tailed horned lizard habitat (FTHLICC 2003a, p. 25; FTHLICC 2010, p. 8). The original and current acreages of each Management Area are listed in Table 1.



TABLE 1—AREA (HECTARES AND ACRES) OF FLAT-TAILED HORNED LIZARD MANAGEMENT AREAS OWNED BY SIGNATORIES TO THE INTERAGENCY CONSERVATION AGREEMENT IMPLEMENTING THE FLAT-TAILED HORNED LIZARD RANGEWIDE MANAGEMENT STRATEGY AND AREA OWNED BY NON-SIGNATORIES (PREDOMINANTLY PRIVATE) IN 1997 AND THROUGH 2009, PLUS AREA AND PERCENTAGE OF PROJECT-RELATED IMPACTS PERMITTED BY SIGNATORIES WITHIN EACH MANAGEMENT AREA (SOURCES: FTHLICC 1997, P. 74; FTHLICC 2003A, P. 48; FTHLICC 2009, P. 10; FTHLICC 2010, P. 8)

Management area	Area of signatory lands in 1997	Area of non-signatory lands in 1997	Area of non-signatory lands added to signatory lands since 1997	Total area of signatory lands in 2009	Total area of management area	Total area permitted for impact as of 2009	Percent of total area of management area permitted for impact as of 2009 (percent)
Borrego Badlands.	14,771 ha (36,500 ac).	2,388 ha (5,900 ac).	592 ha *(1,464 ac).	15,363 ha (37,964 ac).	17,159 ha (42,400 ac).	0 ha (0 ac) .....	0.0
West Mesa .....	46,256 ha (114,300 ac).	8,822 ha (21,800 ac).	2,624 ha (6,483 ac).	48,880 ha (120,785 ac).	55,078 ha (136,100 ac).	86.77 ha (214.42 ac).	0.16
Yuha Desert .....	23,148 ha (57,200 ac).	1,214 ha (3,000 ac).	0 ha (0 ac) .....	23,148 ha (57,200 ac).	24,362 ha (60,200 ac).	35.90 ha (88.70 ac).	0.15
East Mesa .....	43,868 ha (108,400 ac).	2,792 ha (6,900 ac).	1,380 ha (3,410 ac).	45,248 ha (111,810 ac).	46,660 ha (115,300 ac).	38.40 ha (94.90 ac).	0.08
Yuma Desert .....	46,741 ha (115,500 ac).	6,273 ha (15,500 ac).	6,273 ha (15,500 ac).	53,014 ha (131,000 ac).	53,014 ha (131,000 ac).	10.50 ha (25.95 ac).	0.02
Total .....	174,784 ha (431,900 ac).	21,489 ha (53,100 ac).	10,869 ha (26,857 ac).	185,653 ha (458,759 ac).	196,273 ha (485,000 ac).	171.57 ha (423.97 ac).	0.09

\* Includes 350 ha (864 ac) owned by the Anza-Borrego Foundation.

Representatives from the agencies participating on the Rangewide Management Strategy (also known as the Interagency Coordinating Committee) meet several times a year to coordinate and implement management actions (FTHLICC 2003a, pp. 1–104). The Interagency Coordinating Committee regularly documents progress made to conserve the flat-tailed horned lizard collectively or by participating agencies (FTHLICC 1998, pp. 1–11; FTHLICC 1999, pp. 1–13; FTHLICC 2001, pp. 1–24; FTHLICC 2003b, pp. 1–32; FTHLICC 2004, pp. 1–33; FTHLICC 2005, pp. 1–37; FTHLICC 2006, pp. 1–34; FTHLICC 2007, pp. 1–33; FTHLICC 2008a, pp. 1–35; FTHLICC 2009, pp. 1–38; FTHLICC 2010, pp. 1–33). These reports document and summarize the progress member agencies have made towards implementation of the Planning Actions identified in Rangewide Management Strategy (FTHLICC 2003a, pp. 25–32). The reports indicate that progress by signatory agencies has been made in the following areas: (1) Designation of the five Management Areas and the one Research Area; (2) requiring actions by permittees to follow the avoidance, minimization, and mitigation measures outlined in the Rangewide Management Strategy; (3) rehabilitating damaged and degraded habitat within the Management Areas; and (4) purchase of lands for flat-tailed horned lizard conservation from willing sellers. Although some lower priority actions (tasks), such as research on natural

barriers, remain outstanding, the committee reports that nearly all tasks, many of which are ongoing or multi-year actions, are on schedule (FTHLICC 2010, pp. 21–25). Thus, despite being a voluntary agreement, the signatory agencies generally have been implementing the Interagency Conservation Agreement and associated Rangewide Management Strategy by meeting regularly, working to implement the measures of the Rangewide Management Strategy including providing personnel, developing and distributing public information, and providing ongoing review and feedback.

#### Coachella Valley Multiple Species Habitat Conservation Plan (Coachella Valley MSHCP)

Our past assessments of the status of the flat-tailed horned lizard, particularly the 2003 withdrawal (68 FR 331), addressed the Coachella Valley in detail; thus, for consistency we again address the Coachella Valley here and elsewhere in this document. Since the 2003 withdrawal, and even since our June 28, 2006, withdrawal (71 FR 36745), we have issued an incidental take permit for a large, regional HCP in the Coachella Valley. The Coachella Valley MSHCP is a large-scale, multi-jurisdictional habitat conservation plan encompassing about 445,156 ha (1.1 million ac) in the Coachella Valley of central Riverside County. An additional 27,923 ha (69,000 ac) of Tribal reservation lands distributed within the

plan area boundary are not included in the Coachella Valley MSHCP. The Coachella Valley MSHCP addresses 27 listed and unlisted “covered species,” including the flat-tailed horned lizard. On October 1, 2008, the Service issued a single incidental take permit (TE–104604–0) under section 10(a)(1)(B) of the Act to 19 permittees under the Coachella Valley MSHCP for a period of 75 years. Participants in the Coachella Valley MSHCP include eight cities (Cathedral City, Coachella, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage); the County of Riverside, including the Riverside County Flood Control and Water Conservation District, Riverside County Parks and Open Space District, and Riverside County Waste Management District; the Coachella Valley Association of Governments; Coachella Valley Water District; Imperial Irrigation District; California Department of Transportation; California State Parks; Coachella Valley Mountains Conservancy; and the Coachella Valley Conservation Commission (the created joint powers regional authority). The Coachella Valley MSHCP was designed to establish a multiple species habitat conservation program that minimizes and mitigates the expected loss of habitat and incidental take of covered species, including flat-tailed horned lizard (USFWS 2008, pp. 1–207, and Appendix A, pp. 298–328). The Coachella Valley MSHCP is also a “Subregional Plan” under the State of

California’s Natural Community Conservation Planning (NCCP) Act, as amended.

The permit covers incidental take resulting from habitat loss and disturbance associated with urban development and other proposed covered activities. These activities include public and private development within the plan area that require discretionary and ministerial actions by permittees subject to consistency with the Coachella Valley MSHCP policies. An associated Management and Monitoring Program is also included in the Coachella Valley MSHCP and identifies specific management actions for the conservation of the flat-tailed horned lizard and its habitat.

The Coachella Valley MSHCP identifies a reserve system that, upon full implementation, will establish 21 conservation areas that are either adjacent to each other or are linked by biological corridors. The acquisition program for the plan’s reserve system is designed to conserve 52,484 ha (129,690 ac) during the first 30 years. This program is to be implemented such that acquisitions occur commensurate (in “rough step”) with impacts from urban development that is covered under the plan.

The flat-tailed horned lizard is now known to occur only at two locations

within the Coachella Valley MSHCP area, the Thousand Palms and Dos Palmas conservation areas (CVCC 2010, p. 13) (see also *Description of Specific “Populations”* section below). Table 2 describes the amount of flat-tailed horned lizard habitat conserved and identified to be conserved through implementation of the Coachella Valley MSHCP. Additionally, plan implementation is expected to limit impacts of development and other covered activities on lands within conservation areas but that have not yet been acquired for conservation as part of the Coachella Valley MSHCP reserve system. The plan also designates one core habitat area (as used in that plan, this refers to an area that is large enough to maintain a self-sustaining population)—the Thousand Palms conservation area—and commits to establishing two more self-sustaining populations in other parts of the reserve system, if feasible, to benefit the flat-tailed horned lizard. Because of the distances separating appropriate parts of the reserve system, relocation of flat-tailed horned lizards will be required to re-establish or enhance populations in suitable habitat areas that have the potential to, but currently do not, support self-sustaining populations. Additionally, the plan calls for

Management and Monitoring Programs that are expected to conserve this species in the plan area. Required management activities include limiting activities that degrade flat-tailed horned lizard habitat, evaluation and management of edge effects and other impacts through adaptive management, control of invasive species where necessary, and restoration and enhancement of degraded habitat as necessary according to monitoring results (CVAG 2007, p. 9–123). In our evaluation of the potential impacts of the plan’s implementation on the flat-tailed horned lizard (USFWS 2008, p. 178), we concluded: “After reviewing the current status of this species, environmental baseline for the action area, effects of the proposed action, and cumulative effects, it is the Service’s biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of the flat-tailed horned lizard. Loss of the Coachella Valley population would have a negligible [effect] on the status of the species as a whole, since it makes up approximately 1 percent of the current range of the flat-tailed horned lizard. Persistence of the species in the Plan area is likely only with effective Plan implementation.”

TABLE 2—AREA OF FLAT-TAILED HORNED LIZARD HABITAT CONSERVED, ANTICIPATED TO BE CONSERVED, IMPACTED, AND ANTICIPATED TO BE IMPACTED THROUGH IMPLEMENTATION OF THE COACHELLA VALLEY MSHCP

Criterion (source)	Thousand Palms	Dos Palmas
Flat-tailed horned lizard habitat area conserved at permit issuance in 2008 (CVAG 2007, p. 9–115).	1,318 ha (3,256 ac)	608 ha (1,503 ac)
Additional flat-tailed horned lizard habitat area conserved in 2008 (CVCC 2009, p. 79).	274 ha (678 ac)	107 ha (265 ac)
Additional flat-tailed horned lizard habitat area conserved in 2009 (CVCC 2010, pp. 39 & 51).	8 ha (20 ac)	0 ha (0 ac)
Total flat-tailed horned lizard habitat area under conservation through 2009 (calculated).	1,600 ha (3,954 ac)	715 ha (1,768 ac)
Total flat-tailed horned lizard habitat area expected to be conserved by MSHCP implementation (CVAG 2007, p. 9–115).	1,707 ha (4,219 ac)	2,078 ha (5,134 ac)
Percent flat-tailed horned lizard habitat area conserved through 2009 compared to amount required upon full implementation of the plan (calculated).	94%	34%
Area of flat-tailed horned lizard habitat impacted by permitted activities through 2009 (CVCC 2009, p. 79; CVCC 2010, pp. 39 & 51).	0 ha (0 ac)	0 ha (0 ac)
Area of flat-tailed horned lizard habitat anticipated to be impacted by permitted activities (CVAG 2007, p. 9–115).	44 ha (108 ac)	163 ha (403 ac)
Percent flat-tailed horned lizard habitat area anticipated to be impacted compared to total area of flat-tailed horned lizard habitat in conservation area (calculated).	2%	7%

**Lower Colorado River Multi-Species Conservation Plan (Lower Colorado River MSCP)**

The Lower Colorado River MSCP is a joint effort by Federal and non-Federal (State, local, and private) entities with management authority for storage,

delivery, and diversion of water; hydropower generation, marketing, and delivery; and land management or Native American Trust responsibilities along the Lower Colorado River, to address regulatory requirements under sections 7, 9, and 10 of the Act for their

activities. We issued the 50-year permit (TE–086834) on April 4, 2005. Most of the activities addressed by the Lower Colorado MSCP are outside the range of the flat-tailed horned lizard. The flat-tailed horned lizard habitat contained within the Lower Colorado River MSCP

planning area is under control of agencies, especially the Bureau of Reclamation, that have agreed to implement the Rangewide Management Strategy (USFWS 2005, p. 202).

Implementation of the Lower Colorado River MSCP is expected to provide for the acquisition and long-term protection of 230 acres of existing flat-tailed horned lizard habitat that is currently unprotected. This action is compensation for anticipated impacts to approximately 128 acres of flat-tailed horned lizard habitat (USFWS 2005, pp. 201–202). Purchase of protected habitat, potentially near the Dos Palmas reserve area, is scheduled to start in 2011 (BOR 2010, p. 274). Additionally, activities covered under the permit will be designed to avoid or minimize effects to the species and its habitat in accordance with the conservation needs identified in the Rangewide Management Strategy (USFWS 2005, pp. 201–202).

We found that implementation of the Lower Colorado River MSCP was “Not Likely to Jeopardize the Continued Existence of the Species” (USFWS 2005, p. 202), noting “The habitat area that would be included [under the plan] is not a significant amount of the available habitat for the species. \* \* \* Research and monitoring of the species within the [Lower Colorado River MSCP] area will contribute to understanding the species, its distribution, and habitat needs. \* \* \* [and] There are not likely to be any adverse effects to the species’ conservation elsewhere in the range from the issuance of an incidental take permit for the [Lower Colorado River MSCP]” (USFWS 2005, p. 202).

#### *Population Dynamics*

Flat-tailed horned lizards are difficult to detect, which limits the effectiveness of surveys for the species (FTHLICC 2003a, pp. 9, 65; Grant and Doherty 2007, p. 1050). As a result, not only is presence and especially absence difficult to determine, but determining the size, trend, and demography of populations is problematic as well. The history of flat-tailed horned lizard monitoring and the shortcomings of the techniques used are described in the Rangewide Management Strategy (FTHLICC 2003a, p. 64) and our 2003 withdrawal document (68 FR 332–333). Monitoring using more rigorous data collection and analytical methodologies has been conducted as part of the implementation of the Rangewide Management Strategy (FTHLICC 2003a, pp. 64–66; FTHLICC 2008b, pp. 1–38). The results from this monitoring effort are described below.

As detailed in the Flat-tailed Horned Lizard Monitoring Plan (FTHLICC

2008b, pp. 1–38), flat-tailed horned lizard monitoring consists of two surveys used in tandem: (1) Occupancy estimation surveys and (2) demographic plot surveys. Occupancy estimation was designed to determine whether the distribution (but not numbers of individuals or densities) of flat-tailed horned lizards in the management and research areas is stable, increasing, or decreasing. This component of the monitoring was meant to detect large-scale changes in the status of flat-tailed horned lizard distribution in the Management Areas. The monitoring of demographic plots was designed to delineate flat-tailed horned lizard population dynamics and trends by estimating abundance each summer and yearly survival, recruitment, and population growth rate between years. This component was meant to gather more in-depth information on a smaller number of plots. However, the demographic plots were non-randomly established within areas known or suspected to support greater densities of flat-tailed horned lizards. The Management Areas overall were selected because they provided generally high-quality flat-tailed horned lizard habitat. However, the use of the two complementary survey types, one dispersed and coarse and the other focused and narrow, allows managers to draw, with caution, more detailed conclusions about an entire Management Area than they could have otherwise done by interpreting just one of the survey types alone. Below we summarize the information available from these monitoring efforts (source: USFWS 2010a, pp. 1–76).

Occupancy surveys were conducted at West Mesa (2005 and 2009), East Mesa (2006), Yuha Desert (2008), and Ocotillo Wells State Vehicular Recreation Area (SVRA) (2006–2009). Separate occupancy analyses of these areas were conducted based on three survey methodologies: visual observations of flat-tailed horned lizards, lizard scat observations, and a combination of visual and scat observations. Multi-year analyses also were conducted for a subset of 53 plots in Ocotillo Wells SVRA that were surveyed annually from 2006 to 2009. Our analysis indicates the combined visual-and-scat surveys were the most likely to correctly yield a statistically significant result (i.e., this survey methodology had the greatest statistical power). Although there are no comparable historical data with which to provide context, our analysis suggests that the level of occupancy of flat-tailed horned lizards within the surveyed areas seemed relatively high at all sites.

For example, visual-and-scat survey results show that flat-tailed horned lizards occupied at least 80 percent of the Management Areas in the years surveyed, except in the West Mesa Management Area in 2005, which had a low level of survey effort that year. Additionally, results from the 53-plot subset with multi-year data from 2006 to 2009 suggested that the level of flat-tailed horned lizard occupancy stayed about the same or may have even increased slightly over time. Moreover, our analysis showed considerable support to conclude that there was no linear decline in the proportion of survey plots occupied by flat-tailed horned lizards. These results only reflect the occupancy of flat-tailed horned lizards within the areas surveyed and do not necessarily reflect the level of occupancy throughout the range of the species; nevertheless, we conclude from the above results that the level of occupancy within the survey areas is not low, and that there is no indication of a decline.

Data from the demographic plots were gathered from six 9-hectare (22.2-acre) plots at the following flat-tailed horned lizard Management Areas: East Mesa (1 plot, 2007–2009), West Mesa (1 plot, 2007–2009; 1 plot, 2008–2009), Yuha Desert (1 plot, 2007–2009), and Yuma Desert (2 plots, 2008–2009). Hatchlings were captured at all Management Areas except East Mesa (which was surveyed prior to the time that flat-tailed horned lizards eggs would have been likely to have hatched), indicating that flat-tailed horned lizards were reproducing. The presence of hatchlings during 2008, and especially 2009, suggested that reproductive conditions were favorable in those years.

Because of the complexities of analyzing a cryptic species, we used two methodologies to calculate flat-tailed horned lizard abundance. Because the surveyed plots were not closed (meaning flat-tailed horned lizards could move in and out of the areas being surveyed), we used two different methods (calculations) to estimate the “effective survey area” so that we could translate abundance (number of individuals) into densities (number of individuals per unit area). Using the first method (using a mean maximum distance moved buffer strip to estimate effective survey area), the density of adult flat-tailed horned lizards ranged from 0.3 to 3.3 individuals per ha (0.1 to 1.3 individuals per ac), while the second method (using a hierarchical, spatially indexed capture-recapture model to estimate effective survey area) yielded a range from 0.7 to 4.4 individuals per ha (0.3 to 1.8

individuals per ac). The results from the second method are likely to be more realistic because they incorporated additional spatial information.

Other estimates of density of flat-tailed horned lizards are available in the scientific literature, but comparisons between and among the different studies (including the recent monitoring) are confounded by differing survey and analysis methodologies. Nevertheless, the above densities at the three California Management Areas were generally within the range of estimates reported by Grant (2005, pp. 39–40) during 2002–2004. Similarly, the densities of adult flat-tailed horned lizards at the Yuma Desert Management Area reported above were generally similar to the ranges of estimates presented by Young and Young (2000, p. 28) during 1997–1998, Young *et al.* (2004b, p. *i*) during 2003, and Young and Royle (2006, p. 9) in 2005. Comparisons to even earlier estimations of flat-tailed horned lizard densities, although even more tenuous because of differing methodologies, are also within similar ranges. Despite similar ranges in densities reported from the various studies through time, the increased statistical and methodological rigor of recent efforts has reduced the level of uncertainty in the results. Thus, these recent density estimates are an improvement over older estimates.

The available data indicate that flat-tailed horned lizard abundances and densities have remained relatively stable from 2007 to 2009; however, with only 3 years of standardized monitoring, these data cannot yet provide meaningful inferences about long-term trends. Additionally, no abundance or density information is available for the lower-quality habitat areas outside the demographic plots. However, the complementary coarse-scale occupancy survey data mentioned above suggests flat-tailed horned lizards are widely distributed spatially and, in at least at one Management Area, temporally consistent. This conclusion suggests that flat-tailed horned lizard population trends in the surveyed lower-quality habitat areas are not dissimilar to those of the surveyed higher-quality habitat areas. Moreover, because the recent (2007–2009) and older (1997–2005) density estimates are all generally within similar ranges, this suggests the overall density of flat-tailed horned lizards within the surveyed Management Areas has not markedly decreased over the past decade or so. Thus, with the previously mentioned caveats in mind, we conclude that flat-tailed horned lizard populations in the Management Areas are not low and have

not declined since 2007, and probably not declined since 1997.

#### *Description of Specific “Populations”*

As stated earlier, we have divided the current range of the flat-tailed horned lizard into four populations based on geographic locales. The 2003 Rangewide Management Strategy includes a GIS-based map (FTHLICC 2003a, p. 5) of the “current distribution” of the flat-tailed horned lizard. Except for the Coachella Valley Population, where the flat-tailed horned lizard is now limited to two occurrences, we used the GIS data as a basis for our assessment of the distribution of flat-tailed horned lizard populations. A summary of these populations is presented below.

*Coachella Valley Population* (California)—The “current distribution” within the Coachella Valley as defined by the Rangewide Management Strategy (FTHLICC 2003a, pp. 3–5) does not represent the best scientific distribution information available for this region. Urban and agricultural development has continued in the Coachella Valley, and there are many areas of unsuitable or degraded habitat. In addition to areas of unsuitable habitat, many of which serve as a barrier to flat-tailed horned lizard movement, other potential manmade barriers exist, including several major highways, a railway, and canals. The only area within the Coachella Valley proper that is now known to be occupied by flat-tailed horned lizards is in the Thousand Palms reserve (CVCC 2010, p. 13). Other areas of potentially suitable habitat occur in the region, including areas that were formerly known to be occupied (Barrows *et al.* 2008, p. 1891), although recent surveys have not detected any flat-tailed horned lizards (CVCC 2010, p. 13). Thus, the “current distribution” as defined by the Rangewide Management Strategy (FTHLICC 2003a, pp. 3–5) does not accurately reflect the area occupied by flat-tailed horned lizards in the Coachella Valley; as such, we do not use a GIS-based assessment for the Coachella Valley as we do for the other geographical “populations.”

The Coachella Valley MSHCP is the primary driver of monitoring and management activities for the Coachella Valley Population of the flat-tailed horned lizard because the Rangewide Management Strategy does not include any Management Areas in this region. The Coachella Valley Population area is the smallest of the four geographic “populations,” and we primarily identify it as a separate population to be consistent with our past analyses. Flat-tailed horned lizards also occur in the vicinity of the Dos Palmas Preserve near

the northeast shore of the Salton Sea (Turner and Medica 1982, p. 817; FTHLICC 2003a, pp. 2–6; CVCC 2010, p. 13). The Dos Palmas population is small and likely isolated from other populations because of the presence of the Salton Sea to the west; canals, roads and urban and agricultural development to the northwest; and canals, roads and urban and agricultural development to the southeast. However, not all of these barriers are likely to completely restrict flat-tailed horned lizard movement (see the Factor E discussion, below). The genetic affinities of the Dos Palmas population are not known. Geographically, the flat-tailed horned lizards at Dos Palmas Preserve could arguably be considered part of either the Western Population or Eastern Population (see below); however, because the true affinities of this population are not known, and because the Dos Palmas reserve area is covered under the Coachella Valley MSHCP and its associated monitoring and management, herein we consider the Dos Palmas flat-tailed horned lizards to be part of the Coachella Valley Population. The area of flat-tailed horned lizard habitat in the Coachella Valley Population is about 3,785 ha (9,353 ac) (see Table 2).

*Western Population* (California and Baja California)—This population includes flat-tailed horned lizards in the areas west of the Salton Sea, the Imperial Valley, and the Mexicali Valley. Using a GIS-based assessment to estimate the area of this portion of the “current distribution” as defined by the Rangewide Management Strategy (FTHLICC 2003a, pp. 3–5), we estimated that the Western Population occupies 341,989 ha (845,073 ac). Of this acreage, approximately 253,020 ha (625,226 ac) is within the United States. Within the U.S. portion of the Western Population, approximately 48,262 ha (119,258 ac), or about 19 percent, is non-Federal or non-State owned, or is more likely to be developed. The habitat within this area is mostly intact except for a few developed areas, but as discussed in the “Barriers and Small Populations” section under Factor E, potential manmade barriers to flat-tailed horned lizard movement (in addition to areas of urban and agricultural development) include Interstate 8; State Routes 78, 86, and 98; two railways; the fence and other activities along the international border in the United States, and Mexico Federal Highway 2 in Mexico. The Rangewide Management Strategy designates three Management Areas in this population area, including Borrego Badlands, West Mesa, and Yuha Desert

(see Table 1), and a research area at the Ocotillo Wells SVRA. Much of the westernmost portion of this population is within Anza-Borrego Desert State Park. Additionally, private lands are scattered throughout the U.S. portion, with large aggregations in the Borrego Springs area and in the vicinity of (but outside of) Ocotillo Wells SVRA. The range of the flat-tailed horned lizard in this population also extends southward into Mexico, crossing the international border at the Yuha Desert and continuing south along the east side of the Peninsular Ranges and west of Laguna Salada in Baja California (FTHLICC 2003a, pp. 2–5). The status of the population in this portion of the range in Mexico is poorly known, but there have been few substantive changes to the landscape in this area. Additionally, flat-tailed horned lizards were observed recently near Cerro Prieto, Baja California, which is east of the Sierra de Los Cucapahs (Sierra Cucapá) and west of the agricultural areas of the Mexicali Valley (A. Calvo Fonseca, Pronatura Noroeste, *in litt.* 2010). This recent detection is outside of the current distribution as depicted in the Rangewide Management Strategy (FTHLICC 2003a, p. 5).

**Eastern Population** (California and Baja California)—This population includes flat-tailed horned lizards in the areas east of the Salton Sea and the Imperial Valley but west of the Colorado River. While the isolated population at Dos Palmas Preserve could be included as part of either the Eastern Population or the Coachella Valley Population based on its geographic location, for the purposes of our analysis of threats to the species we consider the Dos Palmas Preserve population to be part of the Coachella Valley Population because of the similarity of potential threats when compared to the populations in the Coachella Valley, and its inclusion within the Coachella Valley MSHCP plan area. Using a GIS-based assessment to estimate the area of the Eastern Population portion of the “current distribution” (as defined by the Rangewide Management Strategy (FTHLICC 2003a, pp. 3–5)), we estimated that the Eastern Population occupies 169,617 ha (419,133 ac). Of this acreage, approximately 146,121 ha (361,073 ac) is within the United States. Within the U.S. portion of the Eastern Population, approximately 5,844 ha (14,441 ac), or about 4 percent, is non-Federal or non-State owned, or is more likely to be developed. The area occupied by the Eastern Population is mostly intact except for a few developed areas, but potential manmade barriers to

flat-tailed horned lizard movement (in addition to areas of urban and agricultural development) include Interstate 8, State Routes 78 and 98, the All-American Canal and the Coachella Canal, and the international border fence in the United States (see “Barriers and Small Populations” section under Factor E, below). The Rangewide Management Strategy designated the East Mesa Management Area within the area occupied by the Eastern Population (see Table 1). The geographic extent of the Eastern Population also includes the Algodones Dunes (also known as the Imperial Sand Dunes or Glamis Sand Dunes), a portion of which is designated Wilderness, and a narrow strip of habitat south of the international border at the southern edge of the Algodones Dunes (FTHLICC 2003a, pp. 2–5). The portion of the Eastern Population area in Mexico is bound by agricultural development (unsuitable habitat) on the west, south, and east. The status of the portion of the Eastern Population in Mexico is poorly known, but flat-tailed horned lizards were observed recently in this area (A. Calvo Fonseca, *in litt.* 2010).

**Southeastern Population** (Arizona and Sonora)—This population includes flat-tailed horned lizards in the areas east of the Colorado River, extending from Yuma, Arizona, south and east to the Gulf of California in northwestern Mexico. In Arizona, the flat-tailed horned lizard occurs in Yuma County, ranging over the Yuma Desert south of the Gila River and west of the Gila and Butler Mountains (Rorabaugh *et al.* 1987, p. 104; FTHLICC 2003a, pp. 2–6). The Rangewide Management Strategy designated the Yuma Desert Management Area within the area occupied by the Southeastern Population (see Table 1). In Mexico, the flat-tailed horned lizard ranges from the international border in the Yuma Desert south and east through the Pinacate Region to the sandy plains around Puerto Peñasco and Bahía de San Jorge along the Gulf of California (Johnson and Spicer 1985, p. 13; González-Romero and Alvarez-Cardenas 1989, p. 519; FTHLICC 2003a, pp. 2–5). About 60 percent of the flat-tailed horned lizard habitat in Sonora lies within two Mexican Federal natural protected areas: the Upper Gulf of California and Colorado Delta Biosphere Reserve, and the Pinacate and Gran Desierto de Altar Biosphere Reserve (CEDO 2001, p. 3).

Using a GIS-based assessment to estimate the area of this portion of the “current distribution” as defined by the Rangewide Management Strategy (FTHLICC 2003a, pp. 3–5), we estimated that the area occupied by the

Southeastern Population is 1,073,551 ha (2,652,802 ac), by far the largest of the four population areas. Of this acreage, approximately 67,922 ha (167,839 ac) is within the United States. Within the U.S. portion of the Southeastern Population, approximately 5,158 ha (12,746 ac), or about 8 percent, is privately owned; an additional 5,832 ha (14,411 ac), or about 9 percent, is State of Arizona-owned lands. The habitat within the Southeastern Population area is mostly intact except for a few developed areas, but potential barriers to flat-tailed horned lizard movement (in addition to areas of urban and agricultural development) include Interstate 8 and the Yuma Areas Service Highway in the United States; the international border (combined with Mexico Federal Highway 2); Mexico Federal Highway 8; and a railway in Mexico (see “Barriers and Small Populations” section under Factor E, below).

In summary, using a GIS-based assessment to estimate the size of the current distribution of the flat-tailed horned lizard as defined by the Rangewide Management Strategy (FTHLICC 2003a, p. 5), we estimated that the three population areas (excluding the Coachella Valley Population) comprise roughly 1,585,000 ha (3,916,600 ac), of which approximately 467,000 ha (1,154,000 ac) (less than 30 percent) is within the United States and approximately 1,100,000 ha (2,718,000 ac) (more than 70 percent) is within Mexico. The area of flat-tailed horned lizard habitat occupied or likely to be occupied that already is or is expected to be conserved in the Coachella Valley Population is about 3,785 ha (9,353 ac) (see Table 2).

#### Previous Federal Actions

In 1982, we first identified the flat-tailed horned lizard as a category 2 candidate species for listing under the Act (47 FR 58454; December 30, 1982). Category 2 candidate species were “taxa for which information now in possession of the Service indicates that proposing to list the species as Endangered or Threatened is possibly appropriate, but for which sufficient data on are not currently available to biologically support a proposed rule” (47 FR 58454). We again identified the flat-tailed horned lizard as a category 2 candidate species in our 1985 notice of review (50 FR 37958; September 18, 1985). In 1989, we elevated the species to category 1 status (54 FR 554; January 6, 1989). Category 1 included species “for which the Service currently has substantial information on hand to support the biological appropriateness

of proposing to list as endangered or threatened" (54 FR 554). We maintained the category 1 status for the flat-tailed horned lizard in our 1991 notice of review (56 FR 58804; November 21, 1991).

On November 29, 1993, we published in the **Federal Register** a proposed rule to list the flat-tailed horned lizard as a threatened species under the Act (58 FR 62624). On February 22, 1994 (59 FR 8450), we published a notice reopening the public comment period and announcing that we had scheduled a public hearing on March 22, 1994, in Imperial, California, in response to a request from the public. Our November 15, 1994, candidate notice of review stated that we had proposed to list the species as threatened (59 FR 58982).

Subsequently, the passage of Public Law 104-6, 109 Stat. 73 on April 10, 1995, resulted in a delay in our final listing determination for the flat-tailed horned lizard. Although the statute's primary purpose was to provide additional funds for overseas military operations, it also included a rider that withdrew funding for listing determinations. Through a series of moratoria, funding restrictions, and continuing resolutions, this restriction in use of funds remained in effect until April 26, 1996, when the Omnibus Appropriations Act was enacted (Pub. L. 104-134, 110 Stat. 1321, (1996)), which contained a moratorium on certain listing activities but allowed the President to waive the moratorium. On April 26, 1996, President Clinton suspended the provision limiting implementation of Section 4 of the Act (61 FR 24667; May 16, 1996). Earlier in 1996, our notice of review had indicated that we had proposed to list the species as threatened (61 FR 7596; February 28, 1996).

On January 21, 1997, the Bureau of Land Management (BLM) announced in the **Federal Register** that the draft Flat-tailed Horned Lizard Rangewide Management Strategy was available for public comment (62 FR 3052). On May 16, 1997, in response to a lawsuit filed by the Defenders of Wildlife and other plaintiffs to compel us to make a final listing determination on the flat-tailed horned lizard, the District Court in Arizona ordered us to issue a final listing decision within 60 days. In June 1997, several State and Federal agencies, including the Service, signed an Interagency Conservation Agreement committing to implement the recently finalized Flat-tailed Horned Lizard Rangewide Management Strategy (FTHLICC 1997, pp. 1-106). Pursuant to the Interagency Conservation Agreement, cooperating parties agreed

to take voluntary steps aimed at "reducing threats to the species, stabilizing the species' populations, and maintaining its ecosystem" (see FTHLICC 2003a, p. 80).

On July 15, 1997, we issued a final decision to withdraw the proposed rule to list the flat-tailed horned lizard as a threatened species (62 FR 37852). We based the withdrawal on three factors: (1) Population trend data did not conclusively demonstrate significant population declines; (2) Some of the threats to the flat-tailed horned lizard habitat had abated since the proposed rule was issued; and (3) Our conclusion that the recently approved Interagency Conservation Agreement would ensure further reductions in threats (62 FR 37852).

On December 30, 1997, the Defenders of Wildlife and others filed a complaint in the U.S. District Court for the Southern District of California challenging our 1997 withdrawal of the proposed rule. On June 16, 1999, the District Court upheld our decision to withdraw the proposed listing rule. The District Court's decision was appealed and on July 31, 2001, the Ninth Circuit Court of Appeals vacated the previous ruling of the District Court. The case was remanded back to the Secretary because: (1) The withdrawal of the proposed rule did not expressly consider whether the flat-tailed horned lizard is likely to become an endangered species within the foreseeable future in a significant portion of its range; and (2) The withdrawal of the proposed rule did not "address the lizard's viability in a site-specific manner with regard to the putative benefits of the Interagency Conservation Agreement." In accordance with the Appeals Court's ruling, we published a document in the **Federal Register** on December 26, 2001, reinstating the 1993 proposed rule and opening a 120-day public comment period (66 FR 66384).

On May 30, 2002, we published a document in the **Federal Register** reopening the public comment period for an additional 60 days (67 FR 37752) and announced that we would be holding public hearings in El Centro, California, on June 19, 2002. On September 24, 2002, we published in the **Federal Register** another document (67 FR 59809) announcing the reopening of the public comment period for an additional 15 days to allow for peer review, additional public comment on the proposed rule, and submittal of information that became available since our 1997 withdrawal.

On January 3, 2003, we again published in the **Federal Register** a decision to withdraw the November 29,

1993, proposed rule to list the flat-tailed horned lizard as a threatened species (68 FR 331). The Service found the lizard to be "in danger of extirpation in the Coachella Valley" (68 FR 348); however, we determined that the Coachella Valley is not a significant portion of the species' range. We concluded in the January 3, 2003, withdrawal that the flat-tailed horned lizard populations on either side of the Imperial Valley-Salton Sea and in Arizona were not likely to become endangered in the foreseeable future and that listing the species was not warranted.

The Tucson Herpetological Society and others filed a complaint with the District Court for the District of Arizona challenging the January 3, 2003, withdrawal of the proposed rule. In a ruling issued on August 30, 2005, the District Court for the District of Arizona issued an order granting plaintiffs' motion for summary judgment, citing our failure to specifically evaluate the lost habitat of the flat-tailed horned lizard, and whether the amount of lost habitat represented a significant portion of the species' range. On December 7, 2005, we published a document in the **Federal Register** reinstating the 1993 proposed rule (70 FR 72776). On March 2, 2006, we announced in the **Federal Register** that we were reopening the public comment period on the 1993 proposed rule for 14 days for the purpose of soliciting comments and information relevant to the specific issue identified in the District Court's November 2005 ruling (*i.e.*, whether the flat-tailed horned lizard's lost historical habitat rendered the species likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of its range) (71 FR 10631). On April 21, 2006, we announced in the **Federal Register** an additional public comment period on the 1993 proposed rule from April 21, 2006, to May 8, 2006 (71 FR 20637).

After re-examining the lost historical habitat of the flat-tailed horned lizard in relation to our January 3, 2003, withdrawal, we determined that the lost historical habitat is not a significant portion of the species' range, and its loss does not result in the species likely becoming endangered in the foreseeable future throughout all or a significant portion of its range. We published our decision in the **Federal Register** on June 28, 2006, to once again withdraw the November 29, 1993, proposed rule to list the flat-tailed horned lizard as a threatened species (71 FR 36745).

Following a supplemental complaint from Tucson Herpetological Society and others challenging the 2006 withdrawal

of the proposed rule to list the flat-tailed horned lizard under the Act, the United States District Court for the District of Arizona (the District Court) granted summary judgment in favor of the Secretary of the Interior (*Tuscon Herpetological Society v. Kempthorne*, 04-CV-00075-PHX-NVW); however, this ruling was appealed to the Court of Appeals for the Ninth Circuit. In a ruling issued on May 18, 2009, the Court of Appeals for the Ninth Circuit reversed the District Court's ruling when it determined that in the context of the analysis of whether the lizard's lost historical range constituted a significant portion of the species' range, the administrative record did not support what the Court of Appeals for the Ninth Circuit viewed as the Service's conclusion that flat-tailed horned lizard populations were stable and viable throughout most of its current range.

On November 3, 2009, the District Court remanded the 2006 withdrawal to the Service for further consideration and reinstated the 1993 proposal to list the species. The District Court ordered the Service to complete this reconsideration in accordance with the deadlines set forth in 16 U.S.C. 1533(b). On March 2, 2010, we published a notice in the **Federal Register** announcing the reinstatement of the 1993 proposed rule, the reopening of the public comment period for 60 days, and the scheduling of public hearings (75 FR 9377). Public hearings were held in Palm Desert, California, on March 23, 2010, and Yuma, Arizona, on March 24, 2010.

### Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1531 *et seq.*) and the regulations that implement the listing provisions of the Act (50 CFR part 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act (Factors A through E).

We evaluated threats to the flat-tailed horned lizard under the five listing factors in the 1993 proposed rule to list the flat-tailed horned lizard as threatened under the Act (58 FR 62624). Subsequent documents in 1997 and 2003 withdrawing the proposed rule to list the species included additional evaluations (62 FR 37852; 68 FR 331). The 2003 document withdrawing the proposed rule was the most comprehensive and the most recent five-factor analysis. The 2006 document

withdrawing the proposed rule (71 FR 36745) did not address the five factors in detail because its scope was limited by a court order (*see* Previous Federal Actions section). In this document, we use the best scientific and commercial data available to evaluate current potential threats to flat-tailed horned lizard and its habitat rangewide per the five listing factors, and we provide brief summaries of the 1993 and 2003 evaluations for context.

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

For this factor, we evaluated the present (current) or threatened (anticipated) impacts that may be affecting the habitat or range of the flat-tailed horned lizard. This factor does not address historical or past actions that resulted in destruction, modification, or curtailment of the species' habitat or range. Past actions that destroyed, modified, or curtailed the species' habitat or range are not threats in and of themselves. Any persisting ramifications of such past actions that may be threats to the species are addressed under Factor E (other natural or manmade threats), below. However, for Factor A, we do look to past actions to inform our evaluation of potential future threats affecting the species' habitat or range in that the history of past actions allows us to predict the likelihood of such actions continuing into the foreseeable future.

In the 1993 proposed rule (58 FR 62625–62626), we identified historical flat-tailed horned lizard habitat losses that resulted in the curtailment of the species' range under Factor A. We noted threats that were current or anticipated at that time, including agricultural and urban development, off-highway vehicle (OHV) use, geothermal energy development, sand and gravel extraction operations, military training activities, and construction of roads and utility corridors. We also mentioned that flat-tailed horned lizard habitat had been fragmented, causing isolation of populations (curtailment of the species' range) (*see* below for additional discussion on fragmentation).

Additionally, the 1993 proposed rule also mentioned gold mining as a potential threat. There are currently no gold mines in flat-tailed horned lizard habitat, and we are not aware of any proposals for new gold mines; therefore, we do not expect gold mines to become a threat in the foreseeable future.

In the 2003 withdrawal document (68 FR 341–345), we found that current and anticipated urban and agricultural development was limited to a few, small

areas and did not constitute a significant threat to the species. However, we did state that past agricultural, urban, and associated infrastructural development (such as canals and roads) had fragmented the species' range, which we discuss below as a separate threat under Factor A.

#### Fragmentation and Past Habitat Loss

Because of our past treatment of fragmentation in our previous rules, we are providing a discussion of *fragmentation* as a term and its application to the five-factor analysis for the flat-tailed horned lizard. This discussion should: (1) Provide a clear definition of the term that we use in this document, and (2) acknowledge that our lack of clarity for this term in past documents may have resulted in unanswered questions as to how the flat-tailed horned lizard may have been affected by historical development in the Salton Trough. Because of the connection between fragmentation and historical habitat loss, we also describe how historical habitat loss was addressed in past assessments.

In the 2003 withdrawal document, we defined fragmentation as the "breaking up of a habitat or ecosystem into smaller parcels" (68 FR 341). This definition is similar to the more detailed version used by Wilcove *et al.* (1986, p. 237) who defined habitat fragmentation as occurring "when a large expanse of habitat is transformed into a number of smaller patches of smaller total area, isolated from each other by a matrix of habitats unlike the original." Thus, fragmentation is a process, one that inextricably involves habitat loss (Fahrig 1999, p. 87). However, in addition to the effects associated with habitat loss, fragmentation also includes the effects associated with the fractured nature of that habitat *after its transformation* (Fahrig 2003, p. 487). The implication is that the biological properties of the remaining, small, isolated patches of habitat have changed during or as a result of the fragmentation of the habitat (van den Berg *et al.* 2001, p. 225). In other words, after some portion of the habitat of a species has been destroyed, that species may be impacted by one or more secondary effects (threats) associated with reduction in the size of remaining habitat patches (or the populations of the species therein) and the isolation of those patches (and populations) from each other (Andr n 1994, p. 355). Thus, the effects of fragmentation include: (1) The effects associated with the ongoing loss of habitat; and (2) the subsequent, secondary effects that are the current ramifications of past habitat loss.

Because multiple secondary effects may be related or correlated to each other (Fahrig 2003, pp. 491–492), the term fragmentation, as it has been used in the scientific literature and by the Service in past assessments of this species, is ambiguous (Haila 2002, p. 321). Because of this ambiguity, in applying the Act's five listing factors to the flat-tailed horned lizard, we will address current and anticipated habitat loss under Factor A, and the relevant, identifiable secondary effects (including threats associated with fragmentation) to the species under Factor E.

Our past assessments describe in detail and attempted to quantify the historical development in the Salton Trough (58 FR 62626; 62 FR 37857; 68 FR 341–345; 71 FR 36751), as did the scientific literature (such as Johnson and Spicer 1985, p. 38, 45–48; Rorabaugh *et al.* 1987, p. 106; Hodges 1995, pp. 1–18; Hodges 1997, pp. 1–16; Piest and Knowels 2002, pp. 1–4; FTHLICC 2003a, pp. 2–3; Piest and Knowels 2006, pp. 1–4). These documents have, to a greater or lesser extent, estimated the areal extent of current and historical flat-tailed horned lizard habitat in all or certain portions of its range. One of the more detailed of such analyses was Hodges (1997, pp. 15–16), who concluded that 503,161 ha (1,243,341 ac) out of 979,016 ha (2,419,200 ac), or about 51 percent, of flat-tailed horned lizard habitat in the United States had been destroyed by past development.

However, such calculations, no matter how carefully crafted, are necessarily based on assumptions of what areas constituted historical habitat for the species (such as Hodges 1997, p. 10). Because much of the area within the range of the flat-tailed horned lizard was converted to agricultural and urban development during the early half of the 20th century (*see* Background section, above) prior to any systematic surveys for the flat-tailed horned lizard, little reliable information exists on the historical distribution of the species (Barrows *et al.* 2008, p. 1886).

We questioned the validity of such assumptions in our past assessments. For example, Hodges (1997, pp. 5, 7, and 16) included the area now inundated by Salton Sea as historical habitat, but we stated in our 2003 withdrawal that the Salton Sea area could arguably be considered ephemeral historical habitat. In our 2006 withdrawal, we concluded that the former lakebed of historical Lake Cahuilla (including and beyond the present-day Salton Sea) likely was not habitat important to the flat-tailed horned lizard (71 FR 36750–36751). The

information on the genetics of flat-tailed horned lizard populations raises further doubts about the validity of the assumptions made in earlier assessments, both by us and by others, of historical flat-tailed horned lizard habitat.

As discussed above (*see* Background section), genetic data readily support three of the four geographic populations as distinct, indicating that these populations generally had little genetic interchange among each other (Mulcahy *et al.* 2006, pp. 1807–1826; Culver and Dee 2008, pp. 1–14). This lack of genetic exchange suggests a barrier separated, and likely still separates, these populations. As discussed in the Background section, the areas within the present-day Imperial Valley, Mexicali Valley, and San Luis Valley were historically interlaced by a network of Colorado River-influenced water courses, including the Alamo River, the New River, and the Río Hardy (or their precursors or equivalents). Historically, these “rivers” were dependent upon the Colorado River for water and only transported water periodically. Prior to the increase of agricultural development and prior to the digging of the irrigation canal and subsequent flood that created the Salton Sea early in the 20th century (*see* Background section), some areas along these river channels were characterized by Parish (1914, p. 88) as having “channels, sloughs, and lagoons.” These hydrologically influenced areas likely did not contain flat-tailed horned lizard habitat, as defined in the Background section. As such, not all of the area between the present-day Salton Sea and the Gulf of California, including areas outside the lakebed of historical Lake Cahuilla, historically supported flat-tailed horned lizard habitat. This information further supports our conclusion presented in our 2006 withdrawal that the “area of the historical range periodically inundated by Lake Cahuilla was not important to the long-term viability of the flat-tailed horned lizard because this area was frequently unavailable and likely contained little quality habitat” (71 FR 36750).

Because of the extensive manmade changes to the landscape, we cannot precisely determine with any degree of specificity how much of the area was historically flat-tailed horned lizard habitat. Moreover, we maintain that much uncertainty exists with any attempt to precisely quantify the amount of flat-tailed horned lizard habitat that has been destroyed by historical agricultural development, as has been attempted in the past. We

agree with the conclusions of previous assessments, both by us and by others, that portions of the Coachella, Imperial, Mexicali, Yuma, and San Luis Valleys once provided suitable areas of flat-tailed horned lizard habitat. We also agree that historical agricultural development (and, to a lesser extent, urban development) destroyed large areas with flat-tailed horned lizard habitat, thus curtailing the size of the Coachella Valley, Western, Eastern, and Southeastern flat-tailed horned lizard populations in both the United States and Mexico. However, the effects of past actions are better addressed under Factor E.

In the sections below, we address the present or threatened destruction, modification, or curtailment of the habitat or range of the flat-tailed horned lizard. We evaluate the current and anticipated effects associated with several types of land development, the invasion of nonnative plants, OHV activity, and military training. We first describe the respective threats in general terms and then assess those threats to the habitat or range of the flat-tailed horned lizard, focusing on subareas (such as identified populations or Management Areas) within the species' range, where appropriate.

#### Development

We define development as commercial and residential development (*i.e.*, urban development), and the conversion of land for any agricultural purpose. Such development not only includes the obvious associated infrastructure (e.g., roads, pipelines, canals, and power lines), but also reservoirs, power generation facilities, and resource extraction operations such as drilling and mining.

For the purpose of evaluating the threats to a species and its habitat, we focus on the developmental activities that threaten to convert land from a natural or undeveloped state to land no longer suitable as habitat for the species. We consider both the direct and, where appropriate (within the context of Factor A), the indirect effects of such developmental activities. While land development typically has a similar effect, that is the destruction or modification of habitat, differing land uses resulting from development activities can lead to different indirect effects. We therefore distinguish among the types of development when evaluating the effects of such development on a species or its habitat.

For this evaluation of flat-tailed horned lizard under Factor A, we determine whether development is a current or anticipated threat to flat-



tailed horned lizard habitat. Below, we address agricultural and urban development, as well as development associated with energy generation projects.

#### *Agricultural Development*

Within the dry Colorado Desert, agricultural activity is substantially dependent upon irrigation water imported from the Colorado River. As discussed in the Background section, most of the agricultural development within the range of the flat-tailed horned lizard occurred early in the 20th century. Because Colorado River water is a finite resource, agricultural development is no longer expanding into new areas and destroying flat-tailed horned lizard habitat to any substantial degree. Information available from the Coachella Valley Water District (CVWD 2002, p. 1; 2003, p. 1; 2004, p. 1; 2005, p. 25; 2006, p. 27; 2007, p. 25; 2008, p. 25; 2009, p. 25) indicates a slight decline in the amount of irrigable acres and a fairly steady though variable amount of water delivered from 2001 to 2008, indicating that new agricultural development has not occurred in the Coachella Valley within the past decade or so. Also, fields are being fallowed in the Imperial Valley because less water is available for irrigation in this area (IID 2006, p. 1). Thus, conversion of land for agriculture is no longer considered a threat to flat-tailed horned lizard habitat in the Coachella Valley and in the Imperial Valley portions of the Western and Eastern Populations, and is not considered to be a threat in the foreseeable future.

In contrast, recent agricultural development has destroyed flat-tailed horned lizard habitat in other areas. Between 2002 and 2006, an unreported but minority fraction of 1,534 ha (3,790 ac) of flat-tailed horned lizard habitat was developed for agricultural use in Arizona (Piest and Knowles 2006, p. 1). Rodriguez (2002, p. 21) also recorded recent agricultural development in Mexico; however, the majority of the agricultural development in the Mexicali and San Luis Valleys occurred in the early to mid-20th century, closely following the historical agricultural development north of the border (Furnish and Ladman 1975, pp. 84–88). Additionally, about 60 percent of the flat-tailed horned lizard habitat in Mexico lies within two Mexican Federal natural protected areas, the Upper Gulf of California and Colorado Delta Biosphere Reserve (la Reserva de la Biosfera del Alto Golfo de California y Delta del Río Colorado), and the Pinacate and Gran Desierto de Altar Biosphere Reserve (la Reserva de la

Biosfera El Pinacate y Gran Desierto de Altar) (CEDO 2001, p. 3), where agricultural development is limited by Mexican law.

Agricultural activities outside of the areas receiving Colorado River water are severely restricted by the climate of the Salton Trough region, including in Mexico. Thus, while recent agricultural development destroyed areas of flat-tailed horned lizard habitat in the Southeastern Population, the overall acreages were small, especially compared to the amount of habitat available in the Southeastern Population.

Agricultural development, most of which occurred between 1945 and the 1980s (Mills 2009, p. 28), occurred in the Borrego Springs area of the habitat occupied by the Western Population. The Borrego Springs area uses a local aquifer for irrigation, and the area does not receive Colorado River water; however, the aquifer is overdrawn (County of San Diego 2008, p. 8; Mills 2009, p. 4). We do not anticipate substantial amounts of agriculture to expand into adjoining natural lands in this area (see Mills 2009, pp. 40–42). Moreover, the area of private lands in the Borrego Valley is constrained within Anza-Borrego Desert State Park. As a result, we believe that agricultural development no longer threatens flat-tailed horned lizard habitat in the Borrego Springs portion of the Western Population, nor will it in the foreseeable future.

In conclusion, the available information indicates that the vast majority of the agricultural development within the range of the flat-tailed horned lizard took place in the historical past and only a small amount of development has been documented in recent times. Because conversion of land to agriculture in the region is limited by the availability of irrigation water and that water is limited, we do not expect agriculture to expand significantly into adjoining flat-tailed horned lizard habitat in the future. Moreover, increased demand for water outside the region has resulted in a decreased amount of Colorado River water available for agriculture in the Imperial Valley, which has resulted in the fallowing of fields in this area. Therefore, we conclude that agricultural development is not a substantial threat to the flat-tailed horned lizard throughout its range, nor is it anticipated to be in the foreseeable future.

#### *Urban Development*

Like agricultural development, urban development largely occurred in the

historic past. Many of the urban centers in the region that serve agricultural communities are contained within agricultural areas. While urbanization has continued as the human population within the region has grown (FTHLICC 2003a, p. 12; Indrelunas 2010, pp. 1–3), most of this urban development associated with these urban centers has come at the expense of former croplands. As such, this development is not currently destroying substantial amounts of available flat-tailed horned lizard habitat (FTHLICC 2003a, p. 12). However, certain areas of urban development not associated with active or past agriculture have resulted in the destruction of flat-tailed horned lizard habitat. This impact is most evident in the Coachella Valley where urban development not associated with agricultural communities continues today (Indrelunas 2010, pp. 1–3). This growth is corroborated by the number of domestic water meter services, which grew by over 25 percent from 2001 to 2008 (CVWD 2002, p. 1; 2003, p. 1; 2004, p. 1; 2005, p. 25; 2006, p. 27; 2007, p. 25; 2008, p. 25; 2009, p. 25). This urban growth is occurring in the surrounding desert areas, which likely include flat-tailed horned lizard habitat. Our interpretation of past and recent aerial imagery supports this trend.

The flat-tailed horned lizard now appears to be restricted to two occurrences within the Coachella Valley MSHCP plan area, the Thousand Palms conservation area and the Dos Palmas conservation area (CVCC 2010, p. 13). The Coachella Valley MSHCP includes numerous measures to minimize and mitigate impacts of urban development on the flat-tailed horned lizard (see Coachella Valley Multiple Species Habitat Conservation Plan (Coachella Valley MSHCP) section above for a detailed discussion). Approximately 94 percent of the potential habitat where flat-tailed horned lizards are known to occur in the Thousand Palms conservation area is land that is already protected (Table 2), including about 62 percent that is part of the Coachella Valley National Wildlife Refuge. Similarly, approximately 34 percent of the habitat at Dos Palmas is protected (Table 2). The high level of protection of flat-tailed horned lizard habitat at the Thousand Palms conservation area translates into a low magnitude of threat from urban development at this location. In contrast, because only about one-third of the flat-tailed horned lizard habitat at the Dos Palmas conservation area is currently in protected status, the potential magnitude of urban development at the latter location is

greater. However, because this area of habitat is farther away from existing urban areas, the immediacy of the threat of urban development is likely lower, even without the protections for flat-tailed horned lizard included in the Coachella Valley MSHCP plan (which requires the protection of the Dos Palmas conservation area). Therefore, the overall threat from urban development of flat-tailed horned lizard habitat in the Coachella Valley Population is low.

Most of the area occupied by the U.S. portion of the Western Population of flat-tailed horned lizards is owned by the State of California (more than 27 percent) or by the Federal government (more than 52 percent), and the vast majority of the U.S. portion of the Eastern Population is federally owned (more than 95 percent). Much of the State of California land in the Western Population is administered by California State Parks, including Anza-Borrego Desert State Park and Ocotillo Wells State Vehicular Recreation Area. We do not expect any substantive urban development activities on State Park-administered lands. However, such development, should it occur, would likely follow the avoidance, minimization, and compensation measures of the Rangewide Management Strategy because California State Parks is a signatory agency to the Interagency Conservation Agreement.

Additionally, much of the Federal land is administered by the BLM, which is a signatory to the Interagency Conservation Agreement. Moreover, the BLM has incorporated the Rangewide Management Strategy into the California Desert Conservation Area (CDCA) Plan under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) (FLPMA). The CDCA Plan directs BLM's permitting of development projects on the lands the plan covers, including the U.S. portions of the Western and Eastern Populations. Thus, the avoidance, minimization, and compensation measures in the Rangewide Management Strategy are implemented by BLM on these lands, which reduces the impact such development to flat-tailed horned lizard habitat. Other federally owned lands in these areas are lands owned by the Navy, which is also a signatory to the Interagency Conservation Agreement. Not only do we anticipate that the Navy's participation in the Rangewide Management Strategy will continue, which will limit the amount of impact to flat-tailed horned lizard habitat, but the Navy's use of these lands, largely as bombing ranges, will result in little urban development on these lands. As

such, we expect the amount of impact from urban development on areas of flat-tailed horned lizard habitat owned by the State of California and the Federal government in the Western and Eastern Population to be small now and within the foreseeable future because little urban development is likely on State Park lands and most military lands, and what development that may occur on Federal lands will be minimized through implementation of the Rangewide Management Strategy, including through implementation of the CDCA Plan on BLM lands.

Moreover, the designation of the Borrego Badlands, West Mesa, and Yuha Desert Management Areas offer protective mechanisms for 96,599 ha (238,700 ac) (Table 1) of flat-tailed horned lizard habitat within this population. Impacts from permittee actions are limited to 1 percent of the area within Management Areas (FTHLIC 2003a, p. 33). As described above, we expect minimal or no urban development on Federal and California State lands within the area occupied by the Western Population and Eastern Population, but urban development may occur within private lands. Although private inholdings are scattered throughout the Federal and State lands in the region, few concentrations of private land exist. The largest concentration of private inholdings within the areas occupied by the Western Population occurs in and around the community of Borrego Springs, California. Urban development in this area is limited to a finite area within the Borrego Springs area, which is an area of private lands completely surrounded by Anza-Borrego Desert State Park. Additionally, development in this area may be further restricted by a limitation in the amount of available groundwater (Mills 2009, p. 4). As we concluded in 2003 (68 FR 342), even if urban development continues, this area is small enough that it is unlikely that the combined urban or agricultural development in or around this geographically limited area poses a significant threat to the flat-tailed horned lizard throughout its range. Moreover, limited water and isolation of the remaining private lands scattered within the public lands likely will prevent any large-scale urban development in the region, further reducing the effects that urbanization may have on the Western Population of the flat-tailed horned lizard. Because the Mexican portion of the Western Population is isolated from other inhabited areas by the Sierra de Los Cucapahs and the dry lakebed of Laguna

Salada, we believe urban development in this area is likely similarly limited by available resources and isolation. Thus, we conclude that urban development is not a threat to the species in the Western Population, nor is it likely to become a threat in the foreseeable future.

As discussed above, we expect impacts from urban development on Federal lands in the Eastern Population to be limited. Moreover, the designation of the East Mesa Management Area offers protective mechanisms for 45,248 ha (111,810 ac) (Table 1), or about 27 percent of the Eastern Population, of flat-tailed horned lizard habitat within this population. Impacts from permittee actions are limited to 1 percent of the area within each Management Area (FTHLIC 2003a, p. 33). Additionally, 10,654 ha (26,327 ac), or about 6 percent of the Eastern Population, is designated as a Wilderness Area where urban development is prohibited. Most urban development occurs on private property, and less than 5 percent of the U.S. portion of the Eastern Population area occurs on private property. Limited water and isolation of the private lands likely prevent any substantive urban development in the region, including the small amount of habitat in Mexico. Thus, we conclude that urban development is not a threat to the species in the Eastern Population, nor is it likely to become a threat in the foreseeable future.

Urban development has occurred recently in the Southeastern Population of flat-tailed horned lizards. Areas of recent urbanization include development near the communities of Yuma, Arizona (Piest and Knowles 2006, p. 1); San Luis Río Colorado, Sonora, Mexico (Rodriguez 2002, p. 23); and Puerto Peñasco, Sonora, Mexico (Rodriguez 2002, p. 23). Most (about 84 percent) of the flat-tailed horned lizard habitat in Arizona is federally owned, where urban development is less likely, and most of the U.S. Federal land in the Southeastern Population is within the 53,014-ha (131,000-ac) Yuma Desert Management Area (Table 1), where impacts from permittee actions are limited to 1 percent of the area (FTHLIC 2003a, p. 26). Additionally, avoidance and minimization measures are in place within the Barry M. Goldwater Range, Arizona, to prevent or limit impact to the flat-tailed horned lizard and its habitat from military development (USFWS 1996, pp. 18 and 58). Nevertheless, development impacts may occur. For example, construction by Marine Corps Air Station, Yuma, of a new aircraft landing field and associated infrastructure for the F-35B

Joint Strike Fighter at the Barry M. Goldwater Range is expected to permanently remove 33.5 ha (82.7 ac) of flat-tailed horned lizard habitat, plus have additional long-term adverse effects on a 17.8 ha (44 ac) (USFWS 2010b, p. 46). Even so, this project includes minimization measures called for by Rangewide Management Strategy, thereby reducing the impact of this development to the species and its habitat (USFWS 2010b, pp. 10–12, 45). Thus, we conclude that urban development in Arizona is not a significant threat to the species, nor is it likely to become a threat in the foreseeable future.

In Mexico, urban development is likely within the foreseeable future around San Luis Río Colorado, Puerto Peñasco, and elsewhere along the Gulf of California coast. Despite an increase in accessibility to remote areas (Búrquez and Martínez-Yrizar 1997, p. 390), the vast majority of the habitat for the Southeastern Population in Mexico remains isolated with respect to urban development, because urban development requires access to other resources, which are not necessarily available with mere physical access. Moreover, compared to the 1,005,630 ha (2,484,966 ac) of flat-tailed horned lizard habitat in the Mexican portion of the Southeastern Population, roughly 60 percent of which lies within two Mexican Federal natural protected areas where development is limited (CEDO 2001, p. 3), we expect the amount of urban development to be relatively small. Thus, we conclude that urban development is not a significant threat to the species in the Mexican portion of the Southeastern Population, nor is it likely to become a threat in the foreseeable future.

Therefore, despite some urban development occurring in the Southeastern Population, we believe that this development is small relative to the overall amount of flat-tailed horned lizard habitat in the Southeastern Population and is unlikely to significantly increase in the foreseeable future; thus, this development does not pose a substantial threat to the species in the Southeastern Population, nor is it likely to become a threat in the foreseeable future.

In conclusion, flat-tailed horned lizard habitat has been lost to urban development in the Coachella Valley, and we expect urbanization to continue there. The available information indicates the distribution of the species in the Coachella Valley is now limited to two occurrences that are within two Coachella Valley MSHCP conservation areas (CVCC 2010, p. 8); although nearly

all of the flat-tailed horned lizard habitat in the Thousand Palms reserve is already protected, most of the Dos Palmas reserve is not (see Table 2). Implementation of the Coachella Valley MSHCP is expected to limit the impacts to the flat-tailed horned lizard and its habitat (USFWS 2008, Appendix A, p. 317). Furthermore, in our evaluation of the potential impacts of the plan's implementation on the flat-tailed horned lizard (USFWS 2008, p. 178), we concluded: "After reviewing the current status of this species, environmental baseline for the action area, effects of the proposed action, and cumulative effects, it is the Service's biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of the flat-tailed horned lizard. Loss of the Coachella Valley population would have a negligible [effect] on the status of the species as a whole, since it makes up approximately 1 percent of the current range of the flat-tailed horned lizard. Persistence of the species in the Plan area is likely only with effective Plan implementation." Because of the limited amount of private land, urban development is also only likely to destroy relatively small amounts of flat-tailed horned lizard habitat in the Western, Southeastern, and Eastern Populations. Additionally, in areas of flat-tailed horned lizard habitat in the United States and Mexico where urbanization has the potential to occur, it is likely that the amount of urban development will be limited by the availability of water and the isolated nature of many of these areas. The implementation of the Rangewide Management Strategy further restricts development in the United States, limiting impacts inside designated flat-tailed horned lizard Management Areas to 1 percent of the area. In Mexico, urban development is likely to be limited within the Federal natural protected areas (Rodríguez 2002, p. 25). Therefore, we conclude that urban development is not a significant threat to flat-tailed horned lizard habitat throughout its range, nor is it anticipated to become a significant threat in the foreseeable future.

#### *Energy Generation Facility Development*

The analyses in the 1993 proposed rule and 2003 withdrawal document both identified development of geothermal energy facilities as a potential threat to flat-tailed horned lizard habitat. Since then, increased interest in renewable forms of electrical generation has resulted in a greater number of proposed energy development facilities and their associated infrastructure. Recent

proposals not only include geothermal facilities, but also projects harnessing solar radiation and wind. Examples of recent proposals that may affect flat-tailed horned lizard habitat include the following: geothermal projects near the Superstition Mountains (Navy 2008, pp. 1–40) and the Truckhaven area west of Salton City (BLM 2007a, pp. 1–3), solar projects near Plaster City (BLM and CEC 2010, p. ES–1), and a wind project west of the community of Ocotillo (Ocotillo Express 2009, p. 1). Because the development of energy generation facilities occurs within the range of the flat-tailed horned lizard habitat, we assess the magnitude of this development to the species below.

Similar to other forms of development, energy generation projects may result in destruction or modification of flat-tailed horned lizard habitat. These projects can include buildings, roads, power lines, and pipelines, although they differ in the details. For example, geothermal plants typically include wells and pipelines (often aboveground), solar plants typically include solar collecting arrays (using various technologies to convert solar energy to electrical energy), and wind farms have lines or arrays of wind turbines.

The total acreage of potential development for renewable energy facilities is small compared to the overall range of the species. For example, in California, the BLM maintains a GIS database of rights-of-way applications for energy generation facilities. Additional permits are needed before the potential facilities listed in the database can be built, and even if they obtain all of the necessary permits, it is not guaranteed that all of them will be built. Moreover, some of these right-of-way applications have been rejected, denied, or withdrawn. However, assuming that the facilities in the BLM database are built, the total area of development on BLM land for all of the applications on file as of December 2010 would be about 2,585 ha (6,387 ac) in the Eastern Population, and 18,841 ha (46,556 ac) in the Western Population. The BLM data only include areas of BLM (Federal) land and do not include what, if any, nearby private land that may also be developed as part of these energy projects. We do not have data for the potential impacts to private lands adjacent to these areas, but we made a rough assessment of the adjacent private land that may potentially be included in these projects which may add about 260 ha (about 640 ac) to the impacts in the Eastern Population and about 10,600 ha (about 26,000 ac) to the impacts in the Western Population. Using these values,

the energy development in the Eastern Population may impact roughly 2,845 ha (7,030 ac) of BLM and private lands, which is about 1.7 percent of the Eastern Population area, and the energy development in the Western Population may impact roughly 29,441 ha (72,750 ac) of BLM and private lands, which is about 8.6 percent of the Western Population area. Combined, these projects—assuming that they are all built, which is not likely—would impact a total of about 2 percent of the nearly 1.6 million ha (3.9 million ac) of the total range of the species (using 2003 “current distribution”).

Although we expect additional energy development facilities may be constructed elsewhere within the range of the species, including in Arizona and Mexico, we are not aware of any specific proposals that are as large as those proposed in California. Therefore, we conclude that the total acreage of potential development for renewable energy facilities is small compared to the overall range of the species. Additionally, on lands managed by signatory agencies to the Interagency Conservation Agreement, we expect the impacts to flat-tailed horned lizard habitat (whether inside or outside of designated Management Areas) will be further reduced because of the avoidance, minimization, and compensation measures of the Rangewide Management Strategy.

Moreover, because of the avoidance and minimization measures, including the 1-percent impact limit in flat-tailed horned lizard Management Areas, most of the energy generation facilities have been proposed outside of the Management Areas, although some impacts to Management Areas are anticipated resulting from related infrastructure development (FTHLIC/ MOG 2010, p. 2). For example, the 2,454-ha (6,063-ac) Imperial Valley Solar project site is proposed outside of the flat-tailed horned lizard Management Areas called for by the Rangewide Management Strategy, but an associated transmission line is expected to run for about 12 kilometers (km) (7.5 miles (mi)) within the Yuha Desert Management Area. However, this proposed transmission line was routed along an existing powerline corridor to minimize effects to flat-tailed horned lizard habitat in the Management Area (BLM and CEC 2010, pp. B.1–18, C.2–9, and C.2–42).

While project sites may be proposed within flat-tailed horned lizard Management Areas, the Rangewide Management Strategy limits the total acreage of impacts for a given Management Area to no more than 1

percent. As of 2009, signatory agencies control approximately 196,273 ha (485,000 ac) of flat-tailed horned lizard habitat in the designated Management Areas and have collectively permitted activities on 171.57 ha (423.97 ac), or 0.09 percent (Table 1). Thus far, signatory agencies have consistently implemented the Rangewide Management Strategy, even in permitting development electrical generation facilities. Moreover, the implementation of the Rangewide Management Strategy is not completely voluntary at this point; aspects of the Rangewide Management Strategy have been incorporated into documents that implement regulatory mechanisms, including the Federal Land Policy and Management Act (43 U.S.C.1701 *et seq.*) (FLPMA), which affects development on BLM lands (*see* Factor D). Many of the anticipated energy development facilities are on BLM lands or otherwise would require easements or access across BLM lands; thus, the development of these energy generation facilities would be subject to the provisions of the Rangewide Management Strategy through implementation of FLPMA.

In sum, the overall acreage of potential impacts from development of energy facilities is likely to be small compared to the total range of the species, including private lands likely to be developed. Moreover, because of the prevalence of Federal and State lands in the U.S. portions of the range of the flat-tailed horned lizard and because most of this land is managed by signatories to the Interagency Conservation Agreement implementing the Rangewide Management Strategy, we expect that the vast majority of proposed energy development projects that are likely to affect flat-tailed horned lizard habitat in the United States will be subject to the avoidance, minimization, and compensation measures incorporated into the Rangewide Management Strategy, including in areas outside of designated Management Areas. The signatories to the Interagency Conservation Agreement have been actively implementing the Rangewide Management Strategy since its inception, and have committed to its continued implementation. Additionally, the Rangewide Management Strategy has been incorporated into the CDCA Plan, which means it will be implemented as a regulatory mechanism (as opposed to a voluntary agreement). Although the Rangewide Management Strategy is not in effect in Mexico, the amount of habitat that is likely to be destroyed by

energy development projects in that country is likely to be small relative to the total amount of habitat. Therefore, we anticipate the development of energy generation facilities does not now nor in the foreseeable future pose a significant threat to flat-tailed horned lizard and its habitat.

#### Invasive, Nonnative Plants

In our 2003 withdrawal document, we included the effects of invasive, nonnative plants as a potential threat to flat-tailed horned lizard habitat (68 FR 345). However, we concluded that nonnative plants did not pose a substantial threat because of the limited extent to which such plants had established themselves in flat-tailed horned lizard habitat (68 FR 345). The available literature also suggests invasive, nonnative plants are a potential threat to flat-tailed horned lizard habitat (such as Hodges 1997, pp. 4, 5, and 9; CEDO 2001, p. 2; FTHLIC 2003a, pp. 18–19; Hammerson *et al.* 2007, p. 4), but specifics on how nonnative species are impacting flat-tailed horned lizard habitat are generally lacking.

The perennial nonnative tree, *Tamarix aphylla* (athel pine), has been planted as a windbreak in the Coachella Valley. This tree can reduce or prevent wind-transport of sand, thereby reducing available flat-tailed horned lizard habitat there (England 1983, p. 152). Although *T. aphylla* typically spreads vegetatively by adventitious roots or submerged stems, the species can spread sexually by seed following flood events (Walker *et al.* 2006, pp. 191–201). While perhaps not as invasive as other species of *Tamarix* (Cal-IPC 2003, p. 4), *T. aphylla* trees have been removed in some Coachella Valley MSHCP reserve areas in the Coachella Valley as management to improve habitat (FTHLIC 1999, p. 4). Moreover, the population of flat-tailed horned lizards in the Coachella Valley proper is now found only in the Thousand Palms reserve area (CVCC 2010, p. 8), where the plan’s habitat management is focused. Therefore, we do not consider *T. aphylla* to be an invasive, nonnative species that is threatening flat-tailed horned lizard habitat.

Nonnative annual plants, such as *Brassica tournefortii* (Saharan mustard), *Schismus barbatus* (common Mediterranean grass), and *Salsola kali* (Russian thistle), can blanket certain areas of the Colorado Desert in years with higher amounts of rainfall (Brown and Minnich 1986, pp. 411–422; Lovich and Bainbridge 1999, p. 318; FTHLIC 2003a, p. 18; Yurkowsky 2005, *in litt.*, Anza-Borrego Desert State Park; Barrows

*et al.* 2009, pp. 673–686). Such nonnative plants may adversely affect flat-tailed horned lizard habitat throughout its range by altering fire regimes (Brown and Minnich 1986, pp. 418–421; Brooks and Esque 2002, pp. 334–336); stabilizing Aeolian soils (i.e., soil that is transported from one place to another by wind; Barrows *et al.* 2009, p. 684); changing plant assemblages (Barrows *et al.* 2009, p. 683); and changing the availability of seeds for harvester ants, the primary food source for the flat-tailed horned lizard (Gordon 1980, p. 70). Dense stands of plants, which are typical of invasive, nonnative plant species in years of higher amounts of rainfall, also may challenge the locomotor abilities of the wide-bodied flat-tailed horned lizard (Newbold 2005, p. 17).

Plant growth will vary annually in the Colorado Desert because of the variable amount and timing of rainfall that the region receives. Moreover, annual plants die by the end of spring, and in the harsh desert climate the amount of standing biomass of the annual plants, once dead, quickly decreases (Barrows *et al.* 2009, p. 684). We expect the amount and timing of rainfall within the range of the species will continue to be variable into the foreseeable future, even with the potential effects of climate change (Field *et al.* 1999, pp. 8–10). As a result, the effects of invasive, nonnative plants are generally short-lived in areas of flat-tailed horned lizard habitat (Barrows *et al.* 2009, p. 673), and because of the likelihood of continued variability in precipitation, we expect the potential effects of invasive, nonnative plants to continue to be short-lived into the foreseeable future. With the potential exception of increased occurrence of wildland fires, we do not believe that the growth of invasive, nonnative plants poses a lasting, significant threat to flat-tailed horned lizard habitat now or in the foreseeable future. We examine the potential threat of wildland fire below.

Fires typically are rare events in the western Sonoran Desert because of the natural “limited biomass, wide spacing between shrubs and sparse ground cover” (Brown and Minnich 1986, p. 411). However, the periodic increase in the amount of available fuel from nonnative, annual plants in years of heavy precipitation has allowed the frequency, size, and intensity of fires in desert plant communities to increase (Brown and Minnich 1986, p. 411; Brooks and Berry 2006, pp. 117–118; Trader *et al.* 2006, p. 314; see also Rorabaugh 2010, p. 191). Moreover, many of the native perennial plants within the range of the flat-tailed

horned lizard typically take a long time to recover after a fire (O’Leary and Minnich 1981, pp. 61–66; Brown and Minnich 1986, p. 411; Brooks and Esque 2002, p. 330). Thus, fire can change the species composition of the perennial and annual plant communities. Moreover, provided enough water (rainfall) is available, annual plants, especially nonnative species, proliferate after a fire (Minnich 1994, p. 104), which may provide additional fuel and promote additional wildfires. Plant communities in areas with recurrent fires may convert from vegetation types dominated by native shrubs into types dominated by nonnative annual grasses and forbs (type conversion) (Brown and Minnich 1986, p. 411). Type conversion appears to be occurring near the highly urbanized areas, such as the Coachella Valley (Brown and Minnich 1986, p. 411), where increased human activity offers higher numbers of ignition sources (Brooks and Esque 2002, p. 337), but not in the more remote areas of flat-tailed horned lizard habitat. Moreover, the amount of rainfall is a critical factor in how much plant growth occurs (Barrows *et al.* 2009, p. 673). The amount of rainfall is unpredictable within the range of the flat-tailed horned lizard, and is likely to be so for the foreseeable future. It is not clear how the fire regime will be affected long term, but in the foreseeable future, wildland fire does not appear to be a threat.

Additionally, it is unclear whether this localized change in vegetation affects the specific habitat components upon which flat-tailed horned lizards rely. For example, flat-tailed horned lizards take refuge under perennial shrubs for shade and to avoid predators (Muth and Fisher 1992, pp. 1–77; Sherbrooke 2002, pp. 109–120). Fire typically kills the existing desert shrubs, but shrubs do regrow after a fire, although the plant species composition is likely to have changed (Brown and Minnich 1986, pp. 411). Thus, during the period of time following fire while shrubs are regrowing, flat-tailed horned lizards will have fewer options for thermoregulation and predator avoidance. While this condition is not permanent, it remains unclear if the change in plant species composition will have a lasting effect on the flat-tailed horned lizard, especially if type conversion were to occur. Nonetheless, because this change in plant species composition is localized, we conclude any potential effects are low in magnitude at the species level, likely temporary, and thus not a significant threat to the species.

Another potential threat to the flat-tailed horned lizard that may arise from a change in plant species composition after a fire is that harvester ants, the primary food of the flat-tailed horned lizard, could be affected. Fire likely kills individual harvester ants on the surface at the time of the fire, but evidence suggests the underground colonies survive (Zimmer and Parmenter 1998, p. 282; Underwood and Christian 2009, p. 325). As described in the Background section, harvester ants eat seeds of annual and perennial plant species. Although changes in plant composition may alter the type and quantities of available seeds consumed by ants, ant forage likely will not be eliminated, and may even increase because of the increase in annual plants (Zimmer and Parmenter 1998, p. 282; Underwood and Christian 2009, p. 325). For example, several of the species found by Gordon (1980, p. 72) to be important to harvester ants were also species of plants found by Brown and Minnich (1986, p. 416) to do well after a fire. Therefore, wildland fire does not appear to pose a threat to harvester ants.

In conclusion, the spread of invasive, nonnative plants does not appear to be a significant threat to flat-tailed horned lizard habitat throughout its range at this time, nor is it likely to become a significant threat in the foreseeable future.

#### Off-Highway Vehicles (OHVs)

The analyses in the 1993 proposed rule and 2003 withdrawal document included OHV activity as a potential threat to the flat-tailed horned lizard. The Rangewide Management Strategy also describes off-highway (OHV) or off-road vehicle activity as a potential threat (FTHLIC 2003a, pp. 12–14). We consider OHVs to be all vehicles used off-road, including, but not limited to, automobiles, dune buggies, motorcycles, all-terrain-cycles, four-wheelers, and military vehicles. OHV activity includes, but is not limited to, recreational, military, law-enforcement (such as Border Patrol), and trans-border trafficking activities. As discussed in the Background section, flat-tailed horned lizard habitat typically consists of sandy flats and valleys occupied by plant species that are typical of the creosote-white bursage plant association. The presence of ants as a food source is also important.

OHV activity may modify flat-tailed horned lizard habitat because of impacts to vegetation (Luckenbach 1975, p. 4; Vollmer *et al.* 1976, p. 115; Bury *et al.* 1977, p. 7; Lathrop 1983, p. 164; Luckenbach and Bury 1983, p. 280; Groom *et al.* 2007, p. 133), soil

disturbance (Luckenbach 1975, p. 4; Bury *et al.* 1977, pp. 16–18; Webb 1983, pp. 51–79), and introduction of nonnative plants (Brooks and Lair 2005, p. 8). Additionally, some but not all areas with high OHV activity have been shown to have fewer harvester ant colonies (McGrann *et al.* 2006, p. 77).

Past studies of OHV impacts on lizards (Busack and Bury 1974, p. 182; Bury *et al.* 1977, p. 10; Luckenbach and Bury 1983, p. 273; Klinger *et al.* 1990, pp. 1–17; Beauchamp *et al.* 1998, p. 214; Gardner 2002, p. 14; Wright and Grant 2003, p. 30) have been largely inconclusive or cannot be readily applied across the range of the flat-tailed horned lizard (that is, they have limited “inference space” (Ratti and Garton 1994, pp. 1–23)). Luckenbach and Bury (1983, p. 278) reported that a pronounced reduction in flat-tailed horned lizard abundance around the Algodones Dunes had been anecdotally noted by scientists. Marked declines in herbaceous and perennial plants, arthropods, lizards, and mammals in OHV-used areas compared with nearby control areas were also reported by Luckenbach and Bury (1983, p. 265). The declines, however, were for the Colorado Desert fringe-toed lizard (*Uma notata*) and beetles, and did not include flat-tailed horned lizards or ants. Additionally, research has been conducted in creosote-dominated habitats in the Mojave Desert. Researchers compared reptile metrics (measures) between sites used differentially by OHVs and control sites (Bury *et al.* 1977, pp. 1–23). Bury *et al.* (1977, p. 11) found a significant decrease in numbers of reptiles on OHV-used areas compared to numbers on control sites in the Mojave Desert. However, the highest number of desert horned lizards on any one plot occurred on a moderately used OHV site (Bury *et al.* 1977, p. 10). In research conducted by both Busack and Bury (1974, p. 182) and Bury *et al.* (1977, p. 1), there appeared to be an inverse relationship between increased use of OHVs and the abundance of lizards; this means that, as OHV use increased, lizard abundance decreased. Additionally, McGrann *et al.* (2006, pp. 77–79) found that the density of flat-tailed horned lizards was lower in areas of high OHV activity, as was the average body mass of individual flat-tailed horned lizards, suggesting the habitat quality—including harvester ant abundance—in some high-use OHV areas was not as good; however, the authors also noted that small sample size may have allowed qualitative differences between sites sampled to affect their results.

Research in the Ocotillo Wells SVRA found flat-tailed horned lizards at higher densities in non-sandy habitats than sandy habitats within the SVRA, which differed from most other research findings (Beauchamp *et al.* 1998, pp. 213–214). However, it was unclear if flat-tailed horned lizards were found in these atypical habitat types because they are more variable in habitat use than previously thought, because these habitat types are more available in the Ocotillo Wells SVRA than other areas in which flat-tailed horned lizards have been studied, or as a response to OHV activity (Beauchamp *et al.* 1998, p. 214).

OHV activity occurs in the Western, Eastern, and Southeastern Populations, but the amount (intensity, frequency) of OHV activity varies across the landscape, with greater amounts of activity in areas designated for OHV use and areas near existing roads, and lesser amounts in areas where OHV use is not permitted or areas that are away from easy access. In the Coachella Valley, OHV activity is expected to be controlled in protected habitat areas through implementation of the Coachella Valley MSHCP (CVAG 2007, pp. 9–117) and OHV activity is not identified as a conservation issue in the annual report for 2009 (CVCC 2010, p. 14). In our evaluation of the potential impacts of the plan’s implementation on the flat-tailed horned lizard (USFWS 2008, p. 178), we concluded: “After reviewing the current status of this species, environmental baseline for the action area, effects of the proposed action, and cumulative effects, it is the Service’s biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of the flat-tailed horned lizard. Loss of the Coachella Valley population would have a negligible [effect] on the status of the species as a whole, since it makes up approximately 1 percent of the current range of the flat-tailed horned lizard. Persistence of the species in the Plan area is likely only with effective Plan implementation.” Additionally, approximately 94 percent of the potential habitat where flat-tailed horned lizards are known to occur in the Thousand Palms conservation area is land that is already protected (Table 2), including about 62 percent that is part of the Coachella Valley National Wildlife Refuge.

OHV activity along the United States-Mexico international boundary (border) was identified as a potential threat to the flat-tailed horned lizard and its habitat (FTHLIC 2003a, p. 12). The amount of impact to flat-tailed horned lizard habitat along the border is not clear. To put the potential impact in

context of the range of the species, we assumed an area of high impact from border-related OHV activity to be within a 1-km (0.6-mi)-wide zone north of the border. We estimate that the total area of flat-tailed horned lizard habitat within that “zone” is about 12,662 ha (31,288 ac), or about 0.8 percent of the range of the species, comprising 2,318 ha (5,728 ac), 5,012 ha (12,385 ac), and 5,332 ha (13,176 ac) of the Western, Eastern, and Southeastern Populations, or about 0.7 percent, 3 percent, and 0.5 percent of those populations, respectively. This zone of assumed high activity is a broad-brush assessment (for example, the All-American Canal runs along the border in the Eastern Population, likely confining any border-related OHV activities in certain areas to less than 1 km (0.6 mi)). Nevertheless, the zone is small compared to the range of the species and the three populations, individually. Moreover, since 2008, the U.S. Customs and Border Protection constructed the “border fence,” which is a vehicle and, in some areas, pedestrian barrier, plus associated infrastructure, in certain areas between the United States and Mexico. Although some areas of the border are not fenced, the areas of flat-tailed horned lizard habitat along the border are fenced (USCBP 2008a, p. 1–5; USCBP 2008b, p. 2–4; Rorabaugh 2010, p. 181). Prior to construction of the border fence, the new fence and associated infrastructure was anticipated to result in reduction of the amount of illegal, cross-border traffic (USCBP 2008b, p. 3–18). Additionally, as part of the installation of the border fence, a stabilized patrol road on the U.S. side was constructed. The use of the road was also expected to result in an overall decrease in ground disturbance because Border Patrol agents would patrol from vehicles on the road rather than through OHV activity (USCBP 2008a, p. 2–7). Indeed, evidence suggests the border fence has reduced illegal cross-border traffic and associated OHV activity (Rorabaugh 2010, p. 190), thereby reducing the amount of potential impact to flat-tailed horned lizard habitat along the border from illegal trans-border OHV activity and subsequent law-enforcement OHV activity by the Border Patrol.

Moreover, the scientific literature is mixed and inconclusive with respect to the impact of OHV activity on the flat-tailed horned lizard and its habitat. Setser and Young (2000, p. 11) and Setser (2001, p. 12) found flat-tailed horned lizards avoided areas disturbed by OHVs. However, there was no difference in flat-tailed horned lizard habitat use between areas within 10 m

(33 ft) of OHV trails and sites farther away from OHV trails (Setser and Young 2000, p. 11; Setser 2001, p. 12). Setser and Young (2000, p. 11) and Setser (2001, p. 12) concluded that: (1) OHV use might render sites less suitable to flat-tailed horned lizard use, because of the impacts of OHV activity on vegetation and soil characteristics; or (2) OHV trails occur on sites not preferred by flat-tailed horned lizards (e.g., barren ground with no plants or rocks). However, Gardner (2002) and Setser (2004, p. 54) suggested that OHV activity did not have an effect on flat-tailed horned lizards at different areas in the Ocotillo Wells SVRA, on the basis of observations.

In summary, while there has been some research on the adverse effects of OHV activity on vegetation, soils, and flat-tailed horned lizards, its applicability to flat-tailed horned lizard populations is limited and unreliable because of the lack of scientific rigor associated with the research designs. Additionally, the effects of OHV activity on flat-tailed horned lizard populations were not the primary research questions. Nevertheless, these studies have utility in generating hypotheses concerning variation in degree of OHV use and flat-tailed horned lizard abundance. At this time, we conclude that the available studies do not collectively show that OHV activity causes declines in flat-tailed horned lizard populations throughout the range of the species or that adverse OHV impacts pose a significant threat to flat-tailed horned lizard habitat. Management activities, including efforts to reduce conflicts with actions that impact flat-tailed horned lizard habitats, would be enhanced by focused research. Impacts of OHV activity on flat-tailed horned lizard populations should be studied using rigorous research designs to yield conclusions with high degrees of certainty (Ratti and Garton 1994, pp. 1–23) regarding the effects of OHV activity on flat-tailed horned lizard populations across the range of the species. In conclusion, OHV activity does not appear to be a significant threat to flat-tailed horned lizard habitat throughout its range at this time, nor is it likely to become a significant threat in the foreseeable future.

#### Military Training Activities

The Rangewide Management Strategy (FTHLIC 2003a, p.15) summarizes military activity within the range of the flat-tailed horned lizard. The species occurs on two military installations: (1) The western Barry M. Goldwater Range, administered by Marine Corps Air Station (MCAS) Yuma, and (2) Naval

Air Facility (NAF) El Centro. MCAS Yuma manages approximately 46,458 ha (114,800 ac) within the 53,014–ha (131,000–ac) Yuma Desert Management Area, while NAF El Centro manages approximately 12,060 ha (29,800 ac) within the 55,078–ha (136,100–ac) West Mesa Management Area and 3,440 ha (8,500 ac) in the 46,660–ha (115,300–ac) East Mesa Management Area. The U.S. Marine Corps and U.S. Navy are signatories to the Interagency Conservation Agreement implementing the Rangewide Management Strategy.

The training ranges are primarily used for aircraft-related training. Activities that have the potential to impact flat-tailed horned lizard habitat include non-exploding bombing practice, ground-based training, target maintenance, clean up of target sites, road maintenance, mobile target activity, and target and run-in-line grading. Most military activities are confined to previously disturbed areas, so the amount of destruction or modification of flat-tailed horned lizard habitat is limited (FTHLIC 2003a, p.15). Additionally, the military is committed to be good stewards of lands they control, and the two installations have incorporated measures to benefit the flat-tailed horned lizard and other wildlife resources into their planning, training, and management activities (Navy 2001, chapter 3; USAF and USMC 2007, p. 1–8 and chapter 5). Therefore, we do not anticipate military training activities to substantially affect flat-tailed horned lizard habitat now or in the foreseeable future.

#### Summary of Factor A Threats

Flat-tailed horned lizard habitat could potentially be impacted by urban or agricultural development. However, due to the remote location and increasingly limited availability of water, urbanization and agricultural conversion of flat-tailed horned lizard habitat will likely be limited in the United States and Mexico over the foreseeable future. We note that development of energy facilities is increasing, especially in the southwestern United States; however, the overall acreage of impact from these projects, assuming all of the proposed right-of-way applications are constructed, is small compared to the range of the species. In the United States, we expect development impacts to occur outside of the existing Management Areas due to avoidance and minimization measures that result from implementation of the Rangewide Management Strategy. As of 2009, signatory agencies control approximately 185,653 ha (458,757 ac),

or about 40 percent of flat-tailed horned lizard habitat in the United States, within the Management Areas, of which only 0.09 percent has been permitted for impacts. Furthermore, in the United States, most of the species' habitat is federally or State (such as California State Park) owned, where impacts to habitat from development are anticipated to be minimal. In Mexico, the amount of development that may occur in flat-tailed horned lizard habitat is small relative to the large amount of habitat that is available, and thus the effects to the species are expected to be low in magnitude. Therefore, current or anticipated future urban, agricultural, or energy development throughout the species' range is not currently a substantial threat to the flat-tailed horned lizard, nor do we expect it to become a substantial threat in the foreseeable future.

Invasive, nonnative plants could increase the potential for wildland fire in a desert environment where wildland fire is naturally infrequent. Research suggests that invasive, nonnative plant conversion of flat-tailed horned lizard habitat is limited to urbanized and adjacent areas, and is not a substantive threat to the species' habitat throughout its range. Also, frequent OHV activity has the potential to affect flat-tailed horned lizard habitat; however, the available studies do not collectively show that OHV activity causes declines in flat-tailed horned lizard populations throughout the range of the species or that adverse OHV impacts pose a significant threat to flat-tailed horned lizard habitat. Lastly, military training activities have limited impacts on the ground and are not expected to substantially affect flat-tailed horned lizard habitat. We do not consider the potential threats analyzed above to be substantial threats to the flat-tailed horned lizard, either individually or in combination. Therefore, based on our review of the best available scientific and commercial information, we find the flat-tailed horned lizard is not threatened by the present or threatened destruction, modification, or curtailment of its habitat or range, either now or in the foreseeable future.

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

Within the context of this listing factor, overutilization is the capture or collection of individuals of a species to an extent (at a high enough rate) to affect the status of the species. Historically, in the United States, flat-tailed horned lizards may have been among the species of horned lizard

collected for the curio trade (Bolster and Nicol 1989, pp. 2 and 7). Flat-tailed horned lizard were identified by Stewart (1971, p. 33) as utilized in the pet trade. This species was also collected for scientific and educational purposes (Bolster and Nicol 1989, p. 9). However, the collection of the flat-tailed horned lizard is now prohibited except by permit in California (California Administrative Code 40.10, Title 14) and Arizona (Arizona Game and Fish Regulation, Title 17, R12-4-443, Commission Order 43). The flat-tailed horned lizard is also listed in the Official Mexican Norm NOM-059-ECOL-2001, Mexico's threatened species law, as a threatened species in Mexico (SEMARNAT 2002, p. 134), and collection is prohibited without a permit. Because of the difficulty in locating these cryptically colored lizards, we expect unauthorized recreational collection to be rare. In Mexico, Hammerson *et al.* (2007, p. 5) noted that the species may be utilized in the pet trade. As noted in Rodriguez (2002, p. 26), some people in Mexico have flat-tailed horned lizards in their yards, but it is unclear whether those lizards are prevented from moving out. We have no information on the magnitude of the pet trade, but horned lizards in general are known to be difficult to keep alive as captive pets (Stewart 1971, p. 34), including in Mexico (Rodriguez 2002, p. 26). This suggests that the pet trade is small. The information we have, although limited, does not suggest that the amount of utilization that has occurred recently, regardless of purpose, has significantly affected the status of the flat-tailed horned lizard. Therefore, based on our review of the best scientific and commercial information, we find that overutilization for any purpose is not a threat to the flat-tailed horned lizard, now or in the foreseeable future.

### C. Disease or Predation

Disease occurs to some extent in nearly all wildlife populations, but it is only a threat if the disease is virulent to the extent that it significantly impacts the population. We are not aware of any reports of disease in flat-tailed horned lizards. Thus, we do not consider disease to be a threat to the flat-tailed horned lizard anywhere within its range, nor is there any evidence to suggest it is likely to become a threat in the foreseeable future.

Predation occurs naturally, and nearly all populations of wildlife species are subject to some level of predation. Predation of flat-tailed horned lizards is known to occur. For example, 16 of 42 radio-tagged flat-tailed horned lizards

were depredated in a 2-year study (Muth and Fisher 1992, p. 33), although the rate of predation they observed may have been affected by the presence of the radio tags themselves by making the otherwise cryptically colored lizard more apparent to predators. For predation to be a significant threat to the flat-tailed horned lizard, predation rates must be high enough to affect the status of the species such that mortality from predation outpaces births resulting in an overall population decline. Predation has been identified as a potential threat to the flat-tailed horned lizard (FTHLICC 2003a, pp. 16-17). A summary from multiple sources in the scientific literature is presented in the Rangewide Management Strategy (FTHLICC 2003a, p. 16), which identifies known or likely predators to be six species of birds, five species of reptiles, two species of mammals, and one arthropod. Of these, the round-tailed ground squirrel (*Spermophilus tereticaudus*) and the loggerhead shrike (*Lanius ludovicianus*) were highlighted as major predators (FTHLICC 2003a, p. 16; see also Young and Young 2000, p. 60; Young *et al.* 2004a, p. 65). Most of these predators occur naturally (including historically) in areas occupied by flat-tailed horned lizards; thus, predation is not a threat that has emerged recently.

However, information from the scientific literature suggests that the populations of some of these predators are now higher as a result of manmade changes to the landscape, resulting in increased predation of flat-tailed horned lizards in these areas (FTHLICC 2003a, pp. 16-17; Young and Young 2005, p. 8). For example, Barrows *et al.* (2006, pp. 492-493) found evidence suggesting that loggerhead shrikes and other avian predators were responsible for reduced populations of flat-tailed horned lizards near wildland-urban interface, and Young and Young (2005, p. 8) suspected round-tailed ground squirrel populations are similarly augmented with manmade changes to landscape, resulting in similar declines in flat-tailed horned lizard populations in and around urban areas. Additionally, the cryptic coloration that allows flat-tailed horned lizards to blend in with desert soils may be of little use on paved roads, allowing increased levels of predation (Young and Young 2000, p. 62). However, much of the range of the flat-tailed horned lizard is remote, away from areas of manmade change. Thus, for the flat-tailed horned lizard, predation does not appear to be excessively high throughout its range but instead localized near developed

areas. This suggests that the observed high level of predation of flat-tailed horned lizards is an "edge effect" associated with the interface between natural areas and areas of urban and agricultural development. Because the proportion of developed areas within the range of the species is small in comparison to the undeveloped areas, we do not consider increased predation associated with urbanization to be a significant threat to the species. We further consider predation as a secondary effect of development, which is discussed under Factor E, below.

### Summary of Factor C Threats

Disease does not appear to be a threat at this time, nor is it likely to become a significant threat in the foreseeable future. Predation likely occurs in some human-altered areas at higher than typical rates; however, compared to the distribution of the species, relatively few flat-tailed horned lizards are likely subjected to increased predation. Therefore based on our review of the best scientific and commercial information, we find the flat-tailed horned lizard is not threatened by disease or predation, now or in the foreseeable future.

### D. The Inadequacy of Existing Regulatory Mechanisms

In the 1993 proposed rule to list the species, we identified several State (Arizona and California), U.S. Federal, and Mexican Federal laws and other existing regulatory mechanisms that could provide benefits to the flat-tailed horned lizard (58 FR 62627), and we concluded that these regulatory mechanisms were inadequate to protect the species or its habitat (58 FR 62628). In 1997, we also noted several State (Arizona and California), U.S. Federal, and Mexican Federal laws, but particularly noted the benefits provided to the flat-tailed horned lizard by the Interagency Conservation Agreement implementing the Rangewide Management Strategy (62 FR 37858-37859). In 2003, we again noted several State (Arizona and California), U.S. Federal, and Mexican Federal laws and other existing regulatory mechanisms that could provide benefits to the flat-tailed horned lizard (68 FR 346).

Because the Interagency Conservation Agreement implementing the Rangewide Management Strategy is voluntarily implemented on the part of the signatories, we do not consider it to be a regulatory mechanism *per se*. Some entities have incorporated the Interagency Conservation Agreement into other regulatory mechanisms; in such cases, the Interagency



Conservation Agreement is mentioned in the context of those regulatory mechanisms. Additionally, two habitat conservation plans (HCPs) within the range of the flat-tailed horned lizard cover the species and provide mitigation for and conservation of habitat. While implementation of these HCPs will provide localized benefits to the flat-tailed horned lizards populations within the HCP boundaries, these HCPs cover a very small portion of the flat-tailed horned lizard's range and will not substantially influence the overall status of the species. The Interagency Conservation Agreement and the two HCPs are discussed in greater detail in the Background section above.

In the preceding analyses of the threats to the flat-tailed horned lizard under Factors A, B, and C, and in our analysis of threats under Factor E, below, all of the threats presented are of low magnitude, are non-imminent, and/or cover very small portions of the species' range. In the sections that follow, we first discuss the existing regulatory mechanism(s) that would be removed as a result of the withdrawal of the proposed rule to list the species. Then we review the existing regulatory mechanisms that would remain in effect to address the potential threats discussed herein under the other listing factors.

#### U.S. Federal Laws

##### *Section 7(a)(4) of the Act*

The Act contains provisions for Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act. Commonly called a "conference," this requirement would no longer apply to the flat-tailed horned lizard once the withdrawal of the proposed listing rule is finalized. A conference opinion is an advisory mechanism by which the Service recommends measures to avoid adverse effects or jeopardy to the species. There are no requirements to implement reasonable and prudent measures and terms and conditions or for adoption of reasonable and prudent alternatives to avoid impacts to species or habitat. In this regard, the conference opinion requirement under the Act provides little if any additional regulatory protection for this species; although it may provide some benefits to the flat-tailed horned lizard by informing Federal agencies of potential adverse effects to the species that may result from their activities. However, the survival of the flat-tailed horned lizard is not dependent on any protections

afforded by the application of section 7(a)(4) of the Act because the potential threats facing the flat-tailed horned lizard are not substantial (see the other listing factors).

##### *Incidental Protection Via Other Listed Species*

The withdrawal of the proposed rule to list the flat-tailed horned lizard will not affect the listing status of other listed species, and the flat-tailed horned lizard may receive some level of protection in the United States through implementation of the Act because of overlapping ranges or proximity to other federally listed species. These associated federally listed species include Coachella Valley fringe-toed lizard (*Uma inornata*), *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch), *Astragalus magdalenae* var. *peirsonii* (Peirson's milk-vetch), bighorn sheep in the Peninsular Ranges (*Ovis canadensis nelsoni*), and desert tortoise (*Gopherus agassizii*).

The federally threatened Coachella Valley fringe-toed lizard is restricted to the Coachella Valley, but its distribution overlaps with the northern portion of the flat-tailed horned lizard's range in the Coachella Valley. However, the flat-tailed horned lizard may use additional habitat within the Coachella Valley in which the fringe-toed lizard does not occur. The Coachella Valley MSHCP addresses the Coachella Valley fringe-toed lizard, Coachella Valley milk-vetch, and the flat-tailed horned lizard. Federal actions not covered by the Coachella Valley MSHCP that may affect the Coachella Valley fringe-toed lizard, the Coachella Valley milk-vetch, or both are subject to consultation with the Service under section 7 of the Act. These consultations may include avoidance or minimization measures that benefit the listed species and, where they co-occur, the flat-tailed horned lizard. Similarly, consultations on the federally endangered bighorn sheep of the Peninsular Ranges may include measures that benefit flat-tailed horned lizards in the Western and Coachella Valley Populations where suitable habitat for both species is in close proximity to the toe of slope of the mountains; however, the amount of such overlap is likely to be minimal. Likewise, the flat-tailed horned lizard may marginally benefit from consultations addressing the federally threatened *Astragalus magdalenae* var. *peirsonii* and the federally threatened desert tortoise where they co-occur, but these areas of overlap are also likely minimal. When the flat-tailed horned lizard overlaps with other listed species,

we anticipate impacts to the species and its habitat may be avoided or minimized.

##### *Approved Habitat Conservation Plans—Section 10(a)(1)(B) of the Act*

Under section 10(a)(1)(B) of the Act, the Service may issue "incidental take" (*i.e.*, taking of endangered species that is incidental to, but not the purpose of, carrying out of an otherwise lawful activity, see 50 CFR 402.02) permits for listed animal species to non-Federal applicants, which provide exemptions to the take prohibitions under section 9 of the Act. To qualify for an incidental take permit, applicants must develop, fund, and implement a Service-approved habitat conservation plan that, among other requirements, does not jeopardize the continued existence of covered species, and details measures to minimize and mitigate the impact of the approved incidental taking on covered species. As discussed in the Background section and under Factor A, there are two existing incidental take permits that include the flat-tailed horned lizard as a covered species: the Coachella Valley MSHCP and the Lower Colorado MSCP. Regardless of the withdrawal of the proposed rule to list the species, the existing HCPs, and the conservation they provide, would remain in effect.

#### Additional U.S. Federal Mechanisms

##### *Federal Land Policy and Management Act*

The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) (FLPMA), which provides overall direction to the BLM for conservation and management of public lands, allows the agency to participate in Interagency Conservation Agreements. Section 601 required the preparation of the California Desert Conservation Area (CDCA) Plan. The CDCA Plan was amended to formally incorporate the Rangeland Management Strategy into BLM's land use planning, including formal adoption of the BLM-controlled Management Areas comprising the East Mesa Flat-tailed Horned Lizard Management Area, West Mesa Flat-tailed Horned Lizard Management Area, and Yuha Desert Flat-tailed Horned Lizard Management Area (BLM 2004, p. 2). Additionally, section 103(a) of the FLPMA defines an Area of Critical Environmental Concern (ACEC), which allows creation of areas "where special management attention is required \* \* \* [for] fish and wildlife resources." BLM lands comprise much of the U.S. range of the flat-tailed horned lizard, including the aforementioned Management Areas.

Additionally, the BLM has designated ACECs for wildlife resources within the range of the flat-tailed horned lizard. The BLM's implementation of FLPMA, through land management plans that incorporate certain provisions of the Rangeland Management Strategy including the avoidance, minimization, mitigation (compensation), and management measures, helps to reduce the severity of existing potential threats to the flat-tailed horned lizard, especially development and OHV activity. We conclude FLPMA is an adequate regulatory mechanism within the confines of its applicability—that is, allowing BLM to better manage flat-tailed horned lizard habitat and implement the Rangeland Management Strategy on BLM lands. Because much of the U.S. portion of the range of the flat-tailed horned lizard is comprised of BLM land, FLPMA is an important regulatory mechanism that helps to reduce the already low-level threats to the species in these areas. Implementation of the CDCA Plan, as amended, and the incorporated provisions of the Rangeland Management Strategy will continue regardless of the withdrawal of the proposed listing rule for the species.

#### *National Environmental Policy Act*

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) requires all Federal agencies to formally document, consider, and publicly disclose the environmental impacts of major Federal actions and management decisions that have significant effects on the human environment (including natural resources), but NEPA does not require that mitigation alternatives be implemented. Additionally, NEPA applies only to actions by Federal agencies, so private landowners are not required to comply with NEPA unless a Federal agency is involved through provision of Federal funding or a Federal permit. Although NEPA requires disclosure of the effects of proposed Federal actions, it does not afford direct protection to the flat-tailed horned lizard.

#### *Fish and Wildlife Coordination Act*

Through the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*) (FWCA), we may recommend discretionary conservation measures to avoid, minimize, and offset impacts to fish and wildlife resources resulting from Federal projects and water development projects authorized by the U.S. Army Corps of Engineers. Therefore, FWCA may provide some protection for the species and its habitat through avoidance and minimization

measures that may be incorporated into Federal projects. We conclude FWCA is an adequate regulatory mechanism within the confines of its applicability, but its applicability is limited. The minor benefits provided by FWCA will continue regardless of the withdrawal of the proposed rule to list the flat-tailed horned lizard.

#### *Sikes Act*

In 1997, section 101 of the Sikes Act (16 U.S.C. 670a) was revised by the Sikes Act Improvement Act to authorize the Secretary of Defense to implement a program to provide for the conservation and rehabilitation of natural resources on military installations. To do so, the Department of Defense was required to work with Federal and State fish and wildlife agencies to prepare an Integrated Natural Resources Management Plan (INRMP) for each facility with significant natural resources. The INRMPs provide a planning tool for future improvements; provide for sustainable multipurpose use of the resources, including activities such as hunting, fishing, trapping, and non-consumptive uses; and allow some public access to military installations to facilitate their use. Implementation of the measures included in these plans is subject to funding availability. The primary purpose for military lands, including most areas of flat-tailed horned lizard habitat, is to provide for military support and training.

Two major military installations are within the U.S. range of the flat-tailed horned lizard, the MCAS Yuma (within the Barry M. Goldwater Range) and the NAF El Centro, both are signatories to the Interagency Conservation Agreement and are implementing the Rangeland Management Strategy. Both installations have incorporated aspects of the Rangeland Management Strategy into their respective INRMPs, including avoidance and minimization measures, plus monitoring and management activities (Navy 2001, pp. 3–14 to 3–16; USAF and USMC 2007, pp. 6–2 and 6–8; see also USAF *et al.* 2006 entire). Additionally, areas designated as Flat-tailed Horned Lizard Management Areas under the Rangeland Management Strategy include military-owned areas (FTHLIC 2003a, pp. 51–53). Regardless of the withdrawal of the proposed rule to list the species, the application of the Sikes Act would continue and the benefits to the flat-tailed horned lizard would continue within the confines of its applicability—that is, providing benefits to the flat-tailed horned lizard and its habitat on military facilities and implementing the Rangeland Management Strategy on military lands.

#### California State Laws

##### *California Endangered Species Act*

The flat-tailed horned lizard is not listed under the California Endangered Species Act (CESA), the State's primary regulatory mechanism to protect species. Therefore, CESA provides no benefit to the flat-tailed horned lizard.

##### *California Environmental Quality Act*

The California Environmental Quality Act (CEQA) (chapter 2, section 21050 *et seq.* of the California Public Resources Code) requires State and local government agencies to consider and disclose environmental impacts of projects and to avoid or mitigate them where possible. Under CEQA, public agencies must prepare environmental documents to disclose environmental impacts of a project and to identify conservation measures and project alternatives. Section 15380 of the CEQA Guidelines indicates that species designated as “species of special concern” (see below) should be included in an analysis of project impacts if they can be shown to meet the criteria of sensitivity outlined therein (Comrack *et al.* 2008, p. 2). However, CEQA itself does not guarantee that conservation measures will be implemented; the lead agency may either require mitigation through changes to a project, or determine that overriding considerations make mitigation infeasible (CEQA Sec. 21002). In the latter case, projects may be approved that cause significant environmental damage, such as impacts to species or their habitat. Therefore, whether CEQA is an adequate regulatory mechanism within the confines of its applicability depends on the law's application and the determination of the lead agency involved. The minor benefits provided by CEQA will continue regardless of the withdrawal of the proposed rule to list the species.

##### *Natural Community Conservation Planning Act*

The NCCP program is a cooperative effort involving the State of California and numerous private and public partners to protect regional habitats and species. The primary objective of NCCPs is to conserve natural communities at the ecosystem scale while accommodating compatible land use, including urban development (<http://www.dfg.ca.gov/habcon/>). Natural Community Conservation Plans help identify and provide for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. Many NCCPs are developed in

conjunction with habitat conservation plans prepared under the Act, including the Coachella Valley MSHCP. Regardless of the withdrawal of the proposed rule to list the flat-tailed horned lizard, the existing NCCPs, and the protections they provide, would remain in effect.

#### *California Administrative Code*

California Administrative Code 40.10, Title 14, prohibits the collection of flat-tailed horned lizards without a permit. Therefore, we conclude the California Administrative Code is an adequate regulatory mechanism within the confines of its applicability—that is, limiting or preventing overutilization of the flat-tailed horned lizard in California. The benefits provided by California Administrative Code 40.10, Title 14, will continue regardless of the withdrawal of the proposed rule to list the flat-tailed horned lizard.

#### *Species of Special Concern*

The State's Species of Special Concern (SSC) designation is an administrative designation that carries no formal legal status. According to Comrack *et al.* (2008, pp. 1–4), its intent is to focus attention on animals deemed to be at conservation risk, stimulate research, and achieve conservation and recovery of these animals before they meet California Endangered Species Act criteria for listing as a State endangered or threatened species. The flat-tailed horned lizard is on the list of reptile and amphibian species of special concern in California (Jennings and Hays 1994, pp. 134–141).

As stated in Comrack *et al.* (2008, p. 2), sections 15063 and 15065 of the CEQA Guidelines, which address how an impact is identified as significant, are particularly relevant to SSCs. Project-level impacts to listed (endangered, threatened, or rare species) species are generally considered significant, thus requiring lead agencies to prepare an Environmental Impact Report to fully analyze and evaluate the impacts. Moreover, section 15380 of the CEQA Guidelines indicates that SSCs should be included in an analysis of project impacts if they can be shown to meet the criteria of sensitivity outlined therein (Comrack *et al.* 2008, p. 2). In assigning “impact significance” to populations of non-listed species, analysts usually consider factors such as population-level effects, proportion of the taxon's range affected by a project, regional effects, and impacts to habitat features.

Therefore, we conclude the State's Species of Special Concern designation is an adequate regulatory mechanism

within the confines of its applicability—that is, an administrative designation that increases the level of awareness and analysis (such as under CEQA) for flat-tailed horned lizard in California. The benefits provided by the Species of Special Concern designation will continue regardless of the withdrawal of the proposed rule to list the flat-tailed horned lizard.

#### *Arizona State Laws*

##### *Arizona Game and Fish Regulation*

Arizona Game and Fish Regulation, Title 17, R12–4–443, Commission Order 43 prohibits the collection of flat-tailed horned lizards without a permit by indicating that there is no “open season” to collect the species (AGFD 2009, p. 8). Additionally, the Arizona Game and Fish Department has included the flat-tailed horned lizard on the draft List of Wildlife of Special Concern in Arizona, which the State uses to prioritize species for planning and funding purposes, although State regulations do not exist in Arizona to protect this species' habitat at this time. We conclude Arizona Game and Fish Regulation is an adequate regulatory mechanism within the confines of its applicability—that is, limiting or preventing overutilization of the flat-tailed horned lizard in Arizona. The benefits provided by the Arizona Game and Fish Regulation, Title 17, R12–4–443, Commission Order 43 will continue regardless of the withdrawal of the proposed rule to list the flat-tailed horned lizard.

#### *Mexican Federal Law*

##### *Official Mexican Norm*

The Official Mexican Norm NOM–059–ECOL–2001, Mexico's threatened species law, lists the flat-tailed horned lizard as a threatened species (SEMARNAT 2002, p. 134). The Mexican law may be implemented to modify development projects or support creation of Natural Protected Areas, but successful implementation occurs by individuals or groups outside of the Mexican government. We conclude Official Mexican Norm may be an adequate regulatory mechanism within the confines of its applicability—that is, reducing threats to the species in Mexico. The benefits provided by the Official Mexican Norm NOM–059–ECOL–2001 will continue regardless of the withdrawal of the proposed rule to list the flat-tailed horned lizard in the United States.

#### *Summary of Factor D*

With the withdrawal of the proposal to list the flat-tailed horned lizard, the

only change in regulatory protections would be the removal of the conference requirement under section 7(a)(4) of the Act. Since a conference opinion is only advisory in nature, we do not expect this change to have any significant effect on the status of the species. The remainder of the existing regulatory mechanisms summarized above will remain in place and will continue to provide benefits to the species. The aforementioned existing regulatory mechanisms provide some level of protection for the species and its habitat. This includes several laws or mechanisms that reduce potential threats, such as State laws that restrict the collection of flat-tailed horned lizards, or planning documents developed under FLPMA or the Sikes Act that incorporate measures from the Rangewide Management Strategy. Therefore, we conclude the existing regulatory mechanisms are not inadequate and do not threaten the species throughout all or a significant portion of its range, now or in the foreseeable future.

#### *E. Other Natural or Manmade Factors Affecting Its Continued Existence*

For Factor E, we assess the natural or manmade threats to the species that were not addressed under the previous four factors. In the 1993 proposed rule to list the species as threatened and in the 2003 withdrawal document, we considered the potential effects of pesticide spraying and prolonged drought under this factor. Also in these two **Federal Register** publications, we addressed the effects of OHV use on the species and its habitat under Factor A. Similarly, in those earlier assessments, we addressed the potential effects associated with fragmentation on the species and its habitat under Factor A. Also, in our 2006 withdrawal document (71 FR 36750–36751), the scope of which was limited by court order, we addressed historical habitat loss as a component of Factor A on the grounds that Factor A addresses the curtailment of a species' habitat or range as a threat to its continued existence, but this rationale was flawed because Factor A, as discussed here and under Factor A in the present document, is limited to current and anticipated losses of habitat, not *past* losses. Because of the confusion presented in previous analyses, we have emphasized in the current analysis the differences between present and future habitat loss from past habitat loss, including how “fragmentation” as a concept interacts with the topic of habitat loss.

To address explicitly the previously identified threat of “fragmentation,” we

need to address the specific threats encompassed by that ambiguous term. However, these threats include ones that are best addressed under separate listing factors under the Act. As mentioned previously, the term fragmentation includes habitat loss. Factor A addresses present (current) or threatened (anticipated) destruction, modification, or curtailment of a species' habitat or range. Factor A does not address threats posed by *past* losses of habitat. How the *species* is affected by past habitat loss—or in other words, the present-day ramifications of those past actions of habitat destruction—is better addressed under Factor E. The effects of past habitat loss include in particular the effects of manmade barriers on populations and edge effects. Barriers may divide otherwise intact populations into smaller populations, and those smaller populations may be more susceptible to other effects (see below).

Thus, below, we assess the effects of barriers and small populations and edge effects. We also assess the previously identified potential effects to the species from pesticide spraying, OHV use, and prolonged drought; we also address the potential effects associated with global climate change not previously identified.

#### Barriers and Small Populations

As mentioned previously, as used herein a "population" refers to a loosely bounded, regionally distributed collection of individuals of the same species. Thus, individuals of a given species when considered together within some boundary may be considered a population. For example, the group of individuals bounded within the entire range of the species may be considered a population, sometimes referred to as the "entire population" or "population as a whole." Similarly, groups of individuals within the entire population may be considered to occur separately from each other, forming multiple populations. In typical usage, a separation is often a literal separation—that is a physical division, by a barrier for instance—but it may also be a figurative separation; for example, an arbitrary grouping of individuals for the purposes of discussion. Regardless of the criteria used to separate and group individuals, a species may be considered to comprise one or more populations, depending on how the term is used. Moreover, because the term is loosely defined, a given population could be considered to consist of other smaller populations, sometimes hierarchically referred to as "subpopulations." For the purposes of our discussion of barriers and small

populations, below, we primarily refer to populations as being *physically* separated, or potentially so.

Barriers prevent or severely limit contact (genetic interchange) between populations. Thus, an artificial barrier can split a population into two (or more) populations (Jackson 2000, p. 4). For animals that can move freely (vagile animals), like the flat-tailed horned lizard, barriers prevent individuals from moving from one area into another. Barriers not only include physical hindrances that prevent movement (*e.g.*, a wall or a river), but may also include areas that a species may be disinclined to enter (*e.g.*, unsuitable habitat) or areas of increased mortality (*e.g.*, busy roads, or areas with an elevated number of predators) across which individuals would be unlikely to successfully traverse.

The division of populations into other, smaller populations may or may not be deleterious; it largely depends on the size of the resulting populations, with small populations more likely to experience problems than large populations, as discussed below. Moreover, small populations may be disproportionately affected by other natural and manmade factors compared to large populations, such as edge effects, also discussed below. Thus, the creation of artificial barriers results in habitat loss (*see* Factor A) and may also affect the species through potential effects associated with the subsequent isolation, which largely depends upon the size of the resulting populations. Because the threats from barriers and small populations are connected, we discuss the potential threats faced by small populations generally and then discuss the potential effects of barriers and small population sizes on the flat-tailed horned lizard.

The decline of a population is determined by a number of forces and factors that are often grouped into intrinsic and extrinsic. As described by Soulé and Simberloff (1986, pp. 27–28), "extrinsic forces include deleterious interactions with other species (increases in predation, competition, parasitism, disease or decreases in mutualistic interactions) and deleterious events or changes to habitat or the physical environment. Intrinsic factors include random variation in genetically based traits of the species and interactions of these traits with the environment. These include: (1) Demographic stochasticity, which is random variation in sex ratio [and] in birth and death rates, \* \* \* (2) social dysfunction or behaviors that become maladaptive at small population sizes; [and] (3) genetic deterioration brought

on by inbreeding, genetic drift and other factors." For a population to become extirpated (locally extinct), these extrinsic and intrinsic forces and factors must significantly affect the population. These forces and factors are more likely to be significant to small populations (Goodman 1987, pp. 11–34; Pimm *et al.* 1988, pp. 757–785; Lande 1993, pp. 911–927; Frankham 1996, pp. 1500–1508; Henle *et al.* 2004, pp. 207–251).

Our 1993 and 2003 assessments of the flat-tailed horned lizard have described flat-tailed horned lizard populations as "fragmented." As discussed previously, fragmentation is an imprecise term, but one that clearly is associated with the breaking up of populations into smaller populations through the introduction of artificial barriers. As discussed in the Background section, historical agricultural development (and its associated urban development) has largely occurred in contiguous blocks. These large swaths of human-created non-habitat have, for the most part, exacerbated natural barriers separating the Western, Eastern, and Southeastern Populations, and severed the somewhat tenuous connection between the Coachella Valley Population and the Western Population. As a consequence of the past development, the geographical area occupied by these four populations became smaller. With the decrease in the amount of habitat area, we expect populations of flat-tailed horned lizards in those areas to also be smaller (a decrease in the abundance of individuals) (such as Hokit and Branch 2003, p. 261).

The point at which a population becomes a "small population" is not clear and varies by species-specific or situational-specific factors. There is disagreement among scientists and considerable uncertainty as to the population size adequate for long-term persistence of wildlife populations; however, there is agreement that population viability over the long term is more likely to be ensured if population sizes are in the thousands of individuals rather than hundreds (Traill *et al.*, 2010, p. 32, *see also* Reed *et al.* 2003, p. 30, Table 3 therein). In vertebrates, a population of 5,000 is often used as a minimum number needed for high likelihood of viability over the long term (Traill *et al.*, 2010, p. 32), while Reed *et al.* (2003, p. 30) estimated that roughly 7,000 breeding-age adults is the minimum number necessary for a vertebrate population to likely remain viable over the long term. However, as stated by Thomas (1990, p. 324), "there is no 'magic' population size that guarantees the persistence of animal populations." He went on to note

that populations of some vertebrates have survived for decades with population sizes of hundreds or even dozens of individuals, adding “populations that occupy habitat fragments that are far too small to hold thousands of individuals may still possess great conservation potential” (Thomas 1990, p. 326). Moreover, the amount of time that most authors consider to be “long term” is many decades or even centuries (for example, see Shaffer 1981, p. 132; Soule and Simberloff 1986, p. 28; Traill *et al.* 2010, p. 31; see also Reed *et al.* 2003, p. 30, Table 3 therein). Although minimum population sizes for shorter time periods would be correspondingly smaller (see Figure 1 in Traill *et al.* 2010, p. 31), we use the long-term population size to be conservative.

As discussed in the Background section, and discussed further in the present section, the distribution of the flat-tailed horned lizard is divided into discrete populations. Thus, to assess the threat implied by the term “fragmentation,” it is more appropriate to consider the individual populations than to assess the population-as-a-whole. Below we assess the four geographical Populations. We first examine the Western, Eastern, and Southeastern Populations, each as a whole. Then, looking at those three Populations further, we note that potential barriers within the larger Populations may divide each Population into smaller subpopulations. Lastly, we examine the Coachella Valley Population. We treat the Coachella Valley Population separately from the other three Populations because the current distribution of flat-tailed horned lizards in the Coachella Valley occurs in two widely isolated areas and are more like the subpopulations created by barriers within the Western, Eastern, and Southeastern Populations. Thus, we take advantage of the concepts developed in our discussion of barrier-created subpopulations to assess the Coachella Valley Population.

#### *Western, Eastern, and Southeastern Populations*

There are no direct, reliable estimates of flat-tailed horned lizard population size for the four geographically separated populations. The size of the Western Population, Eastern Population, and Southeastern Population areas are 341,989 ha (845,073 ac), 169,617 ha (419,133 ac), and 1,073,551 ha (2,652,802 ac) respectively (Coachella Valley Population area is discussed separately, below). Even at the lowest (most conservative) estimated density of adult flat-tailed horned lizard of 0.3

individuals per ha (0.1 individuals per ac) (see Background section) there are likely more than 50,000 adult flat-tailed horned lizards in the Western Population, 85,000 in the Eastern Population, and 322,000 in the Southeastern Population. We acknowledge that there are numerous assumptions in these calculations that limit accuracy of the extrapolated population sizes; however, even using the most conservative density value, these three populations are of sufficient size such that any threats associated with small populations would be unlikely. However, there are potential barriers that may subdivide the otherwise apparently continuous Western, Eastern, and Southeastern Populations. We examine subdivisions within these three populations, below.

#### *Subpopulations Within the Western, Eastern, and Southeastern Populations*

For the flat-tailed horned lizard, as a diminutive terrestrial animal, a number of manmade changes to the landscape may serve as barriers (see FTHLIC 2003a, p. 14). These include: (1) Railways, canals, and certain types of roadways that are physical hindrances to the movement of flat-tailed horned lizards; (2) developed areas (unsuitable habitat) into which flat-tailed horned lizards may be disinclined to enter; and (3) busy roadways, powerline corridors, and areas adjacent to developed areas (that have artificial perches and nearby artificial food sources resulting in higher densities of predators) that are areas of increased mortality for flat-tailed horned lizards (FTHLIC 2003a, p. 14; see also Boarman *et al.* 1997, pp. 54–58; Fagan *et al.* 1999, pp. 165–182; Jackson 2000, pp. 1–14; Germaine and Wakeling 2001, pp. 229–237; Young and Young 2005, pp. 1–11; Barrows *et al.* 2006, pp. 486–494; Shepard *et al.* 2008, pp. 288–296).

We expect these potential barriers will be variable in how thoroughly they prevent movement of flat-tailed horned lizards, and thus variable in the extent to which they prevent contact between individuals and separate populations. Canals generally extend for long distances without overcrossings, and flat-tailed horned lizards may be reluctant to use (go over) what few crossings exist (bridges); as such, canals are likely impermeable barriers in the same way the Colorado River has separated populations. However, as discussed below, roadways and railways, and the infrastructure associated with border security may or may not constitute complete barriers.

Depending on how roads are constructed, they may serve as physical hindrances to the movement of flat-tailed horned lizards. For example, raised roadbeds, steep curbs, and roadway dividers may contribute to making a roadway a physically impassible barrier for flat-tailed horned lizards. Similarly, railways may serve as physical barriers. However, bridges and culverts, especially those with larger-sized openings, may allow flat-tailed horned lizards to cross under the physical impediments along roads and railways (Painter and Ingraldi 2007, p. 17). Although it is not known whether the openings under such structures are used regularly by the species in the wild, it is likely that the undercrossings with natural substrates created by larger culverts, and especially bridges, are used to some extent. Additionally, blowing sand, which is not atypical for much of the range of the flat-tailed horned lizard, may build up along roadways and railways. Thus, it is possible that accumulated sand, at least until the sand is cleared by maintenance crews, may provide a “bridge” over the physical structures that prevent flat-tailed horned lizard movement. For example, the railway through the sandy Gran Desierto de Altar may be less of a barrier than railways in less sandy portions of the species’ range due to blowing and drifting sands that may provide passage over tracks.

Additionally, roads that do not serve as physical hindrances may be barriers for other reasons. Flat-tailed horned lizards, particularly males (Young and Young 2000, p. 19), are often sighted on paved roads (Mayhew 1965, p. 104; Turner and Medica 1982, p. 822; Johnson and Spicer 1985, p. 40; Stebbins 2003, p. 304). This, combined with their propensity to not flee from oncoming traffic (Young and Young 2000, p. 60), may make flat-tailed horned lizards particularly susceptible to traffic-related road mortality (Nicola and Lovich 2000, p. 211; Gardner *et al.* 2001, p. 10). The stretches of multi-lane highways (Interstate 8 and State Route 86) that cross areas within the current range of the flat-tailed horned lizard have, on average, over 25,000 vehicles pass over them daily, while the smaller, two-lane highways of State Routes 78 and 98 within the species’ range have roughly 3,500 to 5,500 vehicles per day, on average (Caltrans 2008, electronic data). The increased level of vehicle traffic on the multi-lane highways along with the greater number of physical hindrances that may result from multiple lanes is more likely to serve as a barrier than the smaller, two-lane

highways. For example, the population of flat-tailed horned lizards occupying the small part of the Southeastern Population north of Interstate 8 (1,018 ha (2,516 ac)) (see below) is small enough and isolated enough to exhibit some evidence of inbreeding or genetic drift (Culver and Dee 2008, p. 2), suggesting Interstate 8 in this area is an effective barrier preventing movement of flat-tailed horned lizards (see below). However, Interstate 8 likely poses less of a physical hindrance where it crosses the Eastern Population where blowing sand fills in gaps along the road edge, although the traffic volume remains high. Another way roadways may be barriers is that the cryptic coloration that allows flat-tailed horned lizards to blend in with desert soils may be of little use on paved roads, allowing increased levels of predation (Young and Young 2000, p. 62) (see Factor C, *Disease and Predation*). Thus, even though flat-tailed horned lizards may be able to physically cross two-lane roads (Barrows 2006, p. 119), these roads may be barriers to flat-tailed horned lizards for other reasons.

However, it is not clear whether roadways or other potential barriers are *complete* barriers. They may instead be “semipermeable” barriers, reducing contact between populations, but not stopping it. This may be especially true for small roads, especially gravel and unsurfaced roads and OHV “routes.” Although the amount of contact needed to maintain population connectivity of flat-tailed horned lizards is not known, Mills and Allendorf (1996, p. 1517) suggested that if 1 to 10 individuals per generation successfully cross a semipermeable barrier, that level of movement is likely sufficient to maintain the connection between populations, provided the overall population is of sufficient size. Thus, a potential barrier would have to severely limit flat-tailed horned lizard movement throughout its length and at all times for it to be a complete barrier; as such, only a few potential barriers are likely complete barriers.

The “tactical infrastructure,” including fencing, lighting, and access and patrol roads (collectively, the “border fence”), along portions of the international border has the potential to serve as a barrier. The actual fencing in these areas includes vehicle and pedestrian fences that are constructed to allow movement of small animals (USCBP 2008a, pp. 1–4 to 1–6 and Appendix B; USCBP 2008b, pp. 2–5 and 8–9). Although the shifting sand has meant some of the small slots that were incorporated into fine-mesh pedestrian fence to allow movement of flat-tailed

horned lizards are no longer at ground level (FTHLICC 2010, p. 10), the shifting sand has also resulted in gaps under the fence that flat-tailed horned lizards may use to cross under the fence (Rorabaugh 2010, p. 190). Thus, we do not anticipate the fence proper to be a complete physical hindrance to flat-tailed horned lizard movement. The additional infrastructure and activity may deter flat-tailed horned lizard movement or allow for increased mortality. However, in total, we do not believe the level of activity to be high enough to be a complete barrier to flat-tailed horned lizard movement (see also Rorabaugh 2010, p. 190). For example, genetic data from both sides of the border in the Southeastern Population suggests that populations of flat-tailed horned lizards in Arizona are not genetically isolated from neighboring populations in Mexico (Culver and Dee 2008, p. 10). As such, the border fence is likely a semipermeable barrier, not a complete barrier, for the species.

To assess the threat of barriers to the flat-tailed horned lizard, we examined maps of the region, including GIS data and aerial and satellite imagery. The areas in which flat-tailed horned lizards are currently distributed contain numerous potential manmade barriers. As mentioned above, the Coachella Valley Population area has numerous barriers, and the flat-tailed horned lizard is only known from two relatively small areas. Thus, as summarized below, we focused our attention on the three relatively contiguous Western, Eastern, and Southeastern Populations.

For this analysis, we used GIS data of the species’ “current distribution” as delineated by the 2003 Rangeland Management Strategy to examine the size of the areas between those features we considered likely barriers. Barriers divide the areas of habitat into subareas—termed herein as “parts.” Similarly, barriers divide populations of flat-tailed horned lizards into smaller populations, or subpopulations. Features we considered potential likely barriers included: (1) The All-American Canal and the Coachella Canal, which are likely to be complete barriers throughout their lengths; and (2) Interstate 8; State Routes 78, 86, and 98; Mexico Federal Highways 2 and 8; the (old) coastal highway (which is being upgraded to a multi-lane highway, but we do not have GIS data for the new route); the international border; and several railways, which are likely to be semipermeable barriers to varying degrees along their lengths.

For the purposes of dividing the areas into “parts,” we assumed all potential barriers were complete barriers;

however, in the analysis that follows we discuss the situations in which such barriers may be semipermeable. Additionally, for the purposes of the analysis, where two or more potential barriers are adjacent to each other (e.g., portions of Interstate 8 and the All-American Canal), we mapped them as a single barrier. All of the area values (hectares and acres) are approximate and are not as precise as the values given; however, we believe they are sufficiently accurate for this coarse-scale analysis (especially because we used conservative estimates of flat-tailed horned lizard densities).

We used the conservative estimated density of 0.3 adult flat-tailed horned lizards per ha (0.1 per ac) to determine whether potentially isolated parts between barriers were likely to contain more than 7,000 adults, in other words, to be large enough to avoid threats that may be associated with small population size (see above). Where populations were “small,” we also present other potential population sizes using higher densities, including the still-conservative, but perhaps more realistic (for certain “parts”), value of 0.7 individuals per ha (0.3 per ac) (see *Population Dynamics* section, above).

As described in the *Population Dynamics* section in the Background, these density estimates were derived from data that were collected at sites in the northern portion of the species’ range. As a result, we are confident that the density estimates used are conservative. We do not have density estimates for the southern portion of the species’ range; thus, we do not know if 0.3 or 0.7 individuals per ha (0.1 or 0.3 per ac) are as conservative. Nevertheless, because these values are at the low end of a fairly wide range (0.3 to 4.4 adults per ha (0.1 to 1.8 per acre)), we believe them to be within the density range even in the southern areas of the species’ distribution.

Additionally, as discussed near the beginning of the “Barriers and Small Populations” section, above, the point at which a population becomes “small” varies from species to species and from situation to situation. Stated another way, the forces and factors that are *more likely* to be significant threats to a “small” population of a given species are *not guaranteed* to be significant threats to a given population of a given size. We have limited information on the effects such forces and factors may have on the flat-tailed horned lizard. For example, even though information in the scientific literature suggests the previously mentioned population north Interstate 8 is exhibiting some evidence of inbreeding or genetic drift (Culver

and Dee 2008, p. 2), we do not have specific information as to whether or to what degree that population's status is being affected; the information in the scientific literature (as discussed above) suggests that this population is likely facing a greater *risk* from threats associated with genetic deterioration, but we have no data (one way or the other) to assess that particular population's status. Thus, for the purposes of evaluating the potential threats associated with the implied meaning of "fragmentation" to the flat-tailed horned lizard, we have assumed that the populations of flat-tailed horned lizards in areas that we

identified as small, isolated parts are likely to experience adverse effects associated with small population size.

#### Western Population

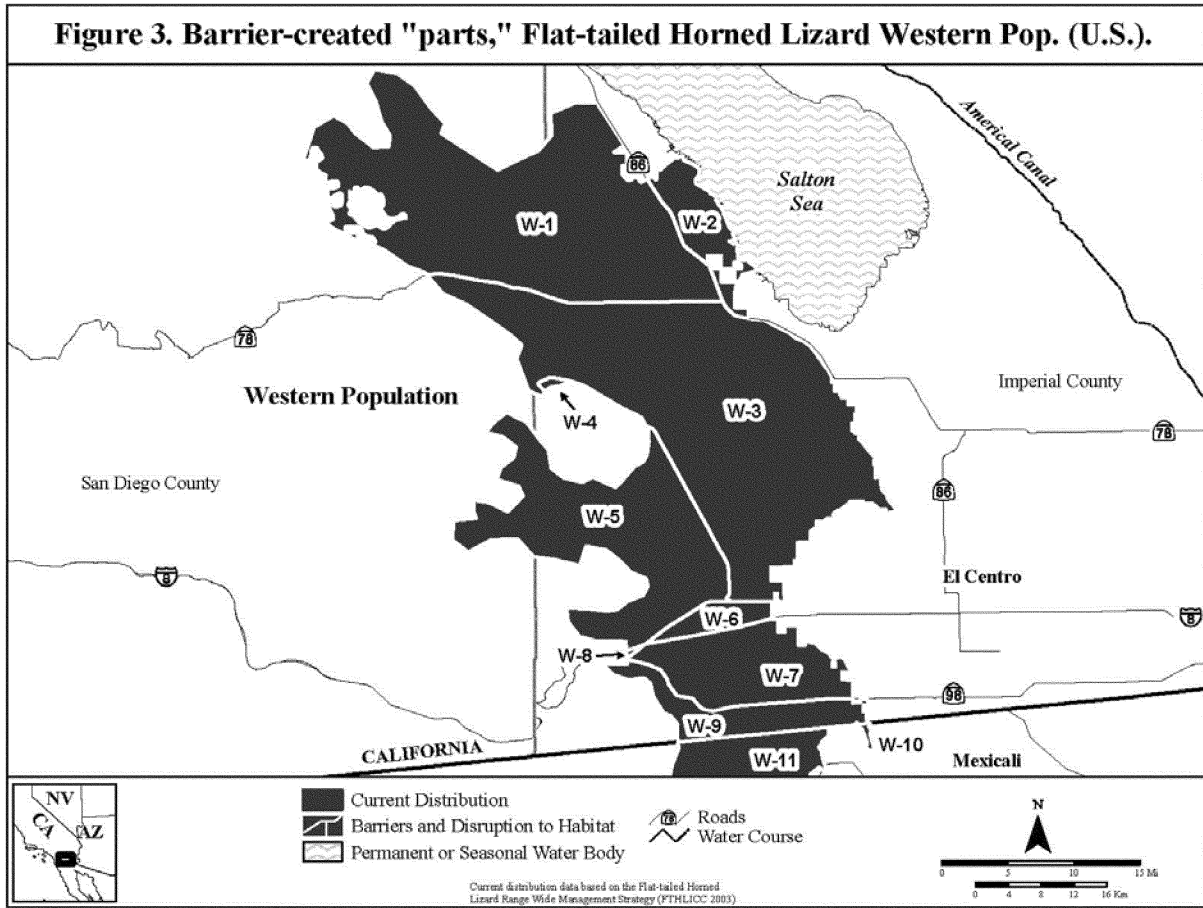
The potential barriers listed above split the Western Population area into 12 parts (Table 3, Figures 3 and 4), four of which are likely to support populations greater than 7,000 individuals, even with the most conservative of the estimated densities. These include: (1) The area north of State Route 78 (77,566 ha (191,670 ac)) (Part W-1; Table 3), which includes the Borrego Badlands Management Area and Ocotillo Wells SVRA; (2) the area immediately south of State Route 78

(89,105 ha (220,183 ac)) (Part W-3; Table 3), which includes the West Mesa Management Area; (3) the area in the vicinity of the southeastern corner of Anza-Borrego Desert State Park (42,443 ha (104,879 ac)) (Part W-5; Table 3); and (4) the long, narrow area south of Mexico Federal Highway 2 in Baja California (74,254 ha (183,486 ac)) (Part W-12; Table 3). Although the long, narrow nature of the area in Baja California may make threats more pronounced (Faaborg *et al.* 1995, p. 366), it remains a large habitat area. Thus, it is likely flat-tailed horned lizards in these four areas are not "small populations."

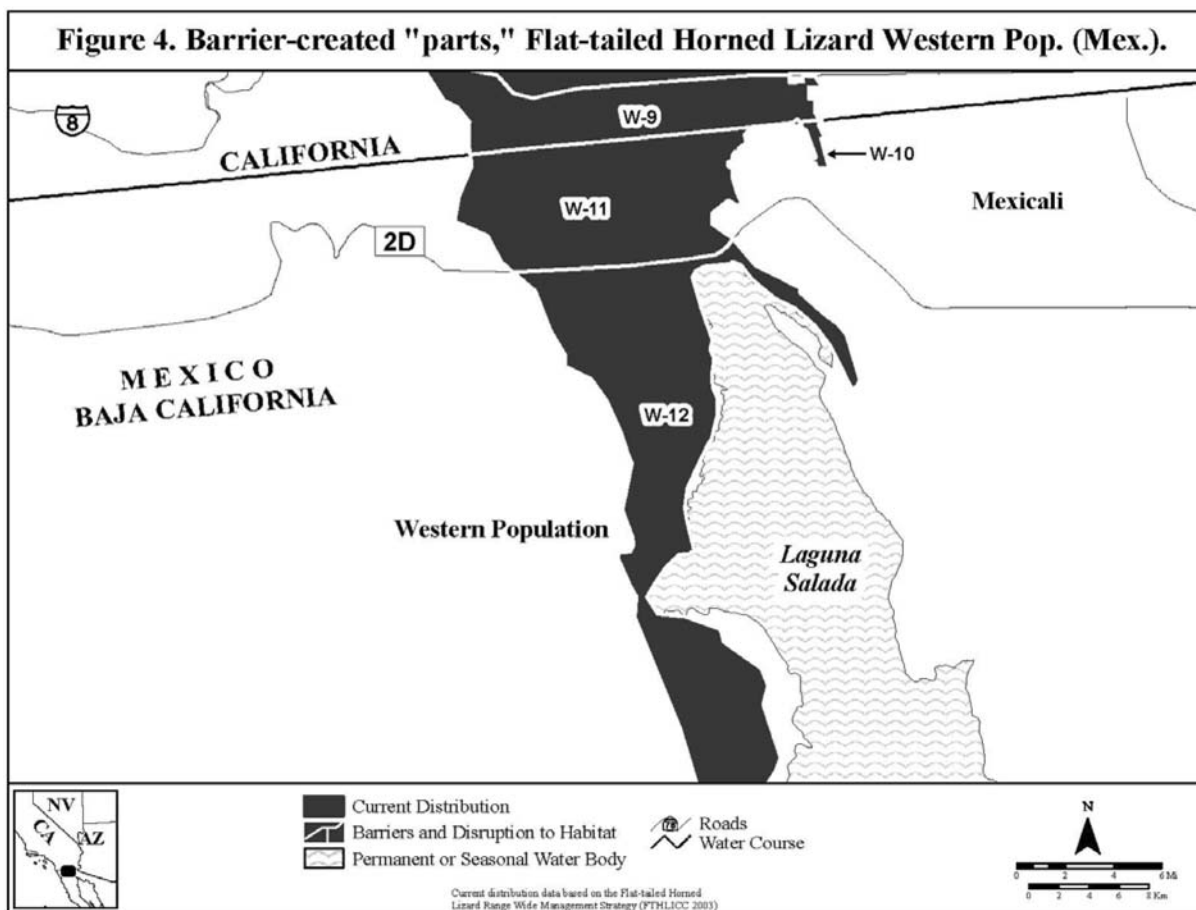
**TABLE 3—THE SIZE (AREA) OF THE "PARTS" CREATED BY BARRIERS (SEE TEXT) WITHIN THE WESTERN POPULATION AND OUR DETERMINATION AS TO WHETHER THE SPECIFIED PART IS UNLIKELY TO BE AT RISK OF DELETERIOUS EFFECTS OF SMALL POPULATIONS AT THE CONSERVATIVE DENSITIES OF 0.3 OR 0.7 INDIVIDUALS PER HA (0.1 OR 0.3 PER AC)**

Part identifier (country)	Area of part <sup>1</sup>	Is this part large enough to avoid deleterious effects associated with small populations when the density is assumed to be:	
		0.3 individuals per ha (0.1 per ac)	0.7 individuals per ha (0.3 per ac)
W-1 (U.S.)	77,566 ha (191,670 ac)	yes	yes.
W-2 (U.S.)	8,777 ha (21,688 ac)	no	no.
W-3 (U.S.)	89,105 ha (220,183 ac)	yes	yes.
W-4 (U.S.)	539 ha (1,331 ac)	no	no.
W-5 (U.S.)	42,443 ha (104,879 ac)	yes	yes.
W-6 (U.S.)	4,081 ha (10,083 ac)	no	no.
W-7 (U.S.)	19,527 ha (48,252 ac)	no	yes.
W-8 (U.S.)	110 ha (272 ac)	no	no.
W-9 (U.S.)	10,873 ha (26,867 ac)	no	yes.
W-10 (Mex.)	294 ha (726 ac)	no	no.
W-11 (Mex.)	14,420 ha (35,632 ac)	no	yes.
W-12 (Mex.)	74,254 ha (183,486 ac)	yes	yes

<sup>1</sup> Area values are estimated through a GIS-based assessment. Despite the level of precision presented, area values are approximate; however, we believe they are accurate enough to draw the conclusions presented.





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Of the remaining eight populations, three (Parts W-4, W-8, and W-10; Table 3) were remnants of a few hundred hectares each, totaling less than 1,000 ha (2,500 ac). If the flat-tailed horned lizards in these areas are isolated from other flat-tailed horned lizard populations, we expect they will be "small populations" and that they, therefore, are more likely to be negatively impacted by the deleterious effects associated with small populations sizes. Although the populations in these parts may have some connection to their respective adjacent parts, Parts W-4, W-8, and W-10 are very small and on the periphery, and any such connection would likely be tenuous at best.

Of the five remaining parts, three (located between Interstate 8 on the north and Mexico Federal Highway 2 to south) (Parts W-7, W-9, and W-11; Table 3) were large enough to likely support more than 7,000 flat-tailed horned lizards if the density of flat-tailed horned lizards was 0.7 individuals per ha (0.3 per ac). Given that the two U.S. areas contain the Yuha Desert Management Area, an area that was selected to be a Management Area

because it is likely to support higher densities of flat-tailed horned lizards and where one of the demographic plots from which the data for density estimates were gathered (*see Population Dynamics* section, above), and the one in Mexico is immediately adjacent to the Yuha Desert Management Area, we believe it is reasonable to conclude that the density of 0.7 individuals per ha (0.3 per ac) is a realistic but still conservative density estimate to use. Moreover, as mentioned above, the border fence is likely a semipermeable barrier, allowing some connectivity between the Yuha Desert Management Area and the areas of habitat south of the international border. Thus, it is likely flat-tailed horned lizards in these areas are not "small populations."

One of the last two remaining parts is the area between Interstate 8 and the railway to the north (Part W-6; Table 3); it is over 4,000 ha (9,900 ac). This part should have some connectivity with the areas to the north because it is unlikely the railway is a complete barrier, and it may even have limited connection to the south across Interstate 8 because of culverts and bridges, especially the large bridge that allows Interstate 8 to span the typically dry South Fork Coyote

Wash at the far west end of Part W-6 (BLM and CEC 2010, p. C.2-22; USFWS 2010c, p. 57). A 2,630-ha (6,500-ac) solar generation facility has been proposed in this area, which is likely to transform much of it into unsuitable habitat. However, requirements for the construction and operation of the solar generation facility include avoidance of impacts to the major washes that cross the site, which would allow the possibility of connectivity (USFWS 2010c, p. 57).

The last area, between State Route 86 and the Salton Sea, is over 8,000 ha (19,800 ac) (Part W-2; Table 3, Figure 3). The multi-lane State Route 86 is likely a substantial barrier, but our interpretation of aerial imagery suggests there are several bridges that may allow some connection. That connection, combined with the size of the area, may reduce the risk this population will suffer from threats associated with "small populations."

In sum, for the Western Population, assuming the identified potential barriers are complete barriers (which is not likely, as explained above, although we do not know how permeable they may be), and assuming the most conservative density of 0.3 flat-tailed

horned lizards per ha (0.1 per ac), we calculate that nearly 83 percent of the area is in parts of sufficient size such that the populations of flat-tailed horned lizards therein are not likely to be substantially affected by the factors associated with small population size. If we assume a slightly less conservative density (though still at the low end of the reported range) of 0.7 individuals per ha (0.3 per ac), we calculate about 96 percent of the area within the Western Population is in large enough blocks to not be substantially affected by

small population size. Thus, the Western Population is not substantially composed of “small populations.” Therefore, we conclude the flat-tailed horned lizards in the Western Population are not substantially threatened by effects associated with barriers that subdivide populations or the deleterious effects that may follow, nor do we expect barriers to be a threat in the foreseeable future.

Eastern Population

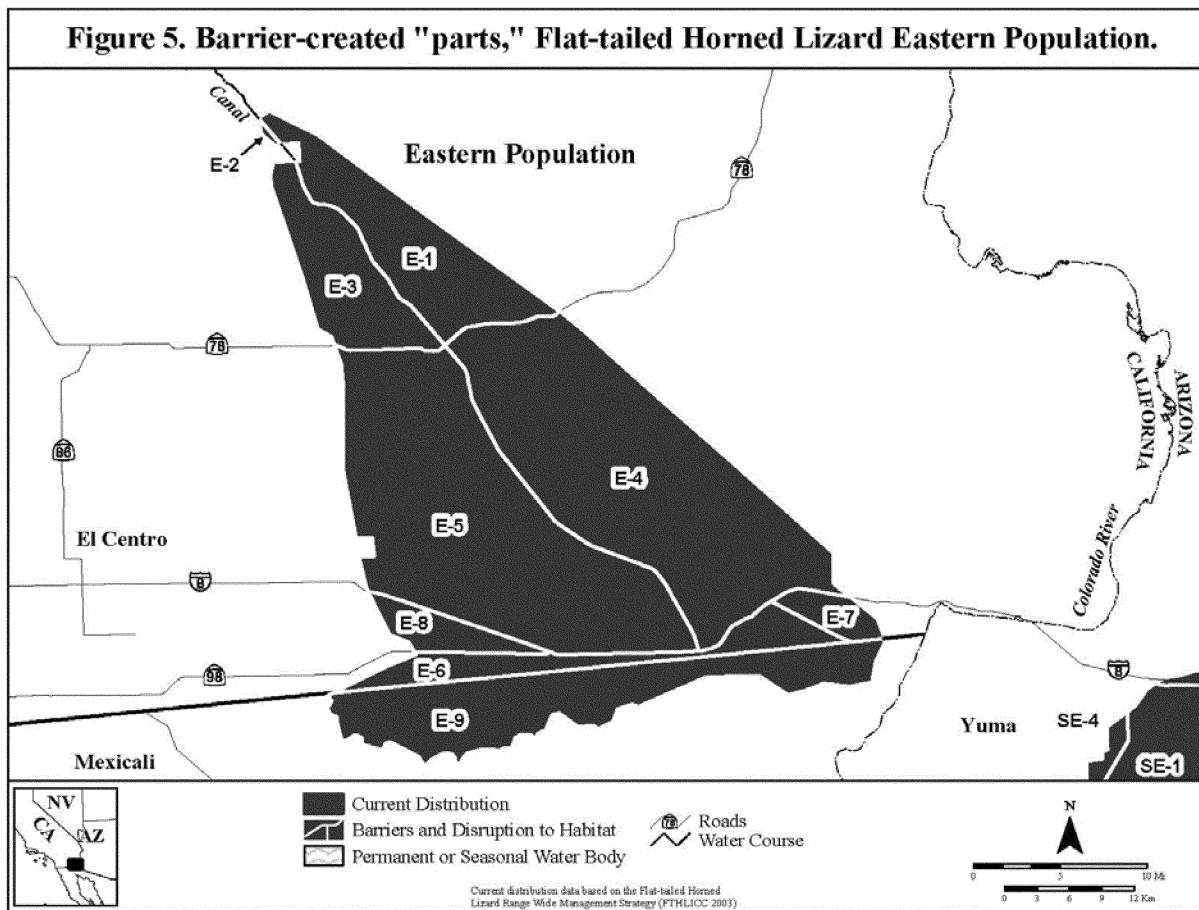
The potential barriers listed above split the Eastern Population area into

nine parts within three subareas (Table 4). Two major canals, which we expect are complete barriers, divide the overall area. The east-to-west-flowing All-American Canal isolates the southern roughly 20 percent (southern subarea) from the northern 80 percent, which in turn is divided by the southeast-to-northwest-flowing Coachella Canal, essentially splitting the northern area in half (East Mesa subarea on the west and the Algodones Dunes subarea to the east). We discuss parts within these three subareas separately below.

TABLE 4—THE SIZE (AREA) OF THE “PARTS” CREATED BY BARRIERS (SEE TEXT) WITHIN THE EASTERN POPULATION AND OUR DETERMINATION AS WHETHER THE SPECIFIED PART IS UNLIKELY TO BE AT RISK FROM DELETERIOUS EFFECTS OF SMALL POPULATIONS AT THE CONSERVATIVE DENSITIES OF 0.3 OR 0.7 INDIVIDUALS PER HA (0.1 OR 0.3 PER AC)

Part identifier (country)	Area of part <sup>1</sup>	Is this part large enough to avoid deleterious effects associated with small populations when the density is assumed to be:	
		0.3 individuals per ha (0.1 per ac)	0.7 individuals per ha (0.3 per ac)
E-1 (U.S.)	16,863 ha (41,669 ac)	no	yes.
E-2 (U.S.)	156 ha (385 ac)	no	no.
E-3 (U.S.)	12,135 ha (29,986 ac)	no	yes.
E-4 (U.S.)	50,270 ha (124,220 ac)	yes	yes.
E-5 (U.S.)	50,721 ha (125,334 ac)	yes	yes.
E-6 (U.S.)	8,968 ha (22,160 ac)	no	no.
E-7 (U.S.)	2,867 ha (7,085 ac)	no	no.
E-8 (U.S.)	4,140 ha (10,230 ac)	no	no.
E-9 (Mex.)	23,496 ha (58,060 ac)	yes	yes.

<sup>1</sup> Area values are estimated through a GIS-based assessment. Despite the level of precision presented, area values are approximate; however, we believe they are accurate enough to draw the conclusions presented.



The southern subarea of the Eastern Population—that is, south of the All-American Canal—is divided by the international border, with the part between the canal and border totaling 8,968 ha (22,160 ac) (Part E-6; Table 4), and the part on the Mexico side of the international border totaling 23,496 ha (58,060 ac) (Part E-9; Table 4). However, as mentioned previously, the border fence is probably a semipermeable barrier. As such, we expect the area of flat-tailed horned lizard habitat to the south of the All-American Canal (Parts E-6 and E-9 combined) could be considered together. However, we estimate that roughly 6,400 ha (15,800 ac) in the easternmost portions of these two parts contain areas of deep, actively shifting sands of the Algodones Dunes that are likely rarely used by flat-tailed horned lizards. Despite this, the area is large enough so as to likely not be affected by the deleterious effects associated with “small populations.”

The East Mesa subarea (the western half of the northern 80 percent) is divided into four parts. The smallest part (Part E-2; Table 4) is a very small, isolated remnant of potential habitat (156 ha (385 ac)) at the far northern end of the Eastern Population area; it is a

small population and may be at greater risk from the deleterious effects associated with small populations. The next smallest part is a triangle of flat-tailed horned lizard habitat between Interstate 8 and the All-American Canal (Part E-8; Table 4). It is 4,140 ha (10,230 ac), likely too small of an area to support a “large population,” and the busy, multi-lane Interstate 8 probably has low “permeability” for flat-tailed horned lizard movement. The third part in the East Mesa subarea (Part E-5; Table 4), the area north of Interstate 8, south of State Route 78 and west of the Coachella Canal, is 50,721 ha (125,334 ac) and includes the East Mesa Management Area, which is considered to be higher-quality flat-tailed horned lizard habitat. This part is large enough to support a large population; moreover, it is likely that the density in this area is at the higher end of the range of density estimates—thus, the population is likely much larger and not at risk of deleterious effects associated with small populations. The fourth part in the East Mesa subarea (Part E-3; Table 4), the area to the north of State Route 78 and west of the Coachella Canal, is 12,135 ha (29,986 ac) and unlikely to support a “large population” of flat-tailed horned

lizards at the most conservative density. However, because of this area’s proximity to the East Mesa Management Area, it likely supports higher densities of flat-tailed horned lizards such that at 0.7 flat-tailed horned lizards per ha (0.3 per ac), this part would support a population that would not be at risk from threats associated with small population size. Moreover, State Route 78 in this area, because blowing sand has filled in any gaps along the road’s edge such that it is not a physical hindrance and it has a lower traffic volume (Caltrans 2008, electronic data), is likely a semipermeable barrier, allowing contact of flat-tailed horned lizards between the two areas (north and south of the highway). As such, we expect the area of flat-tailed horned lizard habitat north of Interstate 8 and west of the Coachella Canal (Parts E-3 and E-5 combined) is large enough so as to not be affected now or in the foreseeable future by the deleterious effects associated with small populations.

The Algodones Dunes subarea (the eastern half of the northern 80 percent) is divided into three parts. The part north of Interstate 8, south of State Route 78 and east of the Coachella

Canal, is 50,270 ha (124,220 ac) (Part E-4; Table 4), large enough to support a large population at the most conservative density estimate. However, this area is mainly composed of the Algodones Dunes, which is an area of deep, actively shifting sand that is likely rarely used by flat-tailed horned lizards (Turner *et al.* 1980, p. 14). Flat-tailed horned lizards in this area are likely (naturally) restricted to the peripheral portions of the dunes. Moreover, large portions of this region include areas of intense recreational OHV activity, including portions of the peripheral areas of the dunes, which may reduce the habitat quality in those areas (see Factor A). The third part of this subarea (Part E-1; Table 4), the area north of State Route 78, is 16,863 ha (41,669 ac), at the most conservative density estimates supporting a population that may be at risk from the deleterious effects of small population size. This part is also mainly composed of the deep, actively shifting sands of the Algodones Dunes, suggesting that higher densities of flat-tailed horned lizards are unlikely. However, unlike the areas to the south of State Route 78, most of the area is designated as Wilderness and, as such, OHV activity is prohibited. Moreover, as in the East Mesa subarea, State Route 78 is likely a semipermeable barrier, allowing contact of flat-tailed horned lizards between the two areas (north and south of the highway). Thus, the areas on the periphery of the Algodones Dunes are likely used by flat-tailed horned lizards within parts E-1 and E-4, but the majority of these two parts, the areas of deep, shifting sands of the Algodones Dunes, likely contributes little to the Eastern Population, and likely contributed little even before the manmade barriers and OHV activity. The smallest part (Part E-7; Table 4), between the All-American Canal and Interstate 8, in the southeast corner of the Eastern Population area, is about 2,867 ha (7,085 ac). Using the conservative density estimate, the population of flat-tailed horned lizards in this part may be at risk of deleterious effects associated with small populations. This part, though sandy, is not dominated by the deep, actively shifting sands of the main dunes.

In sum, for the Eastern Population, assuming the identified potential

barriers are complete barriers (which is not likely, see above, although we do not know how permeable they may be), and assuming the most conservative density of 0.3 adult flat-tailed horned lizards per ha (0.1 per ac) for all the parts, we calculate that about 73 percent of the area is in large enough blocks that the populations of flat-tailed horned lizards therein are not likely to be affected by threats associated with small populations. However, the Eastern Population is divided by the All-American Canal and the Coachella Canal, which we expect are complete barriers to flat-tailed horned lizards. As such, the Eastern Population area is divided into three subareas. The size of the population in the portion east of the Coachella Canal, the Algodones Dunes subarea, is not clear because much of the area includes the deep-sand areas of the Algodones Dunes, which is likely low-quality habitat for the flat-tailed horned lizard. As such, even using our conservative density estimate, this area likely supports—naturally, even prior to any manmade effects—fewer flat-tailed horned lizards compared to the other subareas in the Eastern Population than would be expected from its size. For the subarea south of the All-American Canal, the border fence between part E-6 and E-9 is likely permeable to some extent, but roughly 6,400 ha (15,800 ac) in the easternmost portions of these two parts contain areas of deep, actively shifting sands of the Algodones Dunes that are likely rarely used by flat-tailed horned lizards. Thus we expect the populations of flat-tailed horned lizards in parts E-6 and E-9 are connected, and even subtracting the area of deep sand in the east of these two parts, the subarea south of the All-American Canal is large enough to likely support a population of flat-tailed horned lizards that is unlikely to be substantially affected by the threats associated with small population size. For the subarea west of the Coachella Canal and north of the All-American Canal, the populations of flat-tailed horned lizards in parts E-3 and E-5 are likely connected because State Route 78 likely is a semipermeable barrier. Moreover, Part E-5 contains the East Mesa Management Area where the density of flat-tailed horned lizards is likely greater than the most conservative 0.3

adults per ha (0.1 per ac) density estimate. Similarly, Part E-3 likely supports a population of flat-tailed horned lizards at a density greater than the most conservative 0.3 adults per ha (0.1 per ac). Thus, if we (1) exclude parts E-1, E-4, and the deep-sand areas at the east end of parts E-6 and E-9 because these areas are naturally poor-quality habitat and are likely rarely used by flat-tailed horned lizards; and (2) consider part E-3, E-5, and the non-deep-sand portions of E-6 and E-9 (combined; see above) as likely supporting large populations of flat-tailed horned lizards, then about 93 percent of the Eastern Population area likely supports populations of flat-tailed horned lizards that are large enough to be unlikely affected by threats associated with small populations. Therefore, we conclude that, overall, the flat-tailed horned lizards in the Eastern Population are not substantially threatened now or in the foreseeable future by effects associated with barriers that subdivide populations or the deleterious effects that may follow.

#### Southeastern Population

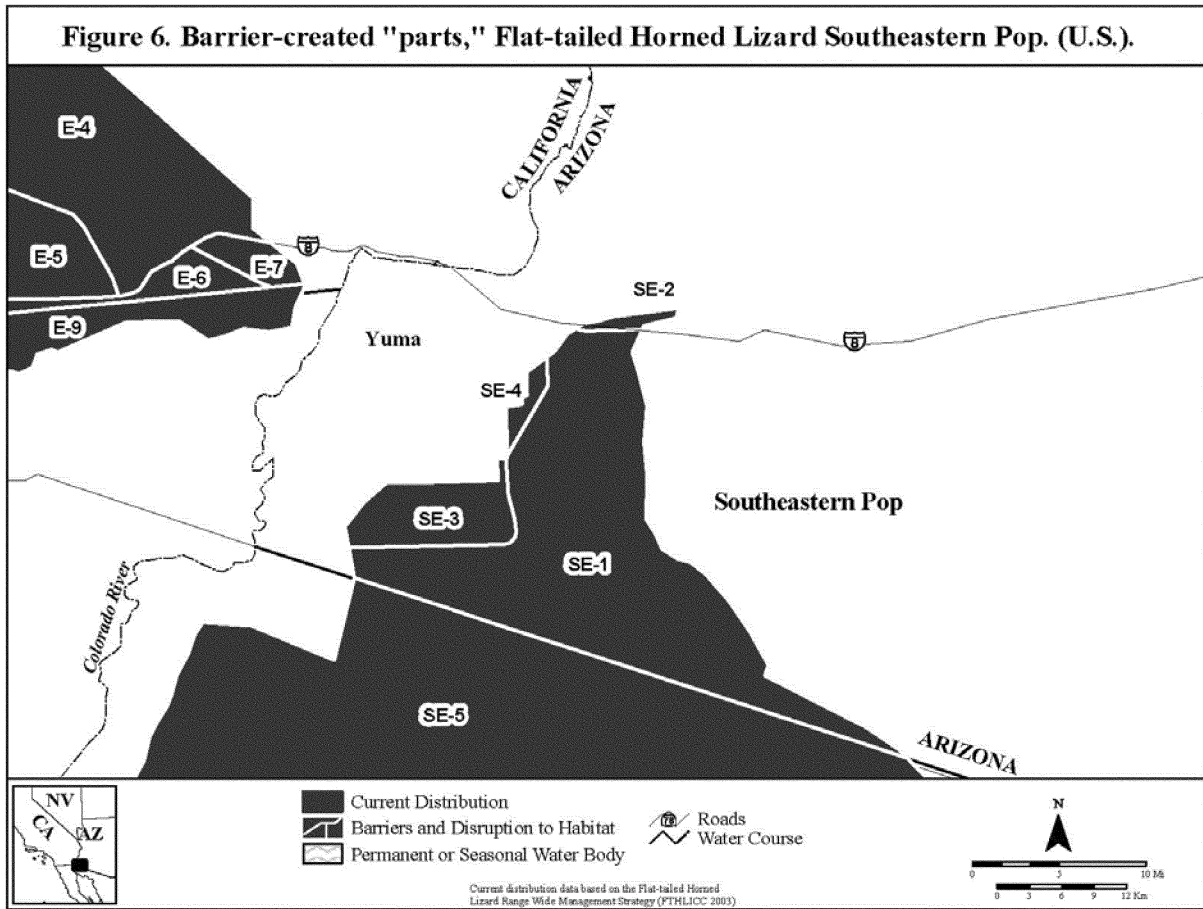
Identified potential barriers divide the Southeastern Population area into 13 parts (Table 5). By far, the largest single part (Part SE-5; Table 5, Figures 6 and 7) is in Mexico between the international border and the Mexicali to Puerto Peñasco railway, northwest of Mexico Federal Highway 8. It is over 720,000 ha (1,779,000 ac) and includes the bulk of the Gran Desierto de Altar where the species occurs in the sandy flats and low, more-stabilized dunes within this region (Rorabaugh 2008, p. 39; Rorabaugh and Young 2009, p. 183), but the deep, actively shifting sands of much of this area are likely rarely used by flat-tailed horned lizards (Rodriguez 2002, p. 18; Rorabaugh and Young 2009, p. 182). Nevertheless, the sheer size and limited manmade alterations to the area suggests that this area likely supports a population large enough to avoid the deleterious effects associated with small populations, even if they are limited to the peripheral portions of the “sand sea.” This large part touches nearly all of the other parts in the Southeastern Population, and in our discussion of the other parts, we refer to this large, central part as the Gran Desierto part.

TABLE 5—THE SIZE (AREA) OF THE “PARTS” CREATED BY BARRIERS (SEE TEXT) WITHIN THE SOUTHEASTERN POPULATION AND OUR DETERMINATION AS WHETHER THE SPECIFIED PART IS UNLIKELY TO BE AT RISK OF DELETERIOUS EFFECTS OF SMALL POPULATIONS AT THE CONSERVATIVE DENSITIES OF 0.3 OR 0.7 INDIVIDUALS PER HA (0.1 OR 0.3 PER AC)

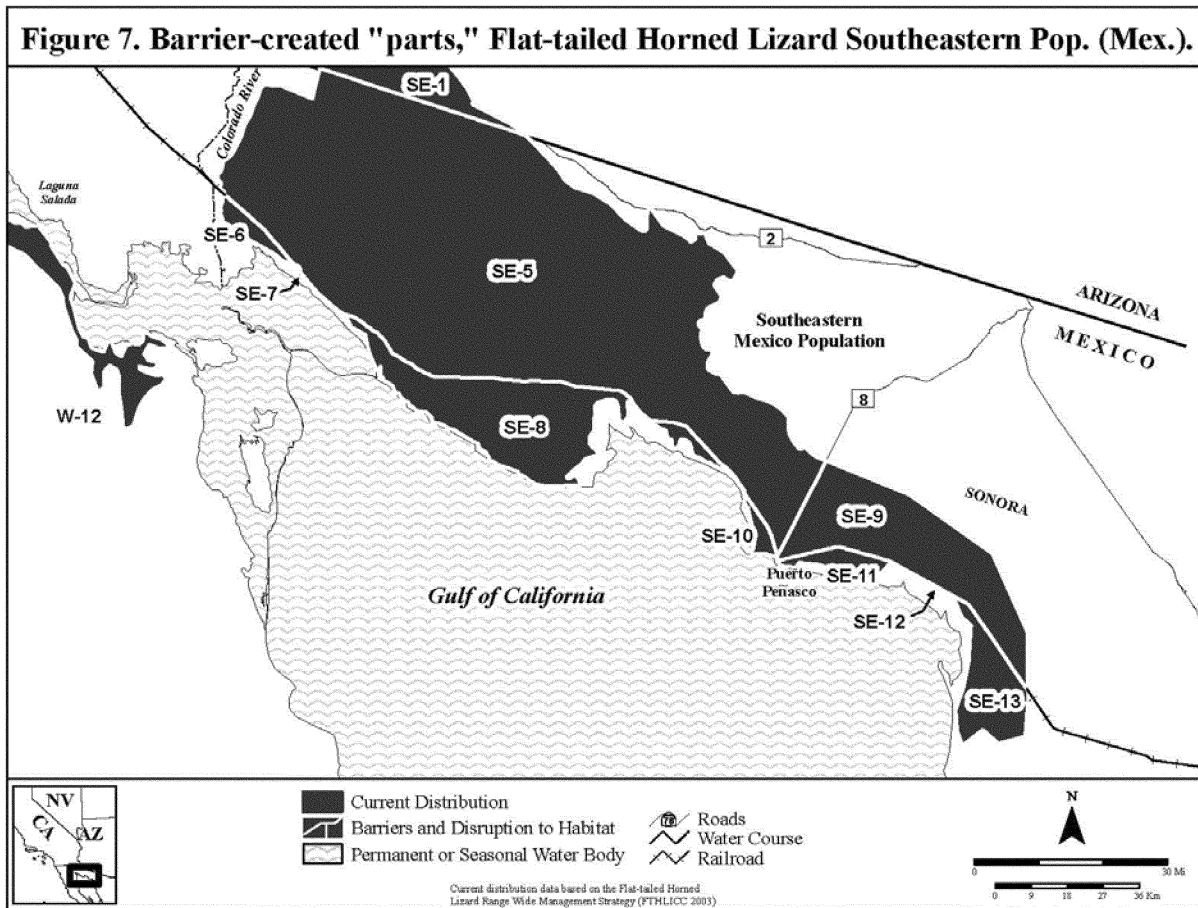
Part identifier (country)	Area of part <sup>1</sup>	Is this part large enough to avoid deleterious effects associated with small populations when the density is assumed to be:	
		0.3 Individuals per ha (0.1 per ac)	0.7 Individuals per ha (0.3 per ac)
SE-1 (U.S.)	56,736 ha (140,198 ac)	yes	yes.
SE-2 (U.S.)	1,018 ha (2,516 ac)	no	no.
SE-3 (U.S.)	8,804 ha (21,755 ac)	no	no.
SE-4 (U.S.)	1,364 ha (3,371 ac)	no	no.
SE-5 (Mex.)	720,168 ha (1,779,573 ac)	yes	yes.
SE-6 (Mex.)	8,354 ha (20,643 ac)	no	no.
SE-7 (Mex.)	496 ha (1,226 ac)	no	no.
SE-8 (Mex.)	110,242 ha (272,414 ac)	yes	yes.
SE-9 (Mex.)	110,857 ha (273,934 ac)	yes	yes.
SE-10 (Mex.)	5,175 ha (12,788 ac)	no	no.
SE-11 (Mex.)	10,585 ha (26,156 ac)	no	yes.
SE-12 (Mex.)	833 ha (2,058 ac)	no	no.
SE-13 (Mex.)	38,919 ha (96,171 ac)	yes	yes.

<sup>1</sup> Area values are estimated through a GIS-based assessment. Despite the level of precision presented, area values are approximate; however, we believe they are accurate enough to draw the conclusions presented.

BILLING CODE 4310-55-P



Current distribution data based on the Flat-tailed Horned Lizard Range Wide Management Strategy (FTHLICC 2003)



**BILLING CODE 4310-55-C**

The railway that runs from Mexicali to Puerto Peñasco and south, along with the 'old' coastal highway (see above), create four parts, three small and one large, along the coast of the Gulf of California northwest of Puerto Peñasco. The three small parts along the coast are 8,354 ha (20,643 ac) (Part SE-6; Table 5), 496 ha (1,226 ac) (Part SE-7; Table 5), and 5,175 ha (12,788 ac) (Part SE-10; Table 5). These parts may be at risk from the deleterious effects associated with small populations; however, the road and railroad separating them from the Gran Desierto part are likely not complete barriers. We expect that blowing sand periodically covers the railway line and any gaps along the sides of the road, allowing some level of connectivity between flat-tailed horned lizard populations on the coast with those in the Gran Desierto part. Similarly, the one large coastal part northwest of Puerto Peñasco (110,242 ha (272,414 ac)) (Part SE-8; Table 5) is also likely connected with the Gran Desierto part; however, Part SE-8 is likely large enough by itself to support a population large enough that it would not be at risk from deleterious effects of small populations. Because we do not believe

these four parts are completely isolated, the population of flat-tailed horned lizards along the coast of the Gulf of California northwest of Puerto Peñasco is likely not at risk from the deleterious effects associated with small populations.

Mexico Federal Highway 8, the northeast to southwest-running highway from Sonoita (on the international border, outside of the range of the flat-tailed horned lizard) to Puerto Peñasco, separates the Gran Desierto part from the southeastern-most portion of the Southeastern Population. The southward continuation of the railway and the parallel-running coastal highway further divides this portion into a total of four parts. One of these parts is very small (833 ha (2,058 ac)) (Part SE-12; Table 5) and confined to a narrow strip along the coast. It may be at greater risk of deleterious effects associated with small populations. Another narrow coastal part is larger (10,585 ha (26,156 ac)) (Part SE-11; Table 5) and could support enough flat-tailed horned lizards to avoid deleterious effects of small populations if the densities were 0.7 individuals per ha (0.3 per ac). However, this area includes a portion of the urban

development of Puerto Peñasco, and densities may be lower. The southernmost (coastal) part (Part SE-13; Table 5) is also separated by the railway-highway combination, but it is large (38,919 ha (96,171 ac)) and is likely to support a population large enough to avoid deleterious effects from small population size even at the most conservative density. These three coastal parts are separated from the large interior part (Part SE-9; Table 5), which is 110,857 ha (273,934 ac) and large enough to support considerably more than 7,000 flat-tailed horned lizards. Additionally, if the railway-highway combination separating the three coastal parts (Parts SE-11, SE-12, and SE-13) from the larger interior part is not a complete barrier, which is possible because of blowing sand, then the two larger coastal parts could receive dispersing flat-tailed horned lizards from the large interior part, which may help further reduce the likelihood of deleterious effects associated with "small populations." Moreover, Mexico Federal Highway 8 may also be permeable, suggesting that the southernmost portion of the Southeastern Population (Parts SE-9, SE-11, SE-12, and SE-13 combined)

may also be connected with the extremely large Gran Desierto part (Part SE-5).

Lastly, the portion of the Southeastern Population in the United States is divided into four parts, including one large part (see below) and three smaller parts, the latter including one north of Interstate 8 and two west of the new Yuma Area Service Highway. The part north of Interstate 8 is 1,018 ha (2,516 ac) (Part SE-2; Table 5) and may be at risk of deleterious effects associated with small populations. We expect the multi-lane Interstate 8 to be nearly a complete barrier along this stretch of the road and, as mentioned above, the evidence suggests that the population there may be exhibiting inbreeding or genetic drift (Culver and Dee 2008, p. 2). The two small parts west of the Yuma Area Service Highway are 8,804 ha (21,755 ac) (Part SE-3; Table 5) and 1,364 ha (3,371 ac) (Part SE-4; Table 5); both may have small populations that could be at risk from the deleterious effects of small population size. The large part in Arizona (56,736 ha (140,198 ac)) (Part SE-1; Table 5) is mostly composed of the Yuma Desert Management Area and is large enough to avoid deleterious effects from small population size. Culver and Dee (2008, pp. 1-14) also sampled the Yuma Desert Management Area and did not report any evidence of inbreeding or genetic drift in flat-tailed horned lizards from this large part, in contrast to the small, isolated part (Part SE-2) north of Interstate 8.

In sum, for the Southeastern Population, assuming the identified potential barriers are complete barriers (which is not likely, see above, although we do not know how permeable they may be), and assuming the most conservative density of 0.3 flat-tailed horned lizards per ha (0.1 per ac), we calculate that about 97 percent of the area is in large enough blocks that the populations of flat-tailed horned lizards therein are not likely to be affected by threats associated with small populations. However, much of the dune areas of the Gran Desierto de Altar are likely to have few, if any, flat-tailed horned lizards. Nevertheless, given the limited amount of manmade development within large areas of the Southeastern Population and the fact that about 97 percent of the area contains large blocks of flat-tailed horned lizard habitat, the Southeastern Population is not substantially composed of "small populations." Therefore, we conclude the flat-tailed horned lizards in the Southeastern Population are not substantially threatened now or in the foreseeable

future by effects associated with barriers that subdivide populations or the deleterious effects that may follow.

For the Western, Eastern, and Southeastern Population areas combined, about 91 percent of the 1,585,157 ha (3,917,008.25 ac) area is in large enough blocks that the populations of flat-tailed horned lizards therein are not likely to be affected by threats associated with small populations. As mentioned above, the part that is primarily composed of the Gran Desierto de Altar is very large; it makes up about 45 percent of the total area of the three populations combined and is larger than the Western and Eastern Population areas combined. Without the Gran Desierto part, about 84 percent of the total area is in parts that are likely to contain populations large enough to avoid deleterious effects associated with small populations. Thus, despite not having complete population data for the species throughout its range, through this analysis of size of the habitat areas, and application of conservative estimates (the smallest density value within the estimated range, and the largest population size value below which we are considering (for our analysis of this species) a "small population"), we conclude that the flat-tailed horned lizard populations are not small and the species is not habitat-limited in the United States or Mexico.

In conclusion, this evaluation suggests that despite the presence of multiple barriers that potentially divide the Western, Eastern, and Southeastern Population areas into smaller parts, most of the areas within the current distribution outside of the greater Coachella Valley are in parts large enough to support populations of flat-tailed horned lizards that are large enough to avoid deleterious effects associated with small populations. Therefore, the implied meaning of fragmentation is not a significant threat to the flat-tailed horned lizard throughout its range or within the Western, Eastern, and Southeastern Population areas.

#### *Coachella Valley Population*

The Coachella Valley Population differs from the other three in that it has been highly affected by past agricultural development and recent (and continuing) urban development (see Factor A). As mentioned previously, the only areas with recent detections of flat-tailed horned lizards are within the Thousand Palms and the Dos Palmas reserves. The precise amount of habitat that is occupied is not known, but based on an analysis of habitats within the Coachella Valley MSHCP plan, the

Thousand Palms and Dos Palmas reserves are anticipated to be 1,707 ha (4,219 ac) and 2,078 ha (5,134 ac), respectively (Table 2). Of these, 94 percent of the Thousand Palms reserve is already in protected status, while 34 percent of the Dos Palmas reserve is protected (Table 2). Using the conservative estimated density of 0.3 adult flat-tailed horned lizards per ha (0.1 per ac), neither of these reserves—presently or even at their anticipated size—is large enough to support a "large population." Thus, these two small, fully isolated occurrences may be more likely to experience deleterious effects associated with small population sizes. In our evaluation of the monitoring and management of flat-tailed horned lizard populations and habitat expected under the Coachella Valley MSCHP (USFWS 2008, Appendix A, p. 322), we stated: "The proposed Plan provides reasonably competent direction for monitoring and adaptive management, but not all details can be anticipated beforehand and much would depend on how the monitoring and adaptive management is implemented. We assume the implementation of the monitoring and adaptive management plan would strictly adhere to the guidance in the Plan. The extra pressures of edge effects and invasive species may be buffered by management to prevent pressures that would push a naturally low population to extinction. Populations are expected to increase in numbers again if anthropogenic factors are effectively managed." Additionally, as noted above, even small populations in small habitat areas may be viable in the long term; however, for the purposes of this analysis (to be conservative) we are assuming they are not. Therefore, we conclude the continued existence of the Coachella Valley Population is likely to face significant threats within the foreseeable future.

#### *Summary for Barriers and Small Populations*

Past assessments identified "fragmentation" as a threat to the flat-tailed horned lizard. Fragmentation, as a term used in conservation biology, is ambiguous. To address the implied meaning of the term, we assessed potential barriers and the resulting flat-tailed horned lizard population sizes throughout the species' range.

Barriers prevent movement of individuals and, thus, restrict or prevent gene flow. As such, barriers subdivide larger populations into smaller ones. For vertebrate species, populations of more than about 7,000 individuals are not likely to be affected by deleterious intrinsic and extrinsic forces and factors

over the long term. Not all potential barriers are complete barriers and some potential barriers may be “semipermeable.” Movement of 1 to 10 individuals per generation across a semipermeable barrier is likely enough to maintain connectivity between populations.

The populations of flat-tailed horned lizards in the Western, Eastern, and Southeastern Population areas are potentially divided by artificial manmade barriers. Flat-tailed horned lizards are difficult to detect, and population estimates are limited to a few, well-surveyed areas. Density estimates of adult flat-tailed horned lizards range from as low as 0.3 individuals per ha (0.1 per ac) to as much as 4.4 individuals per ha (1.8 per ac), depending on the analysis used (see Background section). Our evaluation of the range of the species suggests that the Western, Eastern, and Southeastern Population areas were divided by manmade barriers into 12, 9, and 13 “parts,” respectively. Using the lowest (most conservative) estimates of 0.3 adult flat-tailed horned lizards per ha (0.1 per ac), we calculated that the Western, Eastern, and Southeastern Population areas had about 83 percent, 73 percent, and 97 percent of the areas (respectively) in parts likely to support populations that are large enough to avoid deleterious effects associated with small populations. For those values, we assumed all identified potential barriers were complete barriers; however, the circumstance for each individual part varies, and some of the potential barriers we identified are likely to not be complete barriers. As such, some of the parts we identified as separate may contain populations of flat-tailed horned lizards that are actually connected with neighboring populations. Thus, we believe these percentages are conservative because we used the conservative density estimates and the parts, as analyzed, may not actually contain separate populations of flat-tailed horned lizards.

Additionally, the Coachella Valley Population area has numerous barriers and the remaining flat-tailed horned lizards are restricted to two small areas. The populations of flat-tailed horned lizards in these areas are likely to be affected by threats associated with small population size.

We again note that we have very little specific data regarding whether or to what degree populations of flat-tailed horned lizards are actually being affected by threats associated with small population size. Even for the flat-tailed horned lizard population in Part SE-2, which may be exhibiting genetic

deterioration because of isolation and small population size, we do not have direct information on the status of that population. Thus, based on information from the scientific literature on the potential effects of small population size, for the purposes of this threats assessment, we have assumed these “small” populations of flat-tailed horned lizards are being substantially affected by threats associated with small population size or are likely to be substantially affected by threats associated with small population size in the foreseeable future.

Even so, our evaluation suggests that despite the presence of multiple barriers that potentially divide the Western, Eastern, and Southeastern Population areas into smaller parts, most of the area within the current distribution outside of the greater Coachella Valley are in parts large enough to support populations of flat-tailed horned lizards larger than 7,000 individuals, meaning they are not habitat-limited and are not likely to suffer from threats associated with small populations now or in the foreseeable future. As such, the implied meaning of term “fragmentation” is not a threat to the flat-tailed horned lizard throughout its range.

#### Edge Effects

Another effect associated with fragmentation and barriers is that there are more habitat edges. When two ecosystems are separated by an abrupt transition (an “edge”), there may be an interaction between two adjacent ecosystems, known as an *edge effect* (Murcia 1995, p. 58). As noted previously, predation of flat-tailed horned lizards may be greater adjacent to urban and agricultural areas (Barrows *et al.* 2006, p. 486), and may extend several hundred meters (yards) from the neighboring developed area (Young and Young 2005, p. 7). Additionally, invasive, nonnative plants may also occur at higher densities along road edges (Gelbard and Belnap 2003, p. 420); however, native plant growth may also increase along roads (Lightfoot and Whitford 1991, p. 310). Increased plant growth may lead to increased seeds, which may benefit harvester ants, the primary food of the flat-tailed horned lizard.

Additionally, the invasive, nonnative Argentine ant (*Linepithema humile*) has been found to be a problem for coastal horned lizards (*Phrynosoma coronatum*) in habitat edges (Suarez *et al.* 1998, p. 2041; Suarez and Case 2002, p. 291). However, Argentine ants do not tolerate hot, arid conditions (Holway *et al.* 2002, p. 1610) and are not known to be a problem away from habitat edges in flat-

tailed horned lizard habitat (Barrows *et al.* 2006, p. 492); thus, we expect the effect of Argentine ants to be limited to areas adjacent to edges that have water sources.

Although edge effects may result in increased mortality of flat-tailed horned lizards, primarily resulting from increased levels of predation, the area affected is within several hundred meters (yards) of the edge. As discussed in the “Barriers and Small Populations” section, much of the area occupied by the flat-tailed horned lizard is in large areas (or “parts”). In such areas or parts, the ratio of linear edge compared to the areal size of the part is small, meaning large parts have larger “interior” areas that are not affected by edge effects. As such, the populations of flat-tailed horned lizards in large areas or parts are less likely to be substantially affected by edge effects. Conversely, smaller parts have a smaller percentage of their area that is likely to be affected by edge effects. As such, flat-tailed horned lizard populations in the small parts are more likely to be substantially affected by edge effects.

Because “parts” are created by infrastructural elements associated with urban and agricultural development, the small “parts” are more likely near urban and agricultural areas. Moreover, because edge effects are most pronounced near urban and agricultural development, the flat-tailed horned lizards in small parts are the most likely to be substantially affected by edge effects. Thus, edge effects are an added threat faced by flat-tailed horned lizard populations in the small parts. As such, edge effects are not additional threats to the flat-tailed horned lizard, but instead are part of the threats faced by flat-tailed horned lizard populations in small parts. Therefore, like small population size, we do not believe edge effects are a significant threat to the flat-tailed horned lizard now or in the foreseeable future.

#### Pesticide Spraying

Past assessments identified the spraying of pesticides as part of the California Department of Food and Agriculture’s Curly Top Virus Control Program as a threat to the flat-tailed horned lizard, mainly in the East Mesa, West Mesa, and Yuha Desert (58 FR 62627; FTHLICC 2007, p. 20). As described in the program’s environmental assessment (BLM 2007b, p. 8), beet curly top virus is a disease of commercially important crops, and also backyard vegetable and flower gardens. The only known vector of beet curly top virus is an insect known as the sugar beet leafhopper (*Circulifer*



*tenellus*). The Curly Top Virus Control Program includes aerial and ground-based spraying of malathion, which is the only product registered in California for the control of sugar beet leafhopper on rangeland (BLM 2007b, p. 15). The areas to be sprayed (treated) are prioritized; treatment priorities are given to areas subject to perennial virus infection, areas sustaining significant infection from the previous year, and areas with the highest current sugar beet leafhopper populations (BLM 2007b, p. 8).

Available information in the scientific literature regarding the effects of malathion, a broad-spectrum insecticide, on lizard species are equivocal, with some suggesting that malathion has substantial deleterious effects on lizards (such as Özelmaz and Akay 1995, pp. 730–737; Khan 2003, pp. 821–825; Khan 2005, pp. 77–81), and others suggesting the effects are less pronounced (such as Holem *et al.* 2006, pp. 111–116; Holem *et al.* 2008, pp. 92–98). We are not aware of any studies examining the effects of malathion on horned lizard species.

Flat-tailed horned lizards are insectivorous, primarily feeding on harvester ants. If the food source for the flat-tailed horned lizard is substantially affected by the spraying of malathion, the flat-tailed horned lizard could be affected. To address this concern, implementation of the Curly Top Virus Control Program in the Imperial Valley in 1991 included monitoring of harvester ant colonies. Results showed malathion killed worker ants on the surface at the time of the spraying, negatively affecting ant colonies temporarily; however, it also showed that the colonies, with the queen and other workers below ground, rapidly recovered (Peterson *in litt.* 1991, p. 10; see also BLM 2007b, p. 75). Although that monitoring was cursory, the information suggests that spraying is not likely to substantially affect the primary food source of the flat-tailed horned lizard now or in the foreseeable future.

Even if flat-tailed horned lizards or harvester ants are affected by malathion, the Curly Top Virus Control Program includes measures to limit its impact. The threat from pesticide spraying has been reduced by avoidance and minimization measures incorporated in the program since the publication of the 1993 proposed rule to list the flat-tailed horned lizard, including the following (BLM 2007b, p. 33):

(1) No malathion treatments shall occur in designated flat-tailed horned lizard Management Areas as set forth in the Flat-tailed Horned Lizard Range-wide Management Strategy.

(2) Application of malathion within the geographic range of the [flat-tailed horned lizard] will consist of no more than a single treatment per given area per year.

(3) All application [within flat-tailed horned lizard habitat] will be aerial. No spraying from off-road vehicles or use of off-road vehicles on other than designated roads will be used within [flat-tailed horned lizard] habitat.

Beyond the avoidance and minimization measures incorporated into the Curly Top Virus Control Program, aerial spraying is conducted infrequently in the Imperial Valley— aerial treatments have been necessary only twice in the 9 years prior to the 2007 environmental assessment (BLM 2007b, p. 9). Additionally, the State's program administrator for the Curly Top Virus Control Program indicated that although the program will continue in the region, the frequency of aerial treatments in the foreseeable future is anticipated to decrease; instead, treatments are more likely to be implemented via ground-based spraying in areas near agriculture outside of flat-tailed horned lizard habitat (R. Clark, California Department of Food and Agriculture, pers. comm., 2010).

Because of the avoidance and minimization measures incorporated into the Curly Top Virus Control Program, and because of the likely limited effects to the flat-tailed horned lizard and its food source at the levels that the program is expected to be implemented, we conclude that implementation of the Curly Top Virus Control Program is not a threat to the flat-tailed horned lizard.

#### Vehicle Activity

Flat-tailed horned lizards may be directly affected by vehicle activity. The assessments in the 1993 and 2003 documents (58 FR 62624 and 68 FR 331, respectively) identified impacts from vehicles as a threat to the species, especially OHV activity. Impacts of vehicle activity on flat-tailed horned lizard habitat are addressed in Factor A, above. Additionally, individual flat-tailed horned lizards may be killed—crushed—by vehicle activity. As discussed above, because flat-tailed horned lizards are unlikely to flee from oncoming traffic, when flat-tailed horned lizards are on paved roadways they are likely to be killed by any vehicle activity. Additionally, flat-tailed horned lizards may be killed by vehicles operating off paved roads, including vehicle activity on established dirt or gravel roads and trails, or vehicle activity off established roads and trails (OHV activity as defined in Factor A)

(Muth and Fisher 1992, p. 33). Vehicle drivers may not see or recognize flat-tailed horned lizards because their cryptic coloration makes them difficult to spot or they may be interpreted as rocks. Moreover, the species' propensity to freeze rather than flee makes them particularly susceptible. Impacts from vehicles are more likely when the lizards are on or near the surface; hibernating flat-tailed horned lizards are generally buried deep enough that they are not crushed by vehicles driving over them (Grant and Doherty 2009, p. 511). Additionally, most of the OHV activity in the region occurs during the cooler times of the year (Wone 1992, pp. 4–5), suggesting that fewer flat-tailed horned lizards would be on the surface during peak times of OHV activity.

Moreover, the density of flat-tailed horned lizards is apparently naturally low. Even at the highest estimated density of 4.4 adult flat-tailed horned lizards per hectare (1.8 per acre) (see Background), which is equivalent to 0.00044 individuals per square meter (0.00004 per square foot), the chances of a flat-tailed horned lizard being run over by a vehicle is low, even in areas of high OHV activity (for example, see Nicola and Lovich 2000, pp. 208–212). Nevertheless, mortality of flat-tailed horned lizards resulting from OHV activity has been documented, even in areas of low OHV use. For example, in an area closed to OHV traffic, 2 of the 42 radio-tagged flat-tailed horned lizards were killed by illegal OHV activity, and 1 was killed by a vehicle on a paved road (Muth and Fisher 1992, pp. 18 and 33). However, in comparison, in that same study, 16 of the 42 radio-tagged flat-tailed horned lizards were depredated over the same period (Muth and Fisher 1992, p. 33).

In the past, OHV activity along the United States-Mexico boundary (border) from Border Patrol activity and other border-related OHV traffic has been specifically identified as a threat. Border-related OHV activity is part of our definition of OHV activity and is covered above. Moreover, since 2008, the U.S. Customs and Border Protection constructed the “border fence,” which is a vehicle and, in some areas, pedestrian barrier, plus associated infrastructure, in certain areas between the United States and Mexico. Although some areas of the border are not fenced, the areas of flat-tailed horned lizard habitat along the border are fenced (USCBP 2008a, p. 1–5; USCBP 2008b, p. 2–4; Rorabaugh 2010, p. 181). Evidence suggests the border fence has reduced illegal cross-border traffic and associated OHV activity (Rorabaugh 2010, p. 190), thereby reducing the amount of

potential impacts to flat-tailed horned lizards along the border from illegal trans-border OHV activity and subsequent law-enforcement OHV activity by the Border Patrol.

Because the flat-tailed horned lizard occurs naturally in low densities, roads are generally widely separated, and OHV activity is only intense in a few areas, the chances that a flat-tailed horned lizard being crushed by vehicle activity is low over the majority of the species' range; therefore, we conclude that vehicle activity is not a substantial threat to the species throughout its range, nor do we expect it to become a significant threat in the foreseeable future.

#### Drought and Climate Change

The assessments in the 1993 and 2003 documents (58 FR 62624 and 68 FR 331, respectively) included drought as a potential threat to the flat-tailed horned lizard. Additionally, changes in weather patterns associated with global climate change, particularly the timing and amount of rainfall in this arid region, are a potential threat to the species. We examine both below.

Prolonged periods of atypically low rainfall (drought) may potentially affect flat-tailed horned lizard by affecting its food chain (see Background section). Plants produce fewer seeds during periods of low rain, leading to a reduction in the number of foraging ants (Tevis 1958, p. 698), which reduces the amount of food available for flat-tailed horned lizards. However, harvester ant colonies do appear to survive prolonged periods of drought (Tevis 1958, p. 701; Whitford *et al.* 1999, p. 165), indicating that flat-tailed horned lizards will have some food available. Depressed flat-tailed horned lizard populations associated with reduced abundance of ants are known to have rebounded after ant populations returned, even in small populations of flat-tailed horned lizards (Barrows and Allen 2009, p. 314). Thus, we do not expect droughts to permanently affect large populations of flat-tailed horned lizards, although droughts may contribute to the extirpation of small populations. Because about 91 percent of the area occupied by flat-tailed horned lizards are in areas large enough to support large populations (see "Barriers and Small Populations" section above), and because evidence shows that even small populations of flat-tailed horned lizards have survived periods of drought (see above), this suggests that it is not likely that all of the 9 percent of the "small population" area would be affected by drought. Therefore, we do not anticipate

drought to be a significant threat to the species throughout its range.

Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–63; Cayan *et al.* 2006, pp. 1–47; Meehl *et al.* 2007, pp. 747–843). Assessments for the Sonoran Desert are few, but the region is expected to warm (IPCC 2007, p. 887). Indeed, since about the 1970s, the region appears to have experienced "widespread warming trends in winter and spring, decreased frequency of freezing temperatures, lengthening of the freeze-free season, and increased minimum temperatures per winter year" (Weiss and Overpeck 2005, p. 2065). Further, if summertime temperatures increase in the already typically hot Sonoran Desert, temperatures may exceed the ability for many animals, including the flat-tailed horned lizard, to survive. For example, Sinervo *et al.* (2010, p. 895) suggest that Phrynosomatid lizards (the family to which flat-tailed horned lizards belong) are susceptible to increased risk of extinction because of their intolerance to an increase in environmental temperatures. Increased temperatures would result in longer periods of time when the flat-tailed horned lizard would be forced to seek cooler microclimates (shade, burrows), leaving less time available in the day for feeding or other necessary activities (see also Huey *et al.* 2010, pp. 832–833). However, we are not aware of any information indicating that the flat-tailed horned lizard is being substantially affected by a reduced frequency of cold temperatures or increased frequency of high temperatures, or that it will be substantially affected in the foreseeable future.

Additionally, precipitation may become more variable (Weiss and Overpeck 2005, p. 2065). Increased severity, frequency, or duration of droughts may exceed the resiliency of the flat-tailed horned lizard, or the species in the food chain upon which it depends. In contrast, models suggest that the frequency and intensity of El Niño-Southern Oscillation events may increase as a result of global climate change (Field *et al.* 1999, p. 10), which may lead to increased rainfall in some portions of the species' range. Although typically considered a benefit, increased rainfall may negatively affect harvester ant abundance and thus negatively affect flat-tailed horned lizards, at least in some areas (Barrows and Allen 2009, p. 312). Also, increased rainfall may

disproportionately promote growth of nonnative, invasive plant species, which can increase the prevalence of wildland fire and be a physical hindrance to flat-tailed horned lizard locomotion (see "Invasive, Nonnative Plants" section in the Factor A discussion, above).

Thus, the effects associated with global climate change may affect the flat-tailed horned lizard, but at this time, the level of uncertainty in climate predictions is high. Moreover, we do not know whether such a change would substantially affect the flat-tailed horned lizard. While we recognize that climate change is an important issue with potential effects on species and their habitats, we lack adequate information to make accurate predictions regarding its effects to the flat-tailed horned lizard. We do not have any evidence to suggest that the flat-tailed horned lizard is being substantially affected by climate change at this time, or will be within the foreseeable future. Therefore, the effects of climate change are not a significant threat at this time.

#### Summary of Factor E Threats

For Factor E, we assess the natural and manmade threats that affect the status of the species. Small populations may be disproportionately affected by extrinsic and intrinsic factors that reduce population size. Given that historical agricultural and urban development destroyed large swaths of potential flat-tailed horned lizard habitat, we assessed whether the remaining populations are large enough to likely avoid the deleterious effects associated with small populations. Within the Coachella Valley Population area, where habitat destruction has continued (see Factor A), flat-tailed horned lizards are now found only in two small locations and may be more likely to be affected by the deleterious effects associated with small populations. Using conservative estimates of flat-tailed horned lizard density in combination with the size of the Western, Eastern, and Southeastern Populations areas (as a whole), we conclude that each is large enough to support populations that are not likely to be affected by the deleterious effects associated with small populations.

However, the Western, Eastern, and Southeastern Populations areas have within them potential manmade barriers (canals, roads, railways) that may further act as complete barriers or semipermeable barriers that subdivide the populations into smaller subpopulations. Thus, we assessed whether the areas created by these potential barriers were large enough to

likely support populations (subpopulations) that were likely greater than 7,000 adult individuals. Using the most conservative flat-tailed horned lizard density estimate of 0.3 individual adults per hectare (0.1 per acre), which is the lowest value in the range of estimates that extends to 4.4 individuals per hectare (1.8 per ac), and assuming (1) all potential barriers are complete barriers, which is unlikely because some barriers likely allow some movement of individuals (see above) and only 1 to 10 individuals per generation are needed to maintain population connectivity; and (2) 7,000 adults is the threshold above which a population is large enough to likely avoid the deleterious effects associated with small populations, which is at the high end of the range of estimated population thresholds, we concluded that about 83 percent, 73 percent, and 97 percent of the Western, Eastern, and Southeastern Population areas (respectively), and about 91 percent of the area overall, are in large enough blocks that the populations of flat-tailed horned lizards within them are not likely to be affected by threats associated with small populations. Thus, the vast majority of the current distribution of the flat-tailed horned lizard occurs in blocks of habitat large enough to support populations greater than 7,000 adults; therefore, small population size is not a threat to the flat-tailed horned lizard and the species is not habitat-limited.

Pesticide spraying associated with the Curly Top Virus Control Program is not a threat to the flat-tailed horned lizard because of the small area within the range of the species over which it is likely to occur, the avoidance and minimization measures built into the program, and the likely limited effects of spraying on the flat-tailed horned lizard and its harvester ant food source. Additionally, vehicle activity—on paved roads, non-paved roads, and off-road—is not a substantial threat to the species because the chances of a flat-tailed horned lizard being crushed by vehicle activity are low over the majority of the species' range. Drought is also not likely to be a substantial threat to the species throughout its range. Climate change could potentially affect flat-tailed horned lizards, but the future effects of climate change are uncertain. Moreover, no substantial effects of climate change to the flat-tailed horned lizard are known at this time. Therefore, the effects of climate change are not a significant threat at this time.

We do not consider the potential threats analyzed above to be substantial threats to the flat-tailed horned lizard,

either individually or in combination. Therefore, based on our review of the best available scientific and commercial information we find the flat-tailed horned lizard is not threatened by natural or manmade factors affecting its continued existence, either now or in the foreseeable future.

#### Conservation Efforts

Before we may determine whether a species should be listed as endangered or threatened, section 4(b)(1)(A) of the Act requires that we 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 the flat-tailed horned lizard. Of particular note is the Interagency Conservation Agreement between and among participating State and Federal agencies implementing the Rangeland Management Strategy, which is discussed in detail in the Background section. Other conservation efforts include regulatory mechanisms, which are discussed under Factor D in the Summary of Factors Affecting the Species section.

On April 3, 2008, the Secretary of the U.S. Department of Homeland Security (DHS), pursuant to his authority under section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (8 U.S.C. 1103 note) (IIRIRA), exercised his authority to waive certain environmental and other laws in order to ensure the expeditious construction of tactical infrastructure along the United States-Mexico Border (*i.e.*, the "border fence") (73 FR 18293). As such, activities associated with construction and operation of the border fence are exempt from regulatory mechanisms described in Factor D. These activities also do not need to comply with the avoidance, minimization, or mitigation measures described in the Rangeland Management Strategy. However, the Secretary committed DHS to continue to protect valuable natural and cultural resources (USCBP 2008a, p. ES-1). As a result, the U.S. Customs and Border Protection prepared Environmental Stewardship Plans for the portions of the United States-Mexico border that fall within the current distribution of the flat-tailed horned lizard (USCBP 2008a, 2008b, entire documents). United States Customs and Border Protection has expressed an intent to work in a collaborative manner with local government, State and Federal land managers, and the interested public to identify environmentally sensitive resources and develop appropriate best management practices to avoid or minimize adverse impacts resulting from the installation of tactical

infrastructure (USCBP 2008b, p. ES-1), including certain conservation measures from the Rangeland Management Strategy that will be implemented to the fullest extent applicable and practicable. Thus, implementation of the Environmental Stewardship Plans is best considered a conservation effort for the species.

#### Finding

The flat-tailed horned lizard monitoring data on which we relied in this document are more robust than the data we relied on in our 1993 proposed rule (58 FR 62624) and our earlier withdrawal documents (62 FR 37852, 68 FR 331, and 71 FR 36745), thus enabling us to conclude with increased confidence that flat-tailed horned lizard populations in the Management Areas are not low in abundance or declining. Although no comparable historical abundance data exist, our analysis suggests that occupancy of flat-tailed horned lizards within survey areas is relatively high. Density estimates obtained through the new survey methodology are roughly in the same range provided by previous estimates, suggesting no marked declines in density since the late 1990s. Although additional surveys are needed before the recently collected data can provide long-term trend information, the short-term data do not currently indicate declines. Because of data limitations, we cannot extrapolate the data rangelandwide; however, for the Management Areas surveyed (*see Population Dynamics* under the Background section), the best available scientific information suggests that population levels are not low and not declining. In other words, recognizing that the areas surveyed compose only a fraction of the overall range of the flat-tailed horned lizard, it is our interpretation that the available population data (alone and without considering potential threats) do not support a conclusion that the species is in danger of extinction. Additionally, despite the lack of long-term trend data, the general agreement of the recent data with the older data from the available scientific literature lead to our interpretation that the available population data (alone and without considering potential threats) do not support a conclusion that the species is likely to become endangered within the foreseeable future.

Although our past assessments suggest that historical loss of habitat resulted in artificial barriers, except for the Coachella Valley Population, the information currently available indicate otherwise. We conclude that the manmade barriers resulting from

historical agricultural and urban development merely expanded pre-existing natural barriers. This conclusion is based on genetic data that show separation of the Western, Eastern, and Southeastern Populations occurred prior to the development of the region more than a century ago. Genetic data also suggest that flat-tailed horned lizards in the Coachella Valley had limited connection with the Western Population; thus, the historical agricultural development northwest of the Salton Sea, along with the continued development in that region, has created an artificial barrier at this location. As such, the treatment of flat-tailed horned lizards in the Coachella Valley as a separate population is more an artifact of manmade activities than of natural divisions within the flat-tailed horned lizard population as a whole.

Moreover, we determined herein that the Western, Eastern, and Southeastern Population areas (each as a whole) are not threatened by the factors associated with small population size and are not habitat-limited. Thus, ramifications of historical habitat loss are not likely to constitute a significant threat to the species within the foreseeable future in these populations. Additionally, because the majority of the Western, Eastern, and Southeastern Population areas are not subdivided by other barriers (such as canals, roads, railways, or border infrastructure), it is unlikely these areas would be substantially affected by the intrinsic and extrinsic factors, including edge effects, that may negatively affect small populations.

In the Coachella Valley, the precise amount of habitat that is occupied is not known, but based on an analysis of habitats within the Coachella Valley MSHCP plan, the Thousand Palms and Dos Palmas reserves are anticipated to be 1,707 ha (4,219 ac) and 2,078 ha (5,134 ac), respectively (see Table 2). Of these, 94 percent of the Thousand Palms reserve is already in protected status, while 34 percent of the Dos Palmas reserve is protected (Table 2). These two small areas are unlikely to support flat-tailed horned lizard populations large enough to escape from being substantially affected by the intrinsic and extrinsic factors, including edge effects, that may negatively affect small populations. However, even if the Coachella Valley Population may be threatened by the effects of barriers and the intrinsic and extrinsic factors that may negatively affect small populations, the 3,785-ha (9,353-ac) Coachella Valley Population area makes up only about 0.2 percent of the roughly 1,585,000 ha (3,916,600 ac) of the rest of the species' range and about 0.8 percent compared

to the 467,000 ha (1,154,000 ac) of the U.S. portion of that range, and the threats to the Coachella Valley population do not substantially threaten the species as a whole.

Therefore, the effects to the species associated with the implied meaning of fragmentation—that is, the division of the species' populations into smaller populations by the introduction of manmade barriers and the subsequent deleterious effects that may be associated with small population size—are not likely to constitute a substantial threat to the species now or within the foreseeable future.

Within the United States, most of the area occupied by the species is under Federal or State control and overseen by agencies that are signatories to the Interagency Conservation Agreement and associated Rangeland Management Strategy. Although the Interagency Conservation Agreement is voluntary, several signatories—including the BLM, which is a major landowner within the U.S. portion of the range of the flat-tailed horned lizard—have incorporated aspects of the Rangeland Management Strategy into their planning documents, thus making them less voluntary because those plans implement existing regulatory mechanisms. Implementation of this strategy resulted in creation of five Management Areas that, as of 2009, total 185,653 ha (458,759 ac) of higher quality flat-tailed horned lizard habitat (Table 1). Management objectives also provide avoidance and minimization measures to reduce impacts from permitted projects and limit the development area within each Management Area to 1 percent. Additionally, implementation of the Rangeland Management Strategy calls for monitoring, management, land acquisition, and research; further, it promotes coordination with governmental and non-governmental groups in Mexico to provide conservation benefit for the species in that country. The tasks identified by the Rangeland Management Strategy have been consistently implemented by signatory agencies per the Rangeland Management Strategy's schedule. Thus, we conclude the conservation efforts implemented by signatories of the Interagency Conservation Agreement and associated Rangeland Management Strategy reduce the impact of existing threats in the United States and promote actions that benefit the flat-tailed horned lizard throughout its range, including Mexico.

Threats to flat-tailed horned lizards associated with development activities are reduced or limited by the Interagency Conservation Agreement on

signatory lands, particularly within Management Areas. Additionally, threats to the species and its habitat in areas outside of the Management Areas are likely restricted by the limited amount of water available in this arid region and remoteness of much of the habitat, especially in Mexico. Less remote areas, such as the Coachella Valley, Borrego Springs, Yuma, San Luis de Colorado, and Puerto Peñasco areas, are more likely to have urban or agricultural development; however, impacts in these areas are anticipated to be small relative to the amount of available habitat throughout the species' current distribution.

Development associated with new energy facilities is likely to be reduced or limited by continued implementation of the Rangeland Management Strategy. Although few energy development projects have been fully permitted to date, we anticipate more will be proposed in the foreseeable future. Within the range of the flat-tailed horned lizard, we expect development within the Western Population between Interstate 8 and the existing railway (Part W-5) to reduce the already limited connectivity across Interstate 8, although South Fork Coyote Wash is expected to continue to be a potential corridor for flat-tailed horned lizard movement. We conclude the remaining habitat in the Western Population area (*i.e.*, north of the railway and south of Interstate 8, including areas designated as Management Areas) is large enough to support flat-tailed horned lizard populations. Also, we expect the total acreage of potential development for renewable energy facilities to be small compared to the overall range of the species, including on private land. Additionally, on lands managed by signatory agencies to the Interagency Conservation Agreement, we expect the impacts to flat-tailed horned lizard habitat (whether inside or outside of designated Management Areas) will be further reduced because of the avoidance, minimization, and compensation measures of the Rangeland Management Strategy.

Additionally, invasive, nonnative plants; vehicle activity, including OHV use near the United States-Mexico border and elsewhere; and pesticide spraying are not likely substantial threats to the species throughout its range. Predation is not likely a substantial threat in and of itself, but because several species that prey upon flat-tailed horned lizards likely occur in higher numbers near manmade areas, predation may contribute to the deleterious effects (as an "edge effect") associated with urban and agricultural

development and increase the level of impermeability of some semipermeable barriers. However, we do not expect increased levels of predation to substantially affect the species where it occurs in large “parts,” which is a majority of its range overall and within the Western, Eastern, and Southeastern Populations. Drought and climate change have the potential to affect flat-tailed horned lizards, but the magnitude of this threat, although unclear because of the high level of uncertainty associated with climate predictions, do not appear to be significant now or within the foreseeable future.

Finally, we acknowledge we lack complete population data for the species throughout its range. However, through our analysis of size of the habitat areas, and application of conservative estimates (smallest density value within the estimated range, and largest population size value below which a population may be considered “small”), we conclude that the flat-tailed horned lizard populations are not small and the species is not habitat-limited in the United States or Mexico at this time, nor do we expect the species to suffer from the deleterious effects of small population size in the foreseeable future.

As required by the Act, we considered the species’ status relative to one or more of the five factors described in section 4(a)(1) of the Act, and the standards for listing as endangered or threatened throughout all of its range, and we considered the conservation efforts being made by any State or foreign nation. We have carefully assessed the best scientific and commercial data available regarding the past, present, and reasonably anticipated future threats faced by this species. Our analysis of the information pertaining to the five threat factors did not identify threats of imminence, intensity, or magnitude, either individually or in combination, to the extent that the species requires the protection of the Act throughout its range. Further, there is no information to suggest that the flat-tailed horned lizard population is declining or is in danger of becoming an endangered species in the foreseeable future. Therefore, we conclude that the species is not in danger of extinction or likely to become so within the foreseeable future and is not in need of the protections afforded by the Act at this time.

#### Distinct Population Segment

Under section 3(16) of the Act, a “species” is defined as including not only the full, taxonomically defined

species (*i.e.*, the species as a whole, including any and all taxonomically defined subspecies) but also any (individual) subspecies and any distinct population segment (DPS) of a vertebrate species (16 U.S.C. 1532). On February 7, 1996, we, along with the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries), finalized a joint policy that addresses the recognition of DPSs of vertebrate species for potential listing actions (DPS policy) (61 FR 4722). The policy was developed (1) to implement the measures prescribed by the Act and Congressional guidance, (2) to allow for a more refined application of the Act to better reflect the biological needs of the taxon being considered, and (3) to avoid the inclusion of entities that do not require protective measures of the Act. As noted in the policy (61 FR 4725), Congressional guidance indicates that the authority to list DPSs is to be used “sparingly.”

As mentioned previously, we proposed to list the flat-tailed horned lizard—the entire species throughout its range—as a threatened species under the Act in 1993 (58 FR 62624). Since then, we conducted several additional analyses on the status of the species. From the 1993 proposed rule through the 2006 withdrawal document (71 FR 36745), we noted the disjunct distribution of the species. Our 2003 withdrawal document in particular explicitly addressed threats over four disjunct populations of the flat-tailed horned lizard that we identified in the United States, including: (1) The Coachella Valley in California, (2) the area west of the Salton Sea and Imperial Valley in California, (3) the area east of the Salton Sea and Imperial Valley in California, and (4) the Yuma Desert area in Arizona (68 FR 331). Additionally, we addressed separately the populations in Mexico.

Also in our 2003 withdrawal document, we conducted a brief evaluation of a potential DPS for the Coachella Valley population (and only that population) in a response to a public comment (68 FR 336). We alluded to the population possibly being discrete (because it was disjunct), but we concluded that it was not significant within the meaning of the DPS policy because: (1) It was not “genetically, behaviorally, or ecologically unique”; (2) it was not a “large population” (not necessarily as defined in the present document); and (3) it did not contribute “individuals to other geographic areas through emigration.” Our response concluded, “If additional information becomes available that indicates the

Coachella Valley population is biologically or ecologically significant pursuant to the [DPS policy], we may reconsider the status of the Coachella Valley population for the purpose of listing under the Act” (68 FR 336).

Since then, additional information has become available on the genetic structure of flat-tailed horned lizard populations. Genetic data could, as indicated by the DPS policy (61 FR 4725), inform our analysis of discreteness or significance. Therefore, in light of this new information and our past DPS analysis, we believe it is appropriate to evaluate potential DPSs of the flat-tailed horned lizard.

The 1996 DPS policy specifies that we should address two elements prior to determining a population segment’s conservation status in relation to the Act’s standard for listing (61 FR 4725). These include: (1) The population segment’s *discreteness* from the remainder of the species to which it belongs, and (2) the population segment’s *significance* to the species to which it belongs. If we determine that a population segment meets the discreteness and significance standards, then we evaluate the level of threat to that population segment based on the five listing factors established by section 4(a) of the Act to determine whether listing the DPS as either endangered or threatened is warranted.

As described in *Description of Specific “Populations”* in the Background section above, the distribution of the flat-tailed horned lizard may be divided into four, physically (geographically) separated populations. Below, we evaluate these populations as potential distinct vertebrate population segments under our DPS policy.

#### Discreteness

Our DPS policy states that a vertebrate population segment may be considered discrete if it satisfies either of the following two conditions (61 FR 4725):

(1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or

(2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

### First Condition for Discreteness

As noted at various points in the Background section, each of the four described populations—the Coachella Valley, Western, Eastern, and Southeastern Populations—are geographically separated from each other by natural barriers, manmade barriers, or both. The four populations of flat-tailed horned lizards are markedly separated from each other as a consequence of physical factors and each may be readily circumscribed and distinguished from the others. Therefore, the four populations of flat-tailed horned lizards meet the first condition for discreteness under our DPS policy.

Additionally, the Coachella Valley Population, although more extensive in the recent past, now consists of two isolated occurrences, the Thousand Palms and Dos Palmas subareas. In the Summary of Factors Affecting the Species section, we considered the Thousand Palms and Dos Palmas subareas together as the Coachella Valley Population because both had the potential to share similar threats due to proximity, and both were covered by the Coachella Valley MSHCP. However, as noted, the genetic affinities of the Dos Palmas subareas are not known. Thus, combining the Thousand Palms and Dos Palmas subareas into the Coachella Valley Population was a grouping of convenience, adequate for evaluating threats, but not necessarily for assessing the population segments as potential DPSs. Thus, we consider the Thousand Palms and Dos Palmas subareas separately in our assessment of significance for the Coachella Valley Population. These two occurrences are markedly separated from each other and from the other populations of flat-tailed horned lizards as a consequence of physical factors (geographical separation); therefore, each meets the first condition for discreteness under our DPS policy.

### Second Condition for Discreteness

The Western, Eastern, and Southeastern Populations extend across the international border with Mexico; as a result, each of these three populations could potentially be further divided into separate population segments under the policy's second condition for discreteness.

Application of the second condition for discreteness (61 FR 4725) with respect to the flat-tailed horned lizard tests for significant differences in: (1) The control of exploitation, (2) the management of habitat, (3) the conservation status, or (4) the regulatory

mechanisms between the United States and Mexico. Below, we present a brief synopsis of these four categories, combining the last two. Please refer to the Summary of Factors Affecting the Species and Findings sections of this document for additional details.

- **Control of exploitation:** We have no information suggesting that the flat-tailed horned lizard is significantly exploited on either side of the border (see the discussion under Factor B).

- **Management of habitat:** Management of flat-tailed horned lizard habitat is essentially the same in the United States and in Mexico, although the underlying mechanisms differ. For example, in the United States large areas are protected as Management Areas through implementation of the Rangewide Management Strategy, and in Mexico large areas are protected as National Parks and Biosphere Reserves (see the discussion under Factor A).

- **Conservation status and regulatory mechanisms:** In terms of actual designations of listing under the two countries' respective species-protection laws, the conservation status differs between the United States and Mexico. In the United States, as a result of this withdrawal, the species is not listed; in Mexico, it is listed as a threatened species under the Official Mexican Norm NOM-059-ECOL-2001 (SEMARNAT 2002, p. 134). However, in the United States, existing conservation efforts and regulatory mechanisms reduce the magnitude of potential threats to the species to a point where protections afforded by the Act are not necessary (see the discussion under Factor D and the Findings and Conservation Efforts sections).

We conclude the second condition is not satisfied because no significant differences exist with respect to the flat-tailed horned lizard across the international boundary between the United States and Mexico. As such, the Western, Eastern, and Southeastern Populations described above are discrete in themselves and not with respect to the international boundary between the United States and Mexico.

### Conclusion for Discreteness per 1996 DPS Policy

We conclude that each of the four population segments analyzed (Western, Eastern, Southeastern, and Coachella Valley) meets the discreteness element of the 1996 DPS policy because each can be considered markedly separated from the other flat-tailed horned lizard populations as a consequence of physical factors (first condition for discreteness). Within the Coachella Valley Population, flat-tailed horned

lizards in the Thousand Palms and Dos Palmas subareas also meet the discreteness element of the 1996 DPS policy under the first condition for discreteness. None of the population segments that cross the United States-Mexico boundary meet the second condition for discreteness.

### Significance

If a population segment is considered discrete under one or more of the conditions described in our DPS policy, its biological and ecological significance will be considered in light of Congressional guidance that the authority to list DPSs be used "sparingly," while encouraging the conservation of genetic diversity. In making this determination, we consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. Because precise circumstances are likely to vary considerably from case to case, the DPS policy does not describe all the classes of information that might be used in determining the biological and ecological importance of a discrete population. However, the DPS policy does provide four possible reasons why a discrete population may be significant. As specified in the DPS policy (61 FR 4722), this consideration of the population segment's significance may include, but is not limited to, the following four conditions (61 FR 4725):

- (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
- (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon,
- (3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
- (4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

A population segment needs to satisfy only one of these criteria to be considered significant. Furthermore, the list of criteria is not exhaustive; other criteria may be used as appropriate. Below, we assess whether the four discrete populations defined above are significant per our DPS policy.

**First Condition**—Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon.

None of the four primary populations of flat-tailed horned lizard occurs in an ecological setting unusual or unique for the species. Although the ecological

setting varies across and within the range of the four populations, important ecological characteristics are similar among the four populations (see Background section). Climatic conditions across the range of the four populations are characterized by hot summer temperatures, mild winter temperatures, and little rainfall. Across the four populations, flat-tailed horned lizards are associated with creosote-white bursage plant associations in areas characterized as sandy flats or valleys (see *Setting and Habitat* in the Background section).

The ecological setting for the Coachella Valley Population as a whole, or the Thousand Palms and Dos Palmas subareas separately, are not markedly unusual or unique. The arenaceous (sandy) soils that support flat-tailed horned lizards in the Coachella Valley are derived from the surrounding areas and are compositionally different from those deposited by the Colorado River (van de Kamp 1973, p. 827), which is

the source for much of the sand over a large portion of the range of the species (see *Setting and Habitat* in the Background section). However, the range of the flat-tailed horned lizard includes other areas where soils are derived from sedimentation from the surrounding areas, particularly the western edge of the Western Population where it meets lower extremities of the Peninsular Range (see *Setting and Habitat* in the Background section). Thus, evidence indicates this difference in substrate does not translate into an ecological setting unusual or unique for the flat-tailed horned lizard. We conclude that none of the four population segments meets the first significance condition.

*Second Condition*—Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon.

Loss of the Western, Eastern, or Southeastern population segment would result in a significant gap in the range

of the species because each of these population segments represents a relatively large portion of the total range of the species (Table 6). In contrast, the range of the Coachella Valley Population as a whole, or the separate Thousand Palms or Dos Palmas subareas, is very small relative to the total range of the species. The range of the Coachella Valley Population represents only 0.24 percent of the total range of the species (0.80 percent of the U.S. portion of the range) (Table 6). The range of the Thousand Palms population represents only 0.11 percent of the total range of the species, and the range of the Dos Palmas population represents only 0.13 percent of the species' total range (Table 6). Loss of the Coachella Valley population segment would not result in a significant gap in the range of the species. We conclude that the Western, Eastern, and Southeastern population segments meet the second significance condition, but the Coachella Valley population segment does not.

TABLE 6—SIZE (AREA) OF THE POPULATIONS UNDER CONSIDERATION TO BE POTENTIAL DISTINCT VERTEBRATE POPULATION SEGMENTS UNDER THE ACT. THE THOUSAND PALMS AND DOS PALMAS OCCURRENCES ARE SUBSETS OF THE COACHELLA VALLEY POPULATION (SEE DESCRIPTION OF SPECIFIC “POPULATIONS” IN THE BACKGROUND SECTION FOR DETAILS).

Population	Total range of species		U.S. portion of range only	
	Size (area) <sup>1</sup>	Percent of total	Size (area) <sup>1</sup>	Percent of total
Western .....	341,989 ha (845,073 ac) .....	21.52	253,020 ha (625,226 ac) .....	53.74
Eastern .....	169,617 ha (419,133 ac) .....	10.67	146,121 ha (361,073 ac) .....	31.03
Southeastern .....	1,073,551 ha (2,652,802 ac) .....	67.56	67,922 ha (167,839 ac) .....	14.43
Coachella Valley .....	3,785 ha (9,353 ac) .....	0.24	3,785 ha (9,353 ac) .....	0.80
(Thousand Palms sub-area).	1,707 ha (4,219 ac) .....	0.11	1,707 ha (4,218 ac) .....	0.36
(Dos Palmas subarea)	2,078 ha (5,134 ac) .....	0.13	2,078 ha (5,135 ac) .....	0.44
Total .....	1,588,942 ha (3,926,361 ac) .....	100.00	470,848 ha (1,163,491 ac) .....	100.00

<sup>1</sup> Area values are estimated through a GIS-based assessment. Despite the level of precision presented, area values are approximate; however, we believe they are accurate enough to draw the conclusions presented.

*Third Condition*—Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range.

Populations of the flat-tailed horned lizard have not been introduced outside the species' historic range, so none of the four population segments meets the third significance condition.

*Fourth Condition*—Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

As described in *Populations and Genetics* in the Background section, the Western, Eastern, and Southeastern Populations are genetically cohesive populations within themselves but are

significantly genetically differentiated from each other (Mulcahy *et al.* 2006, pp. 1807–1826; Culver and Dee 2008, pp. 1–14). Thus, the evidence indicates that the Western, Eastern, and Southeastern Populations of flat-tailed horned lizards differ markedly from each other in their genetic characteristics.

However, evidence shows that the Thousand Palms subarea (occurrence) within the Coachella Valley Population is not markedly different from the Western Population in its genetic characteristics, although the Thousand Palms occurrence within the Coachella Valley Population, like the Western Population, is genetically significantly different from the Eastern and Southeastern Populations. Although

haplotypes unique to flat-tailed horned lizards from the Thousand Palms occurrence within the Coachella Valley Population have been found, genetic differences between these lizards and Western Population lizards were not statistically significant (Mulcahy *et al.* 2006, p. 1811 and p. 1817). Although Coachella Valley flat-tailed horned lizards are currently markedly separated geographically from other flat-tailed horned lizard populations as a result of isolation due to past agricultural and urban development, genetics information suggests that the flat-tailed horned lizards in the Thousand Palms occurrence were historically not separated from Western Population flat-tailed horned lizards (Mulcahy *et al.* 2006, p. 1821). Thus, the evidence

indicates that the population of flat-tailed horned lizards in the Thousand Palm occurrence within the Coachella Valley Population does not differ markedly from the Western Population in its genetic characteristics.

We are not aware of any genetic information on the Dos Palmas subarea (occurrence). [We believe the map shown by Culver and Dee (2008, Figure 1, p. 14) to be in error because they used the same samples for the Coachella Valley Population that Mulcahy *et al.* (2006) used (Culver and Dee 2008, p. 4), which indicated that genetic samples of flat-tailed horned lizards were collected from the Thousand Palms subarea (Mulcahy *et al.* 2006, p. 1826 and Figure 3, p. 1809) (see also Mendelson *et al.* 2004, p. 5)]. Although the genetic affinities of the Dos Palmas occurrence are unknown, it is likely this occurrence was historically connected with the Western Population through a connection to the north or west (when the Salton Basin was dry) or possibly the Eastern Population through a connection to the south along the eastern side of the Salton Trough when Lake Cahuilla was not full. Thus, the evidence suggests that the population of flat-tailed horned lizards in the Dos Palmas occurrence within the Coachella Valley Population is unlikely to differ markedly from the Western Population or Eastern Population in its genetic characteristics. Therefore, we conclude the Coachella Valley Population does not differ markedly from other populations of the species in its genetic characteristics.

We believe the best scientific and commercial information available indicates that the Western, Eastern, and Southeastern Populations meet the fourth condition for significance, but that the best scientific and commercial information available do not support a determination that the Coachella Valley Population (and the Thousand Palms and Dos Palmas subareas, individually) meet the fourth condition for significance. We did not identify additional criteria for determining significance beyond the four identified in the 1996 DPS policy.

#### Conclusion for Significance Element of 1996 DPS Policy

We conclude that the Western, Eastern, and Southeastern Populations of flat-tailed horned lizards meet the significance element of the 1996 DPS policy, but that the Coachella Valley Population does not. Loss of the Western, Eastern, or Southeastern Population would result in a significant gap in the range of the species (second significance condition), and information

indicates that each of these three population segments differs markedly in genetic characteristics from the other populations of flat-tailed horned lizards (fourth significance condition). In considering the importance of the Coachella Valley Population (the Thousand Palms and the Dos Palmas occurrences together) or the Thousand Palms and the Dos Palmas occurrences separately to the species as a whole, we determined that neither the Coachella Valley Population, the Thousand Palms occurrence, nor the Dos Palmas occurrence met any of the four significance conditions identified in the 1996 DPS policy, and we did not identify other considerations that would lead us to conclude that the respective population segments met the significance element of the policy, especially given Congressional guidance that the authority to list DPSs be used “sparingly” while encouraging the conservation of genetic diversity.

#### Conservation Status of DPSs

As stated by our DPS policy (61 FR 4725), if a population segment is discrete and significant (*i.e.*, it is a distinct population segment), its evaluation for endangered or threatened status will be based on the Act's definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPSs of the same vertebrate taxon.

Above, we determined the Western, Eastern, and Southeastern Populations are discrete and significant, and thus, each is a distinct vertebrate population segment. We thus evaluate the conservation status of each of these three distinct population segments. We do not further separately evaluate the conservation status of the Coachella Valley Population or the two occurrences of flat-tailed horned lizards because we determined that these population segments do not meet the significance element of the 1996 DPS policy, and thus none are considered a distinct population segment under the Act and our DPS policy. For the remainder of the DPS analysis, we consider the Coachella Valley Population, which includes the Thousand Palms occurrence and the Dos Palmas occurrence, to be part of the Western DPS. Although it is possible that the Dos Palmas occurrence may more properly be placed in the Eastern DPS, for the purposes of our evaluation for endangered or threatened status, we are considering it to be within the Western DPS.

In our analysis of section 4(a) threats, we evaluated whether potential threats

were significant at the scale of flat-tailed horned lizard across its entire range, as well as whether any of the threats were significant at the scale of the four major populations (*see* Summary of Factors Affecting the Species section).

For Factor A, we identified and evaluated habitat threats from agricultural development, urban development, energy development, invasive and nonnative plants, OHVs, and military training activities. This analysis led us to conclude that none of these potential habitat threats, either individually or cumulatively, is significant enough to cause the flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all of its range. We also conclude based on the results of this same analysis presented in Summary of Factors Affecting the Species that none of these potential habitat threats is significant enough to cause the Eastern, Western, or Southeastern distinct population segments of flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all of their respective ranges.

For Factor B, we concluded that potential threats associated with overutilization due to collection for the pet trade and scientific and educational purposes are not significant threats to flat-tailed horned lizards now or within the foreseeable future across its range. We also conclude, based on this same analysis presented in Summary of Factors Affecting the Species, that potential overutilization threats are not significant enough to cause the Eastern, Western, or Southeastern distinct population segments of flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all of their respective ranges.

For Factor C, we concluded that potential threats associated with disease or predation were not significant threats to flat-tailed horned lizards now or within the foreseeable future across its range. We also conclude based on this same analysis presented in Summary of Factors Affecting the Species that potential disease or predation threats are not significant enough to cause the Eastern, Western, or Southeastern distinct population segments of flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all of their respective ranges.

For Factor D, we concluded that existing regulatory mechanisms are not inadequate and do not threaten the flat-tailed horned lizard throughout all or a



significant portion of its range either now or within the foreseeable future. We also conclude based on this same analysis of the best available information presented in Summary of Factors Affecting the Species that any potential threats associated with inadequate existing regulatory mechanisms are not significant enough to cause the Eastern, Western, or Southeastern distinct population segments of flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all or a significant portion of their respective ranges.

For Factor E, we identified and evaluated threats from other natural or manmade factors including barriers and small populations, edge effects, pesticide spraying, vehicle activity, drought, and climate change. This analysis led us to conclude that none of these potential threats, either individually or cumulatively, is significant enough to cause the flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all of its range. We also conclude, based on this same analysis of the best available information presented in Summary of Factors Affecting the Species, that none of these potential threats is significant enough to cause the Eastern, Western, or Southeastern distinct population segments of flat-tailed horned lizard to be in danger of extinction now or likely to become so within the foreseeable future throughout all of their respective ranges.

#### Conclusion for Conservation Status Element of 1996 DPS Policy

In our analysis of the species as a whole as detailed in Summary of Factors Affecting the Species section, we noted potential threats from development, invasive species, military training, vehicle (including OHV) activity, barriers and small populations, edge effects, pesticide spraying, and climate change. Additionally, we identified regulatory mechanisms and conservation efforts that reduced certain threats in certain areas. We determined that none of the potential threats, either individually or cumulatively, significantly affected the species throughout its range. In that analysis, we also addressed (where appropriate) separate flat-tailed horned lizard populations, including the Western, Eastern, and Southeastern Populations that we have determined, per the analyses in this section, are DPSs. Although all of the identified potential threats occur to a greater or lesser degree in each of the three DPSs, and although

the regulatory mechanisms and conservation efforts differ within and among DPSs, we found no one threat to be unique to any one DPS, nor did we find a threat that occurred with markedly greater magnitude in any one DPS. We therefore conclude that the Western, Eastern, and Southeastern distinct population segments of flat-tailed horned lizard also are not likely to be in danger of extinction now or likely to become so within the foreseeable future throughout all of their respective ranges.

#### Significant Portion of the Range

Having determined that neither the flat-tailed horned lizard nor the identified distinct population segments of flat-tailed horned lizard meet the definition of an endangered or threatened species, we must next consider whether there are any significant portions of the range where the flat-tailed horned lizard is in danger of extinction or is likely to become endangered in the foreseeable future. We considered whether any portion of the flat-tailed horned lizard's range warrants further consideration. Our consideration of areas that may constitute significant portions of the species' range focuses on areas where the geographic concentration of threats may be greater relative to the entire range. We consider whether there are any significant portions of the range of the flat-tailed horned lizard (the species as a whole) or of the identified DPSs that are in danger of extinction or are likely to become endangered in the foreseeable future.

Decisions by Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (2001) and *Tucson Herpetological Society v. Salazar*, 566 F.3d 870 (2009) found that the Act requires the Service, in determining whether a species is endangered or threatened throughout a significant portion of its range, to consider whether lost historical range of a species (as opposed to its current range) constitutes a significant portion of the range of that species. While this is not our interpretation of the statute, we first address the lost historical range before addressing the current range.

#### Lost Historical Range

As shown in Figure 1, the current range of the flat-tailed horned lizard consists of three, large, separate population areas (the Western, Eastern, and Southeastern Populations), plus two, small, isolated occurrences that, together, compose the Coachella Valley Population (see the *Description of Specific "Populations"* section, above).

In our past assessments of the species, following the lead of the information then available to us, we concluded or implied that the *historical* range of the flat-tailed horned lizard was mostly without substantial discontinuities and that modern discontinuities in the species' range were the result of manmade changes, primarily habitat loss through agricultural development and the creation of the Salton Sea (for example, see the Factor A analyses at 58 FR 62625–62626, 62 FR 37857, and 68 FR 341; also Rado 1981, pp. 1–21; Hodges 1997, pp. 1–23). This characterization of the range of the species suggested to the reader that the conversion from habitat to non-habitat of the large swath of land between the Coachella Valley, Western, Eastern, and Southeastern Populations is what *created* those now-separate populations and that prior to the manmade changes all of the now-lost interstitial areas used to be occupied flat-tailed horned lizard habitat. However, the best currently available information indicates that such a conclusion is incorrect.

In our 2006 analyses (71 FR 36750–36751), we determined that the area of the historical lakebed of the former Lake Cahuilla (see Background section), which occupied most of the areas now under agriculture in the southern half, or so, of the Coachella Valley and most of the area now under agriculture in the Imperial Valley (for example, see Patten *et al.* 2003, p. 3), was frequently unavailable (through historical and pre-historical time) and likely contained little quality habitat for the flat-tailed horned lizard. The 2006 analysis then addressed the now-developed areas outside of the historical lakebed, including remaining portions of the Coachella Valley and Mexicali Valley, and the San Luis Valley. However, as detailed in the Background and further discussed in the "Barriers and Small Populations" section of Factor E, above, the available information now leads us to conclude that the Western, Eastern, and Southeastern Populations have long been separated from each other by natural barriers south of the Lake Cahuilla lakebed that pre-date any manmade changes. Specimen data show that large amounts of this now-lost area was formerly occupied by the species (see, for example, Funk 1981, p. 281.1), but as described in the *Setting and Habitat* section, above, the evidence also shows that, in addition to the historical lakebed of the former Lake Cahuilla, some unknown amount of the area in the Mexicali Valley and the San Luis Valley, was also frequently affected by the deltaic meandering and avulsive

flooding of the Colorado River. These hydrologically active areas likely contained little quality habitat for the flat-tailed horned lizard and formed natural barriers to movement of flat-tailed horned lizards thereby allowing genetic differentiation among the Western, Eastern, and Southeastern Populations (see the *Populations and Genetics* section, above). Thus, as we found for the Lake Cahuilla lakebed in our 2006 analyses (71 FR 36750–36751), we have also determined that these additional areas should not be considered part of the species' historical habitat.

Therefore, we consider the flat-tailed horned lizard's historical habitat to be (1) habitat outside the area of the former Lake Cahuilla and (2) the habitat outside the areas historically subject to periodic flooding by the Colorado River. Because we do not know the real extent of the non-habitat areas that created the natural barriers separating the populations, we cannot reasonably estimate (quantify) the size of the areas that do constitute the lost historical habitat for each of the separate populations. As a result, the remainder of this analysis qualitatively considers the species' lost historical habitat.

Because the habitat needs of the flat-tailed horned lizard are met within the home range of each flat-tailed horned lizard individual, the areas of former habitat within the lost historical range did not provide any special or unique features or meet any life-history needs that present-day flat-tailed horned lizards need to survive. In other words, there is no evidence in the available information to indicate that the habitat within the lost historical range provided special features for the flat-tailed horned lizard such as key breeding grounds, lek sites, or migratory pathways, which are examples of special habitat features other species need to survive. Had the habitat within the lost historical range provided any special or unique features or met any particular life-history needs of the flat-tailed horned lizard—in other words, had the habitat in the lost historical range been *significant* to the species—the loss of these habitat areas would have been detectable in further contraction in the range of the species or each DPS over the past 100 or so years (more than 25 flat-tailed horned lizard generations, as described in our 2006 analysis (71 FR 36751)), the time since most of the historical habitat was lost. Since the areas of historical habitat were converted to agriculture early in the 20th century, the distribution of the flat-tailed horned lizard has remained about the same, except in areas of continuing urban expansion where such

reductions in range are attributable to continued habitat loss (see Factor A). (Although adequate sample sizes to determine population trends have been difficult to obtain in the flat-tailed horned lizard, the distribution of the species, and thus its range, is based on where the species was and is detected—presence-absence data—which is much more easily obtained.) Moreover, the agricultural and urban development of the now-lost historical range did not create any new barriers that separated the Western, Eastern, and Southeastern Populations (DPSs) but merely expanded upon pre-existing, natural barriers (see Background section). Therefore, the historical loss of habitat has not resulted in substantial present-day ramifications to the species; in other words, the lost historical range is not biologically significant to the flat-tailed horned lizard and does not contribute meaningfully to the viability of the species overall or to the viability of each DPS.

Moreover, as described under Factor A, we do not expect additional significant conversion of flat-tailed horned lizard habitat to agriculture in the future in the Imperial Valley and elsewhere along the Colorado River given: (1) The existing limitations on the availability of water for irrigation, and (2) the water transfer agreement with San Diego that requires some fields to remain fallow (unirrigated); therefore, agricultural use has even decreased in this area (IID 2006).

The past agricultural and urban development that created the swath of now-lost historical habitat in the United States and Mexico removed the biological features that provided habitat for the flat-tailed horned lizard in these areas. Much of this habitat has been permanently lost due to urbanization, flooding of the Salton Sea, or both. Although habitat lost due to agricultural uses could potentially be restored in certain cases in the future, most agricultural fields are isolated from existing flat-tailed horned lizard populations by major irrigation canals, such as the Coachella Canal, Highline Canal, and All-American Canal, as well as, depending on the site's location, one or more smaller canals and drains. Therefore, we do not anticipate any significant amount of previously lost habitat will likely become suitable as habitat for the flat-tailed horned lizard in the foreseeable future.

In sum, we believe the lost historical habitat does not represent a significant portion of the range of the flat-tailed horned lizard because the habitat was lost decades ago and the species has not experienced a continuing range

contraction due to the loss of this habitat. Most of the lost habitat was lost early in the 20th century and that lost habitat was not significant enough to lead to substantial extirpation of the species within intact habitat (which would be detectable through a reduction of the species' distribution). The historically lost habitat did not provide any special or unique features or meet any life-history needs of the flat-tailed horned lizard that made those areas any more significant than any other habitat. The habitat within the lost historical range was not continuous and contained natural barriers that separated the Western, Eastern, and Southeastern Populations, which means the historical loss of habitat did not create any new barriers within the lost historical range. We do not expect the agricultural development that created the large "swath" of lost habitat to continue to expand substantially, nor do we expect significant amounts of land that are currently under agriculture to become flat-tailed horned lizard habitat within the foreseeable future. Therefore, the lost historical range is not a significant portion of the range for the flat-tailed horned lizard.

#### *Current Range*

We use the concepts of resiliency, redundancy, and representation (see below) as the basic tenets for determining whether a portion of a species' range is significant to that species. A portion of a taxonomic species' or DPS's range is significant if it is part of the current range of the species or DPS and it contributes substantially to the representation, resiliency, or redundancy of the species or DPS. The contribution must be at a level such that its loss would result in a significant decrease in the viability of the species or DPS.

We chose to identify any portions of the range of the species that warrant further consideration as the first step in determining whether a taxonomic species or DPS is endangered or threatened in a significant portion of its range. The range of a species or DPS can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be *significant* and *endangered or threatened*. To identify only those portions that warrant further consideration, we should, under the framework we chose for this evaluation, determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species or DPS may be in danger of extinction there or likely to become so

within the foreseeable future. In practice, we believe a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are not significant to the viability of the species, such portions will not warrant further consideration.

Under this framework, if we identify any portions that warrant further consideration, we then determine whether in fact the species or DPS is endangered or threatened in any significant portion of its range. Depending on the biology of the species, the range of the species or DPS, and the threats the species or DPS faces, it may be more efficient for us to address the significance question first, or the status question first. Thus, if we determine that a portion of the range is not significant, we need not determine whether the species is endangered or threatened there; if we determine that the species or DPS is not endangered or threatened in a portion of its range, we need not determine if that portion is significant.

The terms *resiliency*, *redundancy*, and *representation* are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic or occasional disturbance. A species or its members within a DPS will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species or DPS in such a way as to capture the environmental variability found within the range of the species or DPS. It is likely that the larger the size of a population, the more it will contribute to the viability of the species overall. Thus, a portion of the range of a species may make a meaningful contribution to the resiliency of the species or DPS if the area is relatively large and contains particularly high-quality habitat or if its location or characteristics make it less susceptible to certain threats than other portions of the range. When evaluating whether or how a portion of the range contributes to resiliency of the species, it may help to evaluate the historical value of the portion and how frequently the portion is used by the species or DPS. In addition, the portion may contribute to resiliency for other reasons—for instance, it may contain an important concentration of certain types of habitat that are necessary for members of a species or DPS to carry out their life-

history functions, such as breeding, feeding, migration, dispersal, or wintering.

Redundancy of populations may be needed to provide a margin of safety for the species or DPS to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy that is important to the viability of the species.

Adequate representation insures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species or DPS. The loss of genetically based diversity may substantially reduce the ability of the species or DPS to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

Applying the process described above for determining whether the flat-tailed horned lizard or any of the identified DPSs are likely to become endangered throughout a significant portion of their respective ranges, under this framework we next address whether any portions of the range of the flat-tailed horned lizard or the identified DPSs warrant further consideration. Based on past approaches and other treatments in the literature, the flat-tailed horned lizard may be divided into four "populations." As detailed above, we conducted our analysis of threats to the species based, in part, upon those populations. Moreover, we determined that the Western Population (including the Coachella Valley Population), the Eastern Population, and the Southeastern Population were DPSs under the Act per our DPS policy. We found that the species as a whole is not in danger of extinction or likely to become endangered within the foreseeable future throughout all of its range. We also found that the three DPSs are not in danger of extinction or likely to become endangered within the foreseeable future throughout all of their respective ranges. Because we determined that the DPSs (each as a whole) are not endangered or threatened within those portions of the species' range, we need not determine if the

Western, Eastern, or Southeastern DPSs (each as a whole) are "significant."

We found that the Coachella Valley Population was faced with substantial threats. Also, we noted certain barrier-created "parts" within the ranges of the Western, Eastern, and Southeastern Populations were small enough that the flat-tailed horned lizards therein were more likely to suffer from threats associated with small populations (see "Barriers and Small Populations" under Factor E) or were facing or likely to face other threats.

An important consideration in determining what portions of the species' or distinct population segments' ranges may be appropriate to consider for this analysis is the fact that there are no specific life-history traits of the flat-tailed horned lizard that make any one portion of its range significantly more important to the survival of the species than any other. The flat-tailed horned lizard is a small animal with limited abilities to move long distances, and the habitat features necessary for activities like breeding, feeding, and sheltering, may be found within or very close to the home range of each individual flat-tailed horned lizard. Moreover, a flat-tailed horned lizard's home range size (perhaps as much as 10 ha (25 ac)), although large compared to other horned lizard species, is very small compared to the overall range of the species (1.6 million ha (3.9 million ac)). In other words, this species does not need any particular portion of its range outside the general home-range area of each individual to meet any life history needs, such as particular breeding grounds, lek sites, or migratory pathways. As such, the "parts" identified in Factor E are appropriate subjects to address as potential significant portions of the species' range.

Thus, because the portions of the species' range that compose the Coachella Valley Population and the portions of the species' range that are formed by the small "parts" of the other three populations may face substantial threats, we next determine whether these portions of the species' range are "significant." As described above, we need not assess whether the portions of the species' range that are not facing substantial threats are "significant."

#### Coachella Valley Population Area

As discussed previously, the Coachella Valley Population, which is peripheral to the population-as-a-whole of the species, now consists of two small occurrences, Thousand Palms and Dos Palmas. These two occurrences are small in area and, thus, likely have

small populations of flat-tailed horned lizards (see “Barriers and Small Populations”). As such, the populations of flat-tailed horned lizards that comprise these occurrences may not be large enough to avoid deleterious effects associated with small population size (see “Barriers and Small Populations”). This suggests that the respective portions of the flat-tailed horned lizard’s range in these two occurrences may face substantive threats and have the potential to be endangered or threatened; thus, we should evaluate whether the portions of the species’ range are *significant* portions of the species’ range. To do so, we assess (1) Whether the population of flat-tailed horned lizards in each occurrence contributes meaningfully to the resiliency, redundancy, and representation of the entire species; (2) whether the Thousand Palms occurrence contributes meaningfully to the resiliency, redundancy, and representation of the Western DPS; and (3) whether the Dos Palmas occurrence contributes meaningfully to the resiliency, redundancy, and representation of the Western DPS or Eastern DPS.

*Resiliency*—Resiliency of a species, as described in greater detail above, allows the species to recover from periodic or occasional disturbance. The size of the flat-tailed horned lizard population at the Thousand Palms and Dos Palmas occurrences (each separately or the two combined) is likely small because the amount of available habitat within each of these occurrence areas are small. Small populations are less resilient than large populations. Additionally, neither occurrence nor the two combined contains an important concentration of certain types of habitat that are necessary for flat-tailed horned lizards to carry out their life-history functions because each flat-tailed horned lizard has the habitat types it needs within its home range. Although the sands in the Coachella Valley are largely derived from local sediments (as opposed to being derived from the Colorado River, as are much of the sands within the range of the species), flat-tailed horned lizards occur in a number of areas with locally derived sediment (see Background).

Additionally, there is nothing in the available information to indicate that the location or characteristics of these occurrences (separately or combined) makes them significantly less susceptible to certain threats than other portions of the species’ range. Moreover, there is no indication that these occurrences have provided value to the species historically. The ebbing and

flowing of Lake Cahuilla through historical time has meant these two occurrences have likely been periodically disconnected from each other and from the Western DPS (or, for Dos Palmas, possibly the Eastern DPS). Even prior to any natural or manmade reductions in the geographical or numerical extent of these populations, they were outposts of the main population and did not contribute meaningfully to the viability of the larger Western Population (or, potentially for the Dos Palmas occurrence, the Eastern Population). Thus, the flat-tailed horned lizard populations in the Thousand Palms and Dos Palmas occurrences (each separately or the two combined) do not contribute meaningfully to the resiliency of the entire species, the Western DPS, or the Eastern DPS.

*Redundancy*—Redundancy, as described in greater detail above, provides a margin of safety for the species or DPS to withstand catastrophic events. As discussed in the “Barriers and Small Populations” section under Factor E, the respective populations of flat-tailed horned lizards in the Thousand Palms and Dos Palmas occurrences, or the two combined, is more likely to be significantly affected by deleterious effects associated with small population size, including catastrophic events, than areas with larger populations (see the “Other Small ‘Parts’ of the Three DPSs” section, below). As such, the Coachella Valley occurrences do not provide a significant margin of safety for the species. Additionally, as discussed under *Resiliency*, above, the population of flat-tailed horned lizards in each of these occurrences is likely small because the amount of available habitat within each part is small. Similarly, the entire population of the flat-tailed horned lizard rangewide and the respective populations of flat-tailed horned lizards within each DPS are each relatively large compared to the respective populations of flat-tailed horned lizards in the Thousand Palms or Dos Palmas occurrences, or the two combined, because the amount of available habitat throughout the species’ range and within each DPS is relatively large compared to the Coachella Valley occurrences. As such, the Coachella Valley occurrences, or the two combined, provide an unsubstantial increment of redundancy. Thus, the Thousand Palms and Dos Palmas occurrences separately, or the two combined, do not contribute meaningfully to the redundancy of the

entire species, the Western DPS, or the Eastern DPS.

*Representation*—Representation, as described in greater detail above, ensures that the species’ adaptive capabilities are maintained. The genetic differences between the Thousand Palms occurrence and the Western Population are not statistically significant, despite having some unique haplotypes (see *Populations and Genetics* in the Background section). Thus, the Thousand Palms occurrence does not contribute meaningfully to the maintenance of the adaptive capabilities of the flat-tailed horned lizard rangewide or the Western DPS. Although the genetic affinities of the Dos Palmas occurrence are unknown, it is likely this occurrence was historically connected with the Western Population through a connection to the north or west (when the Salton Basin was dry) or possibly the Eastern Population through a connection to the south along the eastern side of the Salton Trough when Lake Cahuilla was not full. Thus, the Dos Palmas occurrence likely does not contribute meaningfully to the maintenance of the adaptive capabilities of the flat-tailed horned lizard. Therefore, neither the Thousand Palms occurrence, the Dos Palmas occurrence, nor the two occurrences combined (that is, the Coachella Valley Population) contributes meaningfully to the representation of the entire species, the Western DPS, or the Eastern DPS.

Therefore, in sum, we do not expect the Coachella Valley Population as a whole, or the Thousand Palms and Dos Palmas occurrences separately, to contribute substantially to the resiliency, redundancy, or representation of the species, the Western DPS, or the Eastern DPS. As a result of this information, we believe neither the Coachella Valley Population (the Thousand Palms and Dos Palmas occurrences combined), nor the Thousand Palms and Dos Palmas occurrences separately, constitute a significant portion of the range of the entire species, the Western DPS, or the Eastern DPS.

#### Other Small “Parts” of the Three DPSs

In our analysis in the “Barriers and Small Populations” section, we identified certain portions, or “parts,” of the Western, Eastern, and Southeastern Population areas. In the Distinct Population Segment section, we determined these three Populations to be DPSs. We now evaluate whether any of these parts constitute a significant portion of the range of the flat-tailed horned lizard (the species as a whole) or the three DPSs. However, there is no

purpose to analyzing portions of a species' range that are not reasonably likely to be both *significant portions of that species' range and endangered or threatened*. We have chosen in this section to first assess whether the flat-tailed horned lizard is reasonably likely to be endangered or threatened within each part.

For the reasons discussed in the Summary of Factors Affecting the Species section (note that the discussions go beyond the simple yes-no results presented in Tables 3 through 5), we believe the populations of flat-tailed horned lizard in the respective following parts (portions of the species' range) do not face significant threats: W-1, W-3, W-5, W-7, W-9, W-11, W-12, E-3, E-5, E-9, SE-1, SE-5, SE-8, SE-9, and SE-13 (Figures 3 through 7). Although the specifics vary to some extent from part to part, none of these parts faces or is likely to face in the foreseeable future significant threats associated with:

(1) Small population size, because the parts are large in size (area) or, for parts W-7, W-9, and W-11, likely have higher densities of flat-tailed horned lizards than the most conservative estimate (see the Barriers and Small Populations section) and, therefore, likely support large populations of flat-tailed horned lizards;

(2) Significant loss of habitat from development, because what impacts may occur are expected to be small relative to the size of the parts because they are (i) remote; (ii) are receiving and are expected to continue receiving avoidance, minimization, and mitigation measures associated with the Rangewide Management Strategy (including those aspects that have been incorporated into agency plans that implement regulatory mechanisms) in the United States, or in Mexico, protections from biosphere reserves and listing under the Official Mexican Norm; or (iii) some combination thereof; and

(3) Climate change; nonnative, invasive species; or other range-wide threats identified in the five-factor analysis, because none of these potential threats are significantly concentrated in any one part.

As a result, the flat-tailed horned lizard is not reasonably likely to be endangered or threatened within the parts listed above. Thus, these parts do not warrant further consideration in this section.

The remaining parts, W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 (Figures 3 through 7), are either small in area and,

thus, likely have small populations of flat-tailed horned lizards or, in the case of parts E-1 and E-4, which are larger in area, likely have small populations of flat-tailed horned lizards because they primarily contain areas of deep, actively shifting sands of the Algodones Dunes that are likely rarely used by flat-tailed horned lizards (see "Barriers and Small Populations"). As such, the populations of flat-tailed horned lizards in these parts may not be large enough to avoid deleterious effects associated with small population size (see "Barriers and Small Populations"). This suggests that the respective portions of the flat-tailed horned lizard's range in the latter group of parts may face substantive threats and have the potential to be endangered or threatened; thus, we should evaluate whether the portions of the species' range are *significant* portions of the species' range. To do so, we assess whether the population of flat-tailed horned lizards in each part contributes meaningfully to the resiliency, redundancy, and representation of the species as a whole or to each DPS.

*Resiliency*—Resiliency of a species, as described in greater detail above, allows the species to recover from periodic or occasional disturbance. The respective populations of flat-tailed horned lizards in parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 are likely small because the amount of available habitat within each part is small, including the relatively large (in area) parts E-1 and E-4 that primarily consist of the deep, actively shifting sands of the Algodones Dunes that are likely rarely used by flat-tailed horned lizards (see discussions in the "Barriers and Small Populations" section under Factor E). Small populations are less resilient than large populations. Additionally, no one part contains an important concentration of certain types of habitat that are necessary for flat-tailed horned lizards to carry out their life-history functions because each flat-tailed horned lizard has the habitat types it needs within its home range. Moreover, there is nothing in the available information to indicate that the location or characteristics of part W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, or SE-12 makes it significantly less susceptible to certain threats than other portions of the species' range. Thus, none of the flat-tailed horned lizard populations in the remaining parts contribute meaningfully to the resiliency of the species as a whole or to each DPS.

*Redundancy*—Redundancy, as described in greater detail above,

provides a margin of safety for the species or DPS to withstand catastrophic events. As discussed in the "Barriers and Small Populations" section under Factor E, the respective populations of flat-tailed horned lizards in parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 are more likely to be significantly affected by deleterious effects associated with small population size, including catastrophic events, than the respective populations of flat-tailed horned lizards in parts W-1, W-3, W-5, W-7, W-9, W-11, W-12, E-3, E-5, E-9, SE-1, SE-5, SE-8, SE-9, and SE-13. As such, the former group of parts do not provide a significant margin of safety for the species. Additionally, as discussed under *Resiliency*, above, the population of flat-tailed horned lizards in each of these respective parts is likely small because the amount of available habitat within each part is small, including the relatively large (in area) parts E-1 and E-4 that primarily consist of the deep, actively shifting sands of the Algodones Dunes that are likely rarely used by flat-tailed horned lizards (see discussions in the "Barriers and Small Populations" section under Factor E). Similarly, the entire population of flat-tailed horned lizards and the population within each DPS are each likely relatively large compared to the respective populations of flat-tailed horned lizards in parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 because the amount of available habitat throughout the species' range and within each DPS is relatively large compared to the parts under consideration here (see Tables 3 through 5). As such, parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 provide an unsubstantial increment of redundancy. Thus, none of the flat-tailed horned lizard populations in the remaining parts provide a significant level of redundancy for the species as a whole or to each DPS.

*Representation*—Representation, as described in greater detail above, ensures that the species' adaptive capabilities are maintained. The scientific information on the genetics of flat-tailed horned lizard populations indicates that the Western, Eastern, and Southeastern Populations (DPSs) are significantly different from each other (see *Populations and Genetics*); thus, the representation of the species is provided by the three Populations. Although we do not have genetic data

from every “part,” the available information suggests the genetic diversity is fairly uniform and does not differ significantly within each of the three DPSs. As such, no one part within the respective DPSs contributes meaningfully to the representation of the species as a whole or to each DPS. Moreover, as discussed in the *Populations and Genetics* section, one part, Part SE-2, shows evidence suggesting the genetic variability of the flat-tailed horned lizard population in that part has declined as a consequence of being small and isolated by a manmade barrier. This suggests that the species’ adaptive capabilities in this part have declined. That is, the ability of the flat-tailed horned lizard population to provide adequate representation has been reduced in Part SE-2. It is possible the representation of the other parts with small populations and with complete barriers has been or may become similarly reduced. Therefore, it is unlikely that parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 contribute significantly to the species’ adaptive capabilities, and thus, the respective parts do not contribute meaningfully to the representation of the species as a whole or to each DPS.

In sum, we found that none of the “parts” identified in the “Barriers and Small Populations” section constituted significant portions of the range of the flat-tailed horned lizard. For the reasons discussed in the Summary of Factors Affecting the Species section (note that the discussions go beyond the simple yes-no results presented in Tables 3 through 5), we determined that the portions of range of the flat-tailed horned lizard in parts W-1, W-3, W-5, W-7, W-9, W-11, W-12, E-3, E-5, E-9, SE-1, SE-5, SE-8, SE-9, and SE-13 are not reasonably likely to be endangered or threatened; thus, we did not need to determine whether the portions of the range that these parts represented are significant portions. We determined that the flat-tailed horned lizards in the remaining parts, parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12, may face substantive threats and have the potential to be endangered or threatened. As such, we assessed whether any of the portions of the species’ range within the parts in this latter group is a significant portion of the species’ range overall or of the ranges of each DPS. We found that the portions of the species’ range within the respective parts in this latter group

likely contained small populations of flat-tailed horned lizards that did not contribute meaningfully to the species’ resiliency, redundancy, or representation of the species as a whole or of each DPS. We determined, therefore, the portions of the flat-tailed horned lizard’s range in parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 are not significant portions of the range of the species as a whole or of each DPS.

#### *Summary of Significant Portion of the Range*

In summary, we examined whether the lost historical range of the species, the current range of the species in the Coachella Valley Population, or the current range of the species in the other respective “parts” of the Western, Eastern, and Southeastern DPSs constituted significant portions of the species’ or distinct population segments’ respective ranges under the Act. We determined the lost historical habitat does not represent a significant portion of the range of the flat-tailed horned lizard because the habitat was lost decades ago and, despite the amount of time that has since transpired, the species has not experienced a continuing range contraction due to the past loss of habitat. Additionally, the historically lost habitat did not provide any special or unique features or meet any life-history needs of the flat-tailed horned lizards that made those areas any more significant than any other habitat. Moreover, the lost historical range was not continuous and contained natural barriers that separated the Western, Eastern, and Southeastern Populations.

We also determined that neither the Coachella Valley Population as a whole nor the Thousand Palms and Dos Palmas occurrences separately contribute substantially to the resiliency, redundancy, or representation of the entire species, the Western DPS, or the Eastern DPS. Therefore, we conclude that neither the Coachella Valley Population as a whole nor the Thousand Palms and Dos Palmas occurrences separately constitute a significant portion of the range of the entire species, the Western DPS, or the Eastern DPS.

Lastly, we determined that none of the “parts” identified in the “Barriers and Small Populations” section represented a significant portion of the range of the flat-tailed horned lizard. We found that the flat-tailed horned lizards in Parts W-1, W-3, W-5, W-7, W-9, W-11, W-12, E-3, E-5, E-9, SE-1, SE-5, SE-8, SE-9, and SE-13 were not

reasonably likely to be endangered or threatened; thus, we did not need to determine whether the portions of the range that these parts represented are significant portions. We determined that the flat-tailed horned lizards in parts W-2, W-4, W-6, W-8, W-10, E-1, E-2, E-4, E-6, E-7, E-8, SE-2, SE-3, SE-4, SE-6, SE-7, SE-10, SE-11, and SE-12 may face substantive threats and have the potential to be endangered or threatened, meaning that we needed, under our framework, to assess whether the flat-tailed horned lizards in these parts constituted significant portions of the species’ range. We found that the portions of the species’ range within the respective parts in this latter group likely contained small populations of flat-tailed horned lizards that did not contribute meaningfully to the resiliency, redundancy, or representation of the species as a whole or of each DPS. Thus, we determined the portions of the range of this latter group of parts are not significant portions of the range of the species as a whole or of each DPS. Therefore, no portion of the range of the flat-tailed horned lizard is a “significant portion of [the species’] range” under the Act.

#### **Conclusion**

Threats to the flat-tailed horned lizard rangewide or within the three identified DPSs have been reduced, managed, or eliminated, or found to be less substantial than originally thought. Additionally, implementation of the Interagency Conservation Agreement and associated Rangewide Management Strategy, including those aspects of it that have been incorporated into documents that implement existing regulatory mechanisms, is an important conservation effort that reduces threats in the United States and benefits the species throughout its range and within the identified DPSs. Therefore, we conclude that none of the existing or potential threats are likely to cause the flat-tailed horned lizard as an entire species or as any one of the Western, Eastern, or Southeastern DPSs to be in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range.

#### **Withdrawal of Proposal To List Flat-Tailed Horned Lizard**

Based on the information discussed above, we withdraw our November 29, 1993 (58 FR 62624), proposal to list the flat-tailed horned lizard (*Phrynosoma mcallii*) as a threatened species under the Act.

## Peer Review

As described in our 2003 withdrawal (68 FR 340) and in accordance with our July 1, 1994, Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities (59 FR 34270), we solicited six individuals with scientific expertise on flat-tailed horned lizard, its habitat, and the geographic region in which the species occurs to provide their expert opinion and to review and interpret available information on the species' status and threats. Peer reviewer comments and our responses to those comments were included in our 2003 withdrawal (68 FR 340) and are hereby included in this document by reference.

## Summary of Comments and Recommendations

### Public Comments

All public and peer review comments we received during public comment periods and public hearings prior to our March 2, 2010, **Federal Register** announcement on the reinstatement of the 1993 proposed rule and notice of public hearings are included in this document by reference (see Previous Federal Action section for dates, times, and locations of prior comment periods and hearings).

Since the proposed rule was reinstated on March 2, 2010 (75 FR 9377), there has been one public comment period and four public hearings. During the 60-day comment period from March 2 to May 3, 2010, for the reinstated proposed rule, we received a total of 24 comment letters in response to our request for new information: 2 from Federal agencies (duplicate letter from 2 submitters), 4 from State or local agencies and governments, and 18 from organizations or individuals. During the public hearings on March 23, 2010, in Palm Desert, California, and March 24, 2010, in Yuma, Arizona, we received a total of 4 comments: 1 written comment and 3 oral comments. Two of these comments were from local government representatives and the remaining two from organizations or individuals. All comments received were reviewed for substantive issues and new information regarding the 1993 proposed rule to list the flat-tailed horned lizard as a threatened species, and we address those comments below.

### Comments From Federal Agencies

*Comment 1:* The U.S. Navy does not support the listing of flat-tailed horned lizard as a threatened species because: (1) Listing or designation of critical habitat would encroach on the ability to

perform military readiness activities at NAF El Centro; (2) the species is not threatened throughout a significant portion of its range; (3) conservation should be implemented through the existing Interagency Conservation Agreement, the Rangewide Management Strategy, and the updated NAF El Centro INRMP; and (4) conservation should be implemented through a continued working partnership with other State and Federal agencies, including the U.S. Navy.

*Our Response:* Based on the rationales provided in this document, we agree with the U.S. Navy that the species does not warrant listing under the Act. Additionally, we agree that the Interagency Conservation Agreement and associated Rangewide Management Strategy make important contributions to reducing threats to the flat-tailed horned lizard and its habitat through efforts contributed by the Service, BLM, BOR, U.S. Marine Corps, U.S. Navy, Arizona Game and Fish Department, CDFG, and CDPR. Although many of these efforts are voluntary, conservation actions are formally incorporated into planning documents of participating agencies (such as the NAF El Centro INRMP and BLM's California Desert Conservation Area Plan). We appreciate the U.S. Navy's support of this long-term partnership and commitment to conservation of sensitive species, including the flat-tailed horned lizard, and their habitats through its participation in the Interagency Conservation Agreement and implementation of the NAF El Centro INRMP. For additional information on the Interagency Conservation Agreement and the associated Rangewide Management Strategy and the U.S. Navy's conservation actions, please see *Management and Populations* under the Background section and *Sikes Act* under Factor D.

### Comments From State Agencies

*Comment 2:* The Arizona Department of Transportation believes the flat-tailed horned lizard Interagency Conservation Agreement is an adequate regulatory mechanism that provides strong protection for the species on signatory lands. Much of the remaining habitat in southwestern Arizona is managed by agencies that are signatories to the Interagency Conservation Agreement. For example, project proponents for the construction of Arizona State Route 195 (Yuma Area Service Highway) used the Rangewide Management Strategy to avoid and mitigate impacts to the flat-tailed horned lizard and its habitat. Additionally, the Arizona Department of Transportation believes the flat-tailed

horned lizard Interagency Conservation Agreement is a viable mechanism for the long-term conservation of the species in the absence of listing under the Act.

*Our Response:* We agree the Interagency Conservation Agreement and associated Rangewide Management Strategy is a viable conservation effort to promote the long-term conservation of flat-tailed horned lizard. The avoidance, minimization, and mitigation measures incorporated into the Yuma Area Service Highway project reduced impacts to the flat-tailed horned lizard and is an example of how the Rangewide Management Strategy can reduce impacts to the species associated with development (see Factor A).

*Comment 3:* The CDPR expressed a concern that listing flat-tailed horned lizard as a threatened species would restrict CDPR's ability to manage recreational activities and park operations at Ocotillo Wells State Vehicular Recreation Area (SVRA), and that listing the species under the Act may cause OHV use to move to off-site areas with little or no management control. The CDPR also stated that listing the species may potentially reduce the number of visitors, resulting in a negative economic impact on the region. Further, they believe that recreational OHV use does not conclusively show adverse effects to the species.

*Our Response:* Although OHV activity has the potential to crush flat-tailed horned lizards (see Factor E) and impact the species' habitat (Factor A), we determined it is not currently a substantial threat to the species throughout its range. We agree that OHV activity in designated and managed open or limited-use areas is preferable to unmanaged OHV activity elsewhere. We acknowledge CDPR's contributions to the Rangewide Management Strategy through monitoring and management at Ocotillo Wells SVRA, and we encourage CDPR's continued participation in the Interagency Conservation Agreement.

*Comment 4:* The CDPR states that long-term studies of flat-tailed horned lizard are needed because annual climatic conditions can result in variability in population sizes. They believe that long-term studies and an adaptive monitoring program are warranted prior to listing the species under the Act.

*Our Response:* We agree that more information on the effects of weather and climate on the flat-tailed horned lizard and its habitat would be helpful; however, we are required to make a determination based on the best available scientific and commercial

information. We determined the flat-tailed horned lizard does not require protection under the Act. CDPR's contributions to the Rangeland Management Strategy have included funding studies to increase the knowledge of the species, and we encourage CDPR's continued participation, including contributing to developing and implementing long-term studies and adaptive management programs.

#### Comments Related to Biology, Ecology, or Climate Change

*Comment 5:* One commenter believes flat-tailed horned lizard populations will take longer to “\* \* \* rebound to stable wild populations than other classes of animals.” The commenter believes listing flat-tailed horned lizard as a threatened species under the Act is warranted because of low clutch survival rates from breeding to maturity due to impacts from predators and human activities.

*Our Response:* The commenter did not provide any information regarding the class of animals to which he or she was referring in comparison to the flat-tailed horned lizard, or any information to substantiate the claim that wild populations of flat-tailed horned lizards are not stable. With regards to the commenter's concerns about “low clutch survival rates from breeding to maturity due to impacts from predators and human activities,” flat-tailed horned lizards are known to produce relatively small clutches of eggs (N = 31; mean clutch size = 4.7; range = 3 to 7) (Howard 1974, p. 111) compared to most other horned lizards (Sherbrook 2003, p. 139), and predation has been identified as a potential threat to the flat-tailed horned lizard (FTHLICC 2003a, pp. 16–17). However, available information indicates predation does not appear to be excessively high throughout its range, although it is likely higher than natural levels near developed areas. Such results suggest that higher levels of predation of flat-tailed horned lizards observed in some areas is an “edge effect,” but much of the species' distribution is away from habitat edges (see Factor C, *Disease or Predation* section).

*Comment 6:* One commenter states that climate change will become more of an issue as ant population numbers decline because flat-tailed horned lizard populations will subsequently decline.

*Our Response:* Flat-tailed horned lizards do feed primarily on harvester ants; however, what effects climate change may have on harvester ant populations is unclear. Although populations of harvester ants decline

during periods of both drought and increased rain, they rebound as do populations of flat-tailed horned lizards (Tevis 1958, p. 701; Barrows and Allen 2009, p. 311). Harvester ants are also capable of surviving extremes in temperature (Tevis 1958, p. 704). The effects that global climate change may have on localized climate in areas inhabited by flat-tailed horned lizards and harvester ants is unclear, and we are not aware of any evidence indicating that harvester ant populations will decline in the foreseeable future.

*Comment 7:* One commenter stated a belief that the Service's final determinations in the past have been correct and the flat-tailed horned lizard should not be listed as threatened under the Act. The commenter further stated that there are more flat-tailed horned lizards known today compared to 20 years ago, and (with respect to climate change) there has been adequate rainfall to produce forage in the desert for this species to flourish.

*Our Response:* As discussed in the Background section, the number of flat-tailed horned lizards is difficult to estimate. We do not have acceptably accurate data to show any trend, either increasing or decreasing, in flat-tailed horned lizard populations. Rainfall varies from year to year in the Colorado Desert (Shreve and Wiggins 1964, pp. 18–20). We determine if a species needs protection under the Act based on analysis of the species' status relative to one or more of the five factors described in section 4(a)(1) of the Act, and the standards for listing as endangered or threatened (see Summary of Factors Affecting the Species section). We determined the species is not in need of the protections afforded by the Act at this time.

*Comment 8:* One commenter provided information resulting from research they conducted on flat-tailed horned lizard habitat loss in the Coachella Valley. The commenter believes that the reasons that the flat-tailed horned lizard was not listed in the past are because there was not enough known about this species' biology and distribution, and the largest share of the species' distribution was on Federal (BLM, DOD) lands such that the species could be managed without listing. The commenter's opinion is that neither of the above reasons is applicable today. The commenter also believes the Coachella Valley has been underrepresented in past assessments and that construction of the border fence, OHV activity, and development of energy facilities pose threats to the species.

*Our Response:* Our determination of whether to list a species is based on our

assessment of the five listing factors described in the Act and the standards for listing as endangered or threatened. A determination is made using the best scientific and commercial information available. In the Summary of Factors Affecting the Species section, we address the potential threats that may be affecting the species, including those identified by the commenter. Additionally, we have also addressed the Coachella Valley Population in detail.

*Comment 9:* One commenter opposed to the listing of the flat-tailed horned lizard believes that before this species should be considered for listing, researchers should conduct monitoring of the full desert ecosystem, as declines for this species may be a result of natural processes.

*Our Response:* Our determination of whether to list a species as endangered or threatened is based on our assessment of the five listing factors described in the Act using the best available scientific and commercial information. These include potential threats from natural and manmade sources. Although anecdotal evidence suggests that flat-tailed horned lizard populations are smaller now than compared to the past (for example, Luckenbach and Bury 1983, p. 278), we do not have data to suggest a positive or negative trend (see *Population Dynamics* in the Background section).

#### Comments Related to Threats

*Comment 10:* Four commenters support listing the flat-tailed horned lizard as a threatened species, and one commenter supports listing as an endangered species with designated critical habitat. These commenters believe listing is warranted due to a number of threats, including: Recreation; OHV use (such as in the Yuha Desert, Coachella Valley, West and East Mesas, near Algodones Dunes, and near Yuma, Arizona); construction of the border fence and border patrol traffic; development (including renewable energy projects such as SES Solar Two Project or Ocotillo Express Wind Project); power lines (Sunrise Powerlink); road/highway development (Yuma Area Service Highway, El Golfo to Rocky Point Highway); other miscellaneous development (such as Travertine Point, Drop 2 Reservoir, All American Canal, Coyote Wells Specific Plan Project, Reynolds Atlas RV Storage Facility); nonnative plant invasions; predation; and climate change. In general, the commenters believe these threats will continue, resulting in more habitat lost than gained. Further, the commenter that asserts the species



should be listed as endangered states that Federal protection is necessary to ensure the survival of the species and eventual recovery, and ultimately reduce the costs of recovery.

*Our Response:* Although we acknowledge losses of habitat can and do occur through natural and manmade processes, the determination to list a species is made by looking at the five factors described in section 4(a)(1) of the Act and the status of the species relative to the standards for listing as endangered or threatened. This determination is made solely on the basis of the best scientific and commercial information available, and takes into account regulatory mechanisms that many benefit the species and those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect the species through habitat protection or other conservation practices. As described in the Summary of Factors Affecting the Species section, we assessed the potential threats to the species using the five factors. We also assessed the existing efforts and measures that benefit the species or its habitat that may potentially reduce threats. We determined that threats to the flat-tailed horned lizard throughout its range, including recreational OHV activity; various types of development; invasive, nonnative plants; predation; and climate change, are not of a magnitude that it is likely to become endangered in the foreseeable future. Specifically, the identified development projects are not a significant threat to the species throughout its range or the respective DPSs identified in the *Distinct Population Segment* section, above, because the projects (1) are subject to the avoidance, minimization, and compensation measures of the Rangewide Management Strategy (in the United States only); (2) are relatively small compared to the range of the species or DPSs; (3) do not result in complete barriers to flat-tailed horned lizard movement; (4) do not result in the elimination of large "parts" where the deleterious effects associated with small population size are likely to substantially affect the population; (4) or a combination of these, as detailed in the Summary of Factors Affecting the Species section.

*Comment 11:* One commenter believes that urban development is conflicting with flat-tailed horned lizard survival.

*Our Response:* As described in the *Urban Development* section under Factor A, urban development within the range of the flat-tailed horned lizard is

largely occurring within areas that were previously developed for agriculture and is not resulting in additional habitat loss because the prior agricultural conversion had already made the land unavailable for the species. Urban development in flat-tailed horned lizard habitat is occurring, but in a limited area compared to the large area occupied by the species. Additionally, large areas of the species' range are under some level of protection where urban development is prevented or restricted, including Management Areas created through implementation of the Rangewide Management Strategy, CDPR lands, BLM wilderness, Coachella Valley MSHCP reserves, and portions of two biosphere reserves in Mexico. Moreover, where urban development may occur, its impact is further reduced (through avoidance, minimization, and mitigation) by the measures that benefit the flat-tailed horned lizard (such as the Rangewide Management Strategy, Coachella Valley MSHCP, and Mexican Federal listing). Thus, we concluded that urban development is not a substantial threat to the species.

#### Comments Related to the Rangewide Management Strategy

*Comment 12:* Four commenters state that the Rangewide Management Strategy currently in place is working to the benefit of the species, and there is no need to list the flat-tailed horned lizard as a federally threatened species. Two of these commenters further agree with the 2008 Annual Progress Report which states that the Interagency Conservation Agreement and Rangewide Management Strategy continue to provide an effective management focus to conserve flat-tailed horned lizard habitat throughout its range. Two commenters also expressed concern that listing the species could undermine the Interagency Conservation Agreement and questioned the efficacy of listing the flat-tailed horned lizard prior to completion of the surveys called for by the Rangewide Management Strategy.

*Our Response:* We agree with the commenters that the Rangewide Management Strategy is providing important conservation benefits to the flat-tailed horned lizard and its habitat in the United States. Although many of these efforts are voluntary, conservation actions are formally incorporated into planning documents of participating agencies (such as BLM's California Desert Conservation Area Plan). Moreover, most of the measures outlined in the Rangewide Management Strategy are being successfully implemented (FTHLIC 1998, pp. 1–11; FTHLIC 1999, pp. 1–13; FTHLIC

2001, pp. 1–24; FTHLIC 2003b, pp. 1–32; FTHLIC 2004, pp. 1–33; FTHLIC 2005, pp. 1–37; FTHLIC 2006, pp. 1–34; FTHLIC 2007, pp. 1–33; FTHLIC 2008a, pp. 1–35; FTHLIC 2009, pp. 1–38; FTHLIC 2010, pp. 1–33). Most of the benefits to the species occur within the United States. Although implementation of the Rangewide Management Strategy is also contributing to the conservation of the species in Mexico by promoting partnerships with local organizations in that country that are implementing programs that benefit the species, the benefits associated with the avoidance, minimization, and mitigation measures called for by the Rangewide Management Strategy are not in effect in Mexico. As such, the benefits afforded the species through implementation of the Rangewide Management Strategy, important though they may be, are limited. We appreciate the commenters' support of the Interagency Conservation Agreement that is benefitting the flat-tailed horned lizard and its habitat. Please see our response to Comment 1 and *Management and Populations* under the Background section for more information regarding the Rangewide Management Strategy.

Regarding the commenters' concern over the possibility that we may make a determination to list the species without complete flat-tailed horned lizard survey information, we note that we are required to make a final listing determination. Our determination of whether to list a species as endangered or threatened is based on our assessment of the five listing factors described in the Act using the best scientific and commercial information available. Although we agree population trend data would help us better understand the current status of the species, we must meet our obligations under the Act by examining the threats to the species. This analysis is presented in the Summary of Factors Affecting the Species section. We conclude that the species is not in need of the protections afforded by the Act at this time. Additionally, because we are not listing the species, the question of the potential effects of listing on the implementation of the Interagency Conservation Agreement is moot.

*Comment 13:* Three commenters asserted that implementation of the Rangewide Management Strategy, including the designation of Management Areas, is not working to recover the species. The commenters stated that mitigation lands are insufficient to make up for losses of habitat, especially from threats such as OHV use and large-scale renewable

energy projects. Two of the commenters stated the strategy is inadequate and not rangewide. A fourth commenter stated that the Service has relied heavily on the Rangewide Management Strategy to prevent the flat-tailed horned lizard's listing in the past.

*Our Response:* With regard to the commenters' concerns that mitigation lands may be insufficient to recover the species, we concluded that none of the existing or potential threats are likely to cause the flat-tailed horned lizard as an entire species or as any one of the Western, Eastern, or Southeastern DPSs to be in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range; thus, the species does not need to be "recovered." Implementation of the Rangewide Management Strategy, including the mitigation (compensation) by the signatory agencies is providing for the consolidation of the existing Management Areas by purchasing private inholdings within the Management Areas. Moreover, implementation of the avoidance and minimization measures included in the Rangewide Management Strategy is reducing certain potential future threats, including development of energy generation facilities and associated infrastructure on signatory lands.

With regard to the commenters' concerns that the Rangewide Management Strategy is not rangewide, the purpose of this strategy is to provide a framework for conserving sufficient habitat to maintain several viable populations of the flat-tailed horned lizard throughout the range of the species in the United States. Five Management Areas were designed to identify large areas of public land in the United States where flat-tailed horned lizards have been found, and to include most flat-tailed horned lizard habitat identified as key areas in previous studies (Turner *et al.* 1980, pp. 1–47; Turner and Medica 1982, pp. 815–823; Rorabaugh *et al.* 1987, pp. 103–109; FTHLICC 1997, p. 35). Furthermore, the Management Areas were delineated to include areas as large as possible, while avoiding extensive, existing and predicted management conflicts (such as OHV open areas). The Management Areas are meant to be the core areas for maintaining self-sustaining populations of flat-tailed horned lizards in the United States (FTHLICC 2003a, p. 47). Although this strategy does not include Mexico, implementation of the Rangewide Management Strategy includes coordination with partners in Mexico to promote efforts to benefit the species in that country (FTHLICC 2009, p. 14). Additionally, approximately 60

percent of the habitat in Sonora (Mexico) lies within two Mexican Federal natural protected areas where impacts from development and other activities is limited (see *Management and Populations* in the Background section for further discussion).

Regarding the use of the Rangewide Management Strategy in our past listing determinations (withdrawals), we did not rely solely on the Rangewide Management Strategy in our decisions, nor do we do so in this determination. As we state in our response to Comment 12, the evidence indicates that implementation of the Rangewide Management Strategy is providing important conservation benefits to the flat-tailed horned lizard and its habitat; however, that is but one aspect we consider. Our determination to list a species is made by looking at the five factors described in section 4(a)(1) of the Act and the status of the species relative to the standards for listing as endangered or threatened. This determination is made solely on the basis of the best scientific and commercial information available, and takes 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 the species through habitat protection or other conservation practices. Our assessment of the effects of the five listing factors on the flat-tailed horned lizard is presented in the Summary of Factors Affecting the Species section. Our assessment of those efforts being made to protect the species through habitat protection or other conservation practices is presented in the Conservation Efforts section (see also *Management and Populations* under the Background section)—which, in this case, included the Rangewide Management Strategy. Thus, we have considered but have not relied solely upon the Rangewide Management Strategy in our determination.

*Comment 14:* One commenter states that the Rangewide Management Strategy does not discuss impacts of the border fence (which they believe isolates populations) and proposed solar energy projects. Specifically, this commenter and a second commenter believe that the border fence in the Yuha Management Area and the proposed Tesser Solar North America Project (also known as the Imperial Valley Solar Project) will result in isolated populations of the species and fragmented habitat. Further, the second commenter believes this project will result in impacts to the flat-tailed horned lizard and its habitat from construction and maintenance, vibrations from vehicle traffic, changes

in topography, destruction of vegetation that is a food source for harvester ants, and increased dust deposition on vegetation. Additionally, the first commenter believes the Service should analyze the impacts of the border fence and proposed solar projects on the viability of flat-tailed horned lizard populations and cumulative impacts of habitat loss.

*Our Response:* As discussed in our Factor A and E analyses (Summary of Factors Affecting the Species section), we acknowledge that the border fence and solar (energy generation) projects may result in the loss or degradation of flat-tailed horned lizard habitat and potentially serve as barriers, isolating populations of flat-tailed horned lizards. Although not extensively discussed by the Rangewide Management Strategy, private development of solar and other energy generation facilities on lands controlled by signatory agencies is still subject to the avoidance, minimization, and mitigation measures called for by the Rangewide Management Strategy. For example, the project proponent for the Imperial Valley Solar Project designed the project to avoid and minimize impacts to flat-tailed horned lizard Management Areas and is providing funds to acquire off-site habitat areas as compensation for unavoidable impacts, all per the specifications of the Rangewide Management Strategy (BLM 2009, pp. 4–7 to 4–10). Because of the prevalence of Federal and State lands in the U.S. portion of the range of the flat-tailed horned lizard and because most of this land is managed by signatories to the Interagency Conservation Agreement implementing the Rangewide Management Strategy, we expect that the vast majority of proposed energy development projects that are likely to affect flat-tailed horned lizard habitat will be subject to the avoidance, minimization, and compensation measures incorporated into the Rangewide Management Strategy (see *Energy Generation and Facility Development* section).

Such projects may also serve as barriers to flat-tailed horned lizard movement. Many of the proposed and anticipated projects are likely to occur in the Western Population area. As described in the "Barriers and Small Populations" section under Factor E, the parts of the Western Population north and south are large enough to likely not be substantially affected by the threats associated with small population size. Moreover, Interstate 8, which runs along the southern edge of the Imperial Valley Solar Project and many of the other proposed or anticipated energy

generating projects in the area, is already likely to be a substantial barrier to flat-tailed horned lizards within the area of the Imperial Valley Solar project.

Development of renewable energy is not without impacts, but implementation of the Rangeland Management Strategy, either under the voluntary Interagency Conservation Agreement or as it is incorporated into existing regulatory mechanisms, is anticipated to reduce the direct and indirect effects, including habitat loss and isolation of populations. We do not believe vibrations of vehicle traffic, changes in topography, destruction of vegetation that is a food source for harvester ants, and dust on vegetation will be any more substantial than the actual loss or degradation of flat-tailed horned lizard habitat, the effects of which we anticipate to be reduced by avoidance, minimization, and mitigation measures of the Rangeland Management Strategy. Moreover, the cumulative effects of habitat loss are reduced through implementation of the Rangeland Management Strategy by the creation and maintenance of large blocks of flat-tailed horned lizard habitat, including the establishment of Management Areas, the 1 percent cap on impacts, the avoidance and minimization measures directed by the Rangeland Management Strategy, and the consolidation of the respective Management Area through the purchase of private inholdings with monies acquired from compensation for unavoidable impacts from development activities.

Regarding the concerns raised by the commenter about the border fence, we also acknowledge in our Factor E analysis that tactical infrastructure (such as fencing, lighting, and access and patrol roads) along portions of the border fence area has the potential to serve as a barrier for flat-tailed horned lizard movement. However, installed fencing has been constructed to allow movement of small animals (USCBP 2008a, pp. 1–4 to 1–6 and Appendix B; USCBP 2008b, pp. 2–5 and 8–9); thus, we do not anticipate the fence itself to completely hinder flat-tailed horned lizard movement (see “Barriers and Small Populations” under Factor E). Additionally, with respect to the Yuha Desert Management Area, this area was selected for management protections of flat-tailed horned lizards because it is likely to support high densities of lizards (i.e., 0.7 individuals per ha (0.3 per ac), which is a conservative estimate). Moreover, as mentioned above, the border fence is likely a semipermeable barrier for small species such as flat-tailed horned lizard,

allowing some connectivity between the Yuha Desert Management Area and the areas of habitat in Mexico.

*Comment 15:* One commenter believes the Rangeland Management Strategy does not provide enough protection because the document acknowledges that it is unknown whether the lands set aside are sufficient, and that the Ocotillo Wells State Vehicular Recreation Area is not being managed adequately. A second commenter stated that they believe BLM is understaffed and underfunded, which has led to its inability to reduce impacts on flat-tailed horned lizard Management Areas.

*Our Response:* As described in the “Barriers and Small Populations” section under Factor E, we evaluated the size of the parts formed as a result of potential barriers. We calculated the Western, Eastern, and Southeastern Population areas, as defined herein and based upon the current distribution map presented in the revised Rangeland Management Strategy (FTHLIC 2003a, p. 5), are 341,989 ha (845,073 ac), 169,617 ha (419,133 ac), and 1,073,551 ha (2,652,802 ac), respectively. Within those three Population areas combined, we found about 91 percent of the area, despite containing potential barriers, is in large enough blocks that the populations of flat-tailed horned lizards are not likely to be affected by threats associated with small populations. Although the Rangeland Management Strategy is an important conservation effort that provides substantial benefit to the flat-tailed horned lizard and its habitat, especially within the United States, the status of the species does not depend solely upon the lands set aside through implementation of the Rangeland Management Strategy. Similarly, the status of the flat-tailed horned lizard does not depend solely on management that may or may not be adequate on Ocotillo Wells SVRA; however, management activities that reduce threats to the species make important contributions to the status of the species at a local or regional level. Moreover, for implementation of the Interagency Conservation Agreement to be successful, each signatory agency should implement its share of the Rangeland Management Strategy (see also the *Management and Populations* in the Background section, and the *Description of Specific Populations* section for further discussion).

*Comment 16:* One commenter stated that flat-tailed horned lizards should not be listed as a threatened species because there has been sufficient management in place over the past 10 years. The commenter believes management efforts

should be implemented to eradicate Argentine ants (*Linepithema humile*), which displace the main food source (harvester ants) for flat-tailed horned lizards.

*Our Response:* We agree with the commenter that there is sufficient management and conservation occurring for flat-tailed horned lizards (see the Finding section and *Management and Populations* under the Background section of this document for discussion of the long-term management of this species). We will continue to work with our partners to implement management actions to benefit this species.

With regard to the commenter's concern about Argentine ants, the evidence indicates that Argentine ants are not a threat to flat-tailed horned lizards. Argentine ants do not tolerate hot, dry conditions (Holway *et al.* 2002, p. 1610). The range of the flat-tailed horned lizard is hot and dry (see Background section), suggesting that Argentine ants do not invade flat-tailed horned lizard habitat to any substantial degree (Barrows *et al.* 2006, p. 492); thus, they do not substantially affect the primary food of the species throughout most of the species' range. Therefore, we do not believe eradication of Argentine ants in flat-tailed horned lizard habitat is a warranted management action to benefit the species.

*Comment 17:* One commenter states that the management strategy is sufficient for flat-tailed horned lizard and therefore listing this species is not warranted. Specifically, the commenter described the following management actions that are benefiting the species: (1) Since 1997, the Imperial Irrigation District has paid \$10,000 to offset potential project impacts to habitat; (2) although border patrol and unpermitted OHV use continue to impact the species, there are no significant trends in lizard encounter rates in Yuha Desert, East Mesa, or West Mesa from 1979 to 2001; (3) agricultural land development is no longer occurring; (4) urbanization is not occurring in Yuha Desert, East Mesa, or West Mesa; and (5) the Mexican Government is providing protections to flat-tailed horned lizards.

*Our Response:* As described in our analysis above, we agree with the commenter's statements in general. The mitigation (compensation or off-setting) measures associated with the Rangeland Management Strategy are important to consolidating the Management Areas under the control of signatory agencies. We agree monitoring data indicate that flat-tailed horned lizard populations in the surveyed Management Areas are not low and are not declining. We also agree that

agricultural and urban development are not significant threats to the species, as discussed under Factor A, and that the protections afforded to the species by Mexican laws are not inadequate.

**References Cited**

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov>. Additionally, a complete list of all

references cited, as well as others, is available upon request from the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES**).

**Author**

The primary authors of this document are staff members at the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** above).

**Authority:** The authority for this action is section 4(b)(6)(B)(ii) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 25, 2011.

**Daniel M. Ashe,**

*Acting Director, Fish and Wildlife Service.*  
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